DEFENDING CITY HALL AFTER *DUNSMUIR*

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In this article, the author considers the Dunsmuir v. New Brunswick *decision and explores how it affects judicial review of municipal decision-making. The author considers what standard of review a court ought to apply to substantive municipal decisions and what a court ought to take into account when it reviews those decisions, arguing that a court should review municipal decisions much differently than administrative tribunals. First, the author explores the jurisprudence prior to the* Dunsmuir *decision, making note of the judicial and legislative trend towards affording municipal government great deference. The author reflects that prior to* Dunsmuir, *Canadian courts had not articulated a coherent and consistent approach for reviewing the decisions of municipal government. Second, the author summarizes the* Dunsmuir *decision and applies the new "standard of review analysis" to municipal decision-making under which municipalities are generally entitled to great deference, and usually evaluated on a standard of "reasonableness." Finally, the author argues that, after* Dunsmuir, *it is necessary to reorient and re-evaluate the position of municipalities in Canadian society. The author proposes that the courts ought to establish a deferential* Dunsmuir *standard or develop a threshold test for judicial interference in municipal decision-making.*

Dans cet article, l'auteur examine la décision de la cause Dunsmuir c. Nouveau-Brunswick *et explore son incidence sur la révision judicaire de décisions prises au niveau municipal. L'auteur étudie la norme que la cour devrait utiliser pour les décisions municipales importantes et dont elle devrait tenir compte pour la révision, faisant valoir que la cour devrait revoir les décisions municipales différemment que les tribunaux administratifs. L'auteur explore d'abord la jurisprudence qui existait avant la décision* Dunsmuir, *notant la tendance judiciaire et législative de faire preuve d'un grand respect à l'égard du gouvernement municipal. L'auteur réfléchit au fait qu'avant la décision* Dunsmuir, *les tribunaux canadiens n'avaient pas formulé d'approche cohérente et consistante à la révision de décisions de gouvernements municipaux. L'auteur résume ensuite la décision* Dunsmuir *et applique la nouvelle « norme de l'analyse de révision » à la prise de décisions municipales qui est généralement source de grand respect pour ces municipalités et habituellement évaluée en fonction de la norme du «caractère raisonnable». Enfin, l'auteur soutient que depuis* Dunsmuir, *il est nécessaire de réorienter et de réévaluer la position des municipalités canadiennes. L'auteur propose que les tribunaux établissent une norme de respect à l'égard de* Dunsmuir *ou un critère préliminaire relatif à l'ingérence judiciaire dans les décisions municipales.*

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> A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient.… Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.
>
> — Lord Russell C.J.[1]

I. INTRODUCTION

In March 2008, the Supreme Court of Canada released the seminal decision of *Dunsmuir v. New Brunswick*.[2] In *Dunsmuir*, the Supreme Court abandoned the traditional three-standard pragmatic and functional approach. It adopted a new two-standard and seemingly streamlined "standard of review analysis." While this decision will have a profound impact on the way in which Canadian courts review administrative decision-making, *Dunsmuir* also displaces nearly three decades of case law and creates a swell of uncertainty.

One cannot deny that *Dunsmuir* offers helpful guidance. It advocates a promising, more principled approach. It invites the use of standard of review precedent. It provides an innovative legal test. However, public decision-making permeates discrete areas of the law. It encompasses a rich and diverse variety of decisions and decision-makers. Future judicial guidance will be needed to address many pressing questions. Among these questions will be how diverse bodies, with various roles and functions, are to be afforded the appropriate *degrees* of deference within a single reasonableness standard.[3] This is a concern which is especially troubling for local government.

First, this article will consider related jurisprudence leading up to the decision of *Dunsmuir*. It will argue that the Canadian courts have struggled to devise a satisfactory test for substantive judicial review of municipal authority.[4]

Second, this article will consider the Supreme Court's recent decision in *Dunsmuir*, and apply that case's "standard of review analysis" to municipal decision-making. It will argue that municipal decision-making is subject to great deference under the new "standard of review analysis."

Third, this article will argue that after *Dunsmuir*, the position of municipalities in Canadian society must be reconsidered. A municipality is not an administrative tribunal. It is a locally elected government. After *Dunsmuir*, reorientation and re-evaluation is necessary

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1 *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.) at 100 [*Kruse*].

2 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

3 For a thorough and cogent analysis of this dilemma, see *Dunsmuir*, *ibid.* at paras. 118-57, Binnie J., dissenting.

4 This article focuses on *substantive* judicial review as opposed to review for procedural fairness. Hence, where this paper refers to "judicial review," unless otherwise indicated, it refers to *substantive* review of municipal authority. Further, this article will also frequently refer to the review of "municipal decision-making." Unless *expressly* stated, this article is considering only the intra vires decision of a municipality, not the jurisdiction of that tribunal.

to bring judicial review of municipal authority into harmony with recent trends in Canadian law and into accordance with the foundational unwritten constitutional principles which organize the Canadian *Constitution*.[5] While a court will likely afford a municipality great deference under the new "standard of review analysis," the reality is that municipal decision-making is now subject to "reasonableness" review. Given this reality, Canadian courts should send a strong message that a court ought not take "reasonableness" review as an invitation to substitute its views for those of elected officials. Further, in light of these concerns, it may be necessary to entertain a threshold test for judicial interference in the legal and responsible exercise of governmental municipal powers.

II. THE POSITION OF MUNICIPALITIES BEFORE *DUNSMUIR*

To appreciate the position of municipalities after *Dunsmuir*, it is useful to consider how municipalities were treated before *Dunsmuir*. Three points in this area merit consideration. First, municipal decision-making has traditionally been subject to intrusive judicial supervision. Second, in Canadian law there is a recent movement toward acknowledging municipalities as an accountable and autonomous level of government. Third, while this movement is promising, judicial review of municipal authority — specifically, the standard of review which applies to municipal decision-making — has not matured alongside these developments. Canadian jurisprudence has yet to incorporate a test for judicial review of municipal authority that adequately accounts for the governmental and representative capacities of municipalities.

Historically, Canadian courts have viewed municipalities with an attitude of "suspicion and distrust."[6] This distrust has been predicated on the paternalistic belief that "judicial supervision is required to prevent local governments from acting irresponsibly."[7] More recently, however, Canadian courts have recognized the representative function of municipalities, but are not hesitant to emphasize the constitutional lacunae upon which municipal government rests. Municipal authority is granted and defined by provincial statutes. Municipalities are not a "sovereign" government, at least in explicit constitutional terms.[8] As such, the common law has traditionally recognized the power of a court to quash the decisions of a municipal government on the grounds of general unreasonableness[9] or on

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5 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution*].

6 Michelle Lawrence, "Putting an End to Unreasonableness: Judicial Review and Local Governments" (1998) 4 Appeal 84 at 84.

7 *Ibid.* For a critical analysis of this trend, see generally Lawrence, *ibid.* See also Ann McDonald, "In The Public Interest: Judicial Review of Local Government" (1983) 9 Queen's L.J. 62.

8 *East York (Borough of) v. Ontario (A.G.)* (1997), 34 O.R. (3d) 789 (Gen. Div.), aff'd (1997), 36 O.R. (3d) 733 (C.A.), leave to appeal to S.C.C. refused, 26385 (2 April 1998) [*East York*]. See also *Public School Boards' Assn. of Alberta v. Alberta (A.G.)*, 2000 SCC 45, [2000] 2 S.C.R. 409 [*PSBAA*]; *Ontario English Catholic Teachers' Assn. v. Ontario (A.G.)*, 2001 SCC 15, [2001] 1 S.C.R. 470 at para. 58 [*OECTA*], quoting Campbell J. in *Ontario Public School Boards' Assn. v. Ontario (A.G.)* (1997), 151 D.L.R. (4th) 346 at 361 (Ont. Ct. (Gen. Div.)) [*OPSBA*].

9 *Kruse*, *supra* note 1. See also *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 [*Chamberlain*]; *Dunsmuir*, *supra* note 2.

related nominate grounds, such as bad faith,[10] discrimination,[11] and improper purpose.[12] However, in *Shell Products*, McLachlin J. (as she then was) warned that

> courts under the guise of vague doctrinal terms such as "irrelevant considerations", "improper purpose", "reasonableness", or "bad faith", have not infrequently arrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities.[13]

In *Shell Products*, Vancouver's City Council passed a resolution that it would cease to do business with Shell until the company "completely with[drew] from South Africa."[14] City Council and the community had actively opposed Shell's decision to do business with the tyrannical South African apartheid regime. The majority of the Court, led by Sopinka J., relied on narrow and somewhat technical grounds, and found that the city of Vancouver had passed the resolution for an improper purpose. Justice McLachlin disagreed.

In her dissent, McLachlin J. focused on the representative role of municipal government. When a court reviews the decision of a municipal council, it must "respect the responsibility of elected municipal bodies to serve the people who elected them."[15] Deference to council is important both to the flourishing of a healthy local democracy[16] and to the efficient and legitimate administration of municipalities.[17] Further, she stated that there is "little justification for holding decisions on the welfare of the citizens by municipal councillors to a higher standard of review than the decisions of non-elected statutory boards and agencies."[18] Consequently, McLachlin J. found that the city's resolution fell squarely within its governmental and representative mandate. Her forceful and influential dissent would be adopted by the majority of the Supreme Court in *Nanaimo (City of) v. Rascal Trucking Ltd.*[19] and would signal a clear judicial shift in attitude toward local government.[20]

This judicial shift in attitude is bolstered by other movements in Canadian law. A new species of core municipal statute has arisen in many jurisdictions. Unlike previous statutes which defined powers narrowly, this new style of municipal statute recognizes municipalities as "a responsible and accountable level of government"[21] whose purpose is "to provide good

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10 *Re Howard and Toronto (City of)*, [1928] 1 D.L.R. 952 at 956 (Ont. S.C. (A.D.)); *Prince George (City of) v. Payne*, [1978] 1 S.C.R. 458; *Xentel DM v. Windsor (City of)* (2004), 243 D.L.R. (4th) 451 (Ont. Sup. Ct. J.).

11 *Kruse, supra* note 1; *Montréal (City of) v. Arcade Amusements*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650 at 668.

12 *Shell Canada Products Ltd. v. Vancouver (City of)*, [1994] 1 S.C.R. 231 at 244 [*Shell Products*]; *Parks West Mall Ltd. v. Hinton (Town of)* (1994), 148 A.R. 297 (Q.B.); *Hobday v. Corman Park No. 344 (Rural Municipality of)* (1988), 67 Sask. R. 56 (Q.B.). Compare *Kuchma v. Tache (Rural Municipality of)*, [1945] S.C.R. 234.

13 *Shell Products*, *ibid.* at 244.

14 *Ibid.* at 231.

15 *Ibid.* at 233.

16 *Ibid.* at 248.

17 *Ibid.* at 233.

18 *Ibid.* at 247.

19 [2000] 1 S.C.R. 342 at para. 36 [*Nanaimo*]. See also *Adult Entertainment Assn. of Canada v. Ottawa (City of)* (2005), 14 M.P.L.R. (4th) 17 (Ont. Sup. Ct. J.) at para. 22.

20 See also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*, 2004 SCC 19, [2004] 1 S.C.R. 485 at para. 6 [*United Taxi*].

21 *The Cities Act*, S.S. 2002, c. C-11.1, s. 3(1) [*Cities Act*].

government"[22] and "services, facilities and other things that, *in the opinion of council*, are necessary and desirable for … the city."[23] This new species also generally grants municipalities sweeping governmental powers in broad, omnibus terms.[24] Some even expressly restrict judicial interference.[25] These enabling statutes often indicate that the legislature intends "to provide cities with the powers, duties and functions necessary to fulfil their purposes … [and] with the flexibility to respond to the existing and future needs of their residents in creative and innovative ways."[26] Further, Canadian courts have clearly stated that a court ought to afford these statutes a benevolent,[27] "broad and purposive" interpretation.[28] Such an interpretation has been fuelled by active recognition that local governments are "closest to the citizens … and thus most responsive to their needs, to local distinctiveness, and to population diversity."[29] Taken together, these trends show a clear consensus. Canadian attitudes towards local self-representation are changing.

Despite laudable efforts, Canadian courts have yet to devise a coherent and consistent approach which brings substantive judicial review squarely in-line with these developments. Six years after its *Shell Products* decision, the Supreme Court of Canada was again called on to consider how a court ought to review municipal authority. In the decision of *Nanaimo*, the Supreme Court stated that when a court is reviewing the decision of an elected city council, the "pragmatic and functional approach" to judicial review should apply.[30] However, the Court also cautioned that the intra vires decisions of municipalities ought *only* be disturbed where they are patently, or clearly unreasonable.[31] In so doing, the Court drew on

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22 *Ibid.*, s. 4(2)(a).

23 *Ibid.*, s. 4(2)(b) [emphasis added].

24 See generally *Municipal Government Act*, R.S.A. 2000, c. M-26 [*MGA*]; *Cities Act*, *ibid.*, s. 4(2); *The Municipalities Act*, S.S. 2005, c. M-36.1, s. 4(2); *Municipal Act*, C.C.S.M. c. M225, s. 3 [*MA*]; *City of Winnipeg Charter Act*, S.M. 2002, c. 39, s. 5(1); *Municipal Government Act*, S.N.S. 1998, c. 18, s. 2(c); *Charter Communities Act*, being Schedule A to the *Municipal Statutes Replacement Act*, S.N.W.T. 2003, c. 22, s. 3; *Cities, Towns and Villages Act*, being Schedule B to the *Municipal Statutes Replacement Act*, S.N.W.T. 2003, c. 22, s. 3; *Hamlets Act*, being Schedule C to the *Municipal Statutes Replacement Act*, S.N.W.T. 2003, c. 22, s. 3; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28, s. 23, as am. by S.Nu. 2003, c. 2, s. 2. Although it is wise to consider the provisions of each municipality separately, even where a statute does not included explicit language extending broad governmental powers, to a certain extent, such powers might often be properly inferred from the object and scheme of the act. Further, while Saskatchewan legislation is generally referred to as a model of the new "species" of municipal statute, it would be wise to consider individual statutes. As a general rule, new age statutes may contain different provisions, but the overarching theme and unifying principles of such statutes are often very similar.

25 See *MGA*, *ibid.*, s. 539; *Cities Act*, *ibid.*, s. 322; *MA*, *ibid.*, s. 384(a).

26 *Cities Act*, *ibid.*, ss. 3(2)(b)-3(2)(c).

27 *Nanaimo*, *supra* note 19 at para. 19, citing *Kruse*, *supra* note 1 at 99; *Hamilton (City of) v. Hamilton Distillery* (1907), 38 S.C.R. 239 at 249.

28 *United Taxi*, *supra* note 20 at para. 8.

29 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town of)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para. 3. This principle that decision-making is most effective at the level closest to its citizens is known as the principle of subsidiarity.

30 *Nanaimo*, *supra* note 19. Note, however, that the Court seemed to limit its applicability to situations where council was "exercising an *adjudicative* function" (at para. 28).

31 The facts in *Nanaimo*, *ibid.*, are informative. City council declared a pile of soil to be a nuisance. Council ordered it removed. Rascal Trucking did not agree with the city's decision. They brought an application for judicial review. The Court applied the pragmatic and functional approach to the decision. In applying the pragmatic and functional approach, the Court considered two questions. First, the Court considered whether the city had jurisdiction to pass the resolution, or in other words, whether the

McLachlin J.'s *Shell Products* dissent and emphasized the representative function of municipalities. After *Nanaimo*, David Mullan observes that "municipalities have been brought within the mainstream of judicial review theory."[32] This may be true. However, there may also be problems with bringing municipalities squarely within traditional judicial review theory. It is not a perfect fit. There are two grounds for concern.

The first concern is that traditional judicial review, especially the pragmatic and functional approach, is not well-tailored to reviewing the governmental decisions of elected local governments.[33] When a government is acting in a governmental capacity, it may be necessary to take into account considerations which lie outside the purview of traditional judicial review analysis. Indeed, in *London (City of) v. RSJ Holdings*, the Supreme Court seemed to suggest, at least in passing, that in determining the deference to which council is owed, it may be useful to consider the democratic process itself.[34] Deference may depend on whether the decision is "transparent, accessible to the public, and mandated by law."[35] Moreover, as core municipal statutes suggest, the most valid considerations may well be whether municipalities are "accountable to the people who elect them and … [encourage] and [enable] public participation in the governance process."[36] Such considerations may seem foreign to traditional judicial review analysis, which focuses on the reasonableness of the decision itself, not the responsible and accountable exercise of a governmental function.

The second concern is that the approach *Nanaimo* advocates has not been consistently applied. *Nanaimo* suggests that the pragmatic and functional approach ought to be applied whenever a Canadian court reviews municipal authority. However, in one of its most recent decisions in the area, the majority of the Supreme Court failed to apply the pragmatic and functional approach when it reviewed a municipal bylaw.[37] In fact, the pragmatic and functional approach has been subject to its own troubles.[38] Further, *Nanaimo* suggests that

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decision was intra vires. The Court found that this was a question of law and that it should be scrutinized on a correctness standard. The Court found that the city had the power to pass the resolution. Second, the Court considered whether the intra vires decision was substantively correct. The Court found that where a municipality has the power to pass a resolution, that such a decision should only be disturbed where it is patently or clearly unreasonable. The Supreme Court also suggested a court should be extremely hesitant to interfere in intra vires municipal decisions given the unique role and mandate of municipal government. The Court found that the decision to declare the pile of dirt a nuisance was not patently unreasonable.

32 David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 113.

33 *Chamberlain*, *supra* note 9 at paras. 190-208, LeBel J., concurring. See also *Dunsmuir*, *supra* note 2 at para. 33, citing LeBel J.'s comments in *Chamberlain*, as "illustrat[ing] the need for change."

34 2007 SCC 29, [2007] 2 S.C.R. 588 at para. 38 [*RSJ Holdings*].

35 *Ibid.*

36 *Cities Act*, *supra* note 21, s. 3(2)(d).

37 The majority of the Supreme Court merely noted that municipal bylaws should be afforded "great deference," so long as these powers are not exercised in "bad faith or for improper or unreasonable purposes": *Montréal (City of) v. 2952-1366 Québec*, 2005 SCC 62, [2005] 3 S.C.R. 141 at para. 41. Only Binnie J., in dissent, considered *Nanaimo* and the role of the pragmatic and functional approach (at paras. 154, 162-65).

38 For criticism, see David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can. J. Admin. L. & Prac. 59 [Mullan, "Standard of Review"]. See also *Dunsmuir*, *supra* note 2. For a consideration of judicial review of legislation created by administrative bodies, which remains relevant after *Dunsmuir*, see also Philip Bryden "Judicial Review of Administrative Legislation in a Pragmatic and Functional Framework" (2007) 20 Can. J. Admin. L. & Prac. 217. Indeed, as will be explored below, the pragmatic and functional approach has been

a municipality's intra vires decision should only be disturbed where it is *patently*, or clearly unreasonable. However, before, and even after *Nanaimo*, the decisions of locally elected bodies *have* been reviewed on a standard of reasonableness *simpliciter*.[39] Finally, as will be explained hereafter, in light of the Supreme Court's decision in *Dunsmuir*, the *only* deferential option for the review of municipal decision-making authority is "reasonableness."[40]

In summary, recent developments in Canadian law acknowledge the important representative function of municipalities. These developments are promising. This trend signals a break with archaic notions of judicial supervision and distrust. It also suggests that the courts and the legislatures are focusing more on the governmental and representative *function* of municipalities. However, a clear approach for judicial review of municipal decision-making has not been established. With regard to the recent Supreme Court decision of *Dunsmuir*, these issues will arise afresh, and the unique role of municipalities will need to be clearly re-addressed.

III. *DUNSMUIR* AND ITS IMPLICATIONS FOR MUNICIPALITIES

While the facts in *Dunsmuir* are relatively unremarkable,[41] its implications and nuances may well fill volumes of administrative law treatises. For the purposes of this article, only a functional understanding of the case is necessary. What is most important for municipalities is that the Supreme Court: (1) explores the principles underlying judicial review; (2) re-affirms its position that issues of jurisdiction should be construed narrowly; (3) provides innovative statements about the ability of an administrative body to interpret its own statutory framework; (4) suggests that precedent from previous decisions may be determinate in setting

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abandoned.

39 In *Chamberlain*, *supra* note 9 at para. 8, the majority of the Court concluded that the appropriate standard of review to be applied to an elected school board was reasonableness *simpliciter*. Note that a public school board is not a municipality, but they are locally elected and the principles applicable to municipalities ought to have been considered. Note also that, in a concurring opinion, LeBel J. questioned the practicality of applying the pragmatic and functional approach to the decision of an locally elected body in its policy-making capacity (at para. 193). This opinion will be further explored in Part IV below. For pre-*Nanaimo* instances of reasonableness review see *R. v. Bell*, [1979] 2 S.C.R. 212, where a zoning bylaw was quashed for unreasonableness; see also *Tenants' Rights Action Coalition v. Delta (Corp.)* (1997), 151 D.L.R. (4th) 729 (B.C.S.C.) in which the Court found a zoning bylaw to be unreasonable, and in which judicial interference actually exacerbated the very problem it set out to remedy. For a recent example of a municipal decision being reviewed on the *Dunsmuir* reasonableness standard at the superior court level, see *Henderson v. Saskatoon (City of)*, 2008 SKQB 135, [2008] S.J. No. 258 (QL). Further, while the decisions of municipal tribunals have not infrequently attracted a standard of reasonableness, this stands to reason. Indeed, there is no logical reason to afford greater deference to the decisions of appointed municipal tribunals, than to similarly constituted provincial or federal tribunals. See *Canada Lands Co. CLC Ltd. v. Edmonton (City of)*, 2005 ABCA 218, 367 A.R. 180 [*CLC*]; see also *London (City of) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 [*Ayerswood*].

40 See generally, Part III, below.

41 In *Dunsmuir*, *supra* note 2, an employee was terminated. He appealed his termination. An adjudicator construed relevant legislation, and reached the decision that the employee should be reinstated. The employer, the province of New Brunswick, brought an application demanding judicial review of the adjudicator's decision. The decision of the labour adjudicator was eventually overturned by the Supreme Court of Canada.

the standard of review; and (5) most significantly, presents a new test for determining what standard of review applies to administrative decisions. Each of these developments has important implications for municipalities.

In *Dunsmuir*, the Court explored the principles underlying judicial review. The search for an appropriate standard of review is animated by a tension between two principles.[42] The first principle is the rule of law, which Canadian courts are duty-bound to defend.[43] The second principle is respect for legislative intention and democracy, which Canadian courts are also duty-bound to respect.[44] Both legislative intention and the principle of democracy are intensified when a court reviews the decisions of a municipality. Of legislative intention, Mullan notes:

> Deference is also responsive in most situations to legislative intention. Often that legislative intention is expressed in the form of a strong privative clause or a broad, subjectively-worded discretion. On other occasions, *it is appropriately assumed simply from the nature and objectives of the legislative scheme*.[45]

Most core municipal statutes send a clear message. Provincial legislatures intend to create autonomous local bodies with broad governmental powers.[46] Indeed, the purpose of such acts is often to "provide the legal structure and framework within which cities must *govern themselves* and make the decisions that they consider appropriate and in the best interests of their residents."[47] Even in the absence of such explicit language, this intention may be "appropriately assumed simply from the nature and objectives of the legislative scheme."[48] Further, the principle of democracy is greatly amplified when a court reviews the decision of a locally elected government. When a court reviews such a decision, it must weigh not only legislative intention, but also the principle of democracy itself.[49] Where a municipality is bestowed with broad governmental powers, and where it is acting in a responsible, representative capacity, it is endowed with democratic legitimacy. Consequently, any review of municipal decision-making should be animated by tacit respect for the legislature's clear intention that a local government be able to represent its constituents free from unwarranted judicial interference. Furthermore, inherent in such a review should also be an active awareness of the effect judicial interference will have on the legitimacy of local self-representation. Clearly, the animating principles underlying judicial review would bolster a court's decision to afford great deference to municipal decision-making.

In *Dunsmuir*, the Court also sends a strong message that issues of jurisdiction are to be construed narrowly. The Court reiterates Dickson J.'s rejection of the "preliminary questions

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42 *Ibid.* at para. 27.

43 *Ibid.* at paras. 28-29.

44 *Ibid.* at para. 30.

45 Mullan, "Standard of Review," *supra* note 38 at 93 [emphasis added].

46 Note, that while the new "species" of municipal statute expressly bestows broad governmental powers on municipalities, an older form of statute remains in several jurisdictions. This older style of statute is not as explicit. It is wise to consult individual statutes. However, even where authority is derived from an older style of statute, it could also be argued that a similar legislative intention is inherent.

47 *Cities Act*, *supra* note 21, s. 3(2)(a) [emphasis added].

48 Mullan, "Standard of Review," *supra* note 38 at 93.

49 *Supra* note 2 at para. 27.

doctrine"[50] and explains that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."[51] Indeed, "[t]hese questions will be narrow."[52] Consequently, jurisdictional questions surrounding the exercise of municipal authority ought also to be narrow, especially in light of strong legislative and judicial statements that municipal powers ought to be interpreted broadly.[53]

Further, *Dunsmuir* states that a court ought to afford deference to a public body when that body is interpreting its own legislative framework or "home statute."[54] In many instances, municipalities are interpreting their own core municipal statutes. A municipality may even be interpreting a bylaw, such as an official community plan, which the municipality itself created.[55] As such, after *Dunsmuir*, a municipality may be entitled to judicial deference even when it is considering a question of law.

Dunsmuir suggests that a court may use precedent to determine which standard of review applies to a given decision. This statement will be of great relief both to lawyers attempting to advise their clients about the potential standard of review and to officers of the court living with bulging dockets and backlogged applications. The suggestion that a court may not be required to complete a standard of review analysis for each individual decision will promote certainty and stands to reduce litigation. However, this development has important implications for municipalities. Considering this development, local government ought to devote special attention to litigating its interests before a court of law. Present litigation will impact future judicial review.[56]

Most importantly, the majority of the Court in *Dunsmuir* adopted a new test for judicial review. The test has two steps. First, the court must identify the appropriate standard to apply to a public decision. Second, the court must apply that standard to the decision. Each step will be considered in turn and the test will then be applied to municipalities.

The first step a court must take is to decide whether a certain decision should be reviewed on a standard of correctness or on a standard of reasonableness. In determining what standard applies, a court may find it useful to consider the following factors:

(1) Does the legislative framework contain a privative clause? If it does, generally this means that decisions will attract a standard of reasonableness.[57]

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50 See generally *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [*CUPE 963*].

51 *Supra* note 2 at para. 59.

52 *Ibid.*

53 See generally *United Taxi*, *supra* note 20 at para. 8.

54 *Supra* note 2 at para. 54. See also paras. 57, 59.

55 See *The Planning and Development Act, 2007*, S.S. 2007, c. P-13.2, ss. 31, 32, 36-38.

56 *Supra* note 2 at para 54. Further, while there is some doubt as to whether pre-*Dunsmuir* precedent will be received in post-*Dunsmuir* jurisprudence, there is no question that strong statements about the position of municipalities will be pertinent to future litigation.

57 *Ibid.* at para. 52.

(2) Does the decision-maker have a great degree of expertise in the area? If she does, this generally means that her decision will attract a standard of reasonableness.[58]

(3) Is the decision one of fact, or mixed law and fact, or law? If the decision is one of fact, or mixed law and fact, it will generally attract a standard of reasonableness. However, even a question of law may attract a reasonableness standard where there is a privative clause or where a tribunal has expertise in the area.[59] On the other hand, if there is a legal question which is of central importance to the legal system, a standard of correctness is more appropriate.[60]

Further, the Court noted that a discretionary decision, or a policy decision, would generally attract a standard of reasonableness.[61] On the other hand, constitutional questions or questions about the boundaries between administrative bodies would generally attract a standard of correctness.[62]

It is also important to note that in *Dunsmuir*, the Court suggested that "[i]n many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case."[63]

After the standard has been set, the court will apply that standard to the decision in question. Where the standard is one of correctness, the court is to undertake its own, independent analysis of the matter on which the tribunal was called to decide. It should ask whether the decision the tribunal reached was the correct one.[64]

Where the standard is one of reasonableness, a court considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[65] The court will also look at the process which the tribunal employed in reaching its decision and ask whether there was "justification, transparency and intelligibility."[66]

How will a court apply the "standard of review analysis" to municipalities? Again, the inquiry is twofold. First, what standard will generally apply to municipal decision-making? Second, will municipal decisions generally meet that standard?

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58 *Ibid.* at para. 54.

59 *Ibid.*

60 *Ibid.* at paras. 55, 60.

61 *Ibid.* at para. 53.

62 *Ibid.* at para. 58. The preceding factors are a reworking of factors listed in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*], a decision which attempted to synthesize and make clear the pre-*Dunsmuir* approach.

63 *Dunsmuir*, *ibid.* at para. 64.

64 *Ibid.* at para. 50.

65 *Ibid.* at para. 47.

66 *Ibid.* Further, an important issue which arises at this point is whether the reasonableness standard is actually one-size-fits-all, or whether there will be a spectrum within the reasonableness standard. Indeed, in dissent, Binnie J. criticized the majority for failing to appreciate that the single reasonableness standard is not possible in practice. See *ibid.* at paras. 144-57, Binnie J., dissenting. See further discussion of this issue below in Part IV.

First, which standard will generally be applied to municipal decisions? It is amply clear that the vast majority of non-constitutional intra vires municipal decisions will attract a standard of reasonableness. While core municipal statutes do not generally contain a traditional privative clause,[67] some include provisions restricting judicial review for "reasonableness."[68] Also, municipalities have relative expertise in balancing diverse and polycentric local interests and generally consider questions of fact, or mixed law and fact. Where a municipality considers a question of law, it is not infrequently considering its so-called "home statute." As well, municipalities are endowed with broad discretionary powers to make policy decisions.[69] Particularly in light of the legislature's clear intention to create an autonomous local government free from judicial interference, and also considering the principle of democracy, it would be difficult to imagine many municipal decisions being subjected to a standard of correctness.

Second, will municipal decision-making generally meet the reasonableness standard? In other words, will municipal decisions fall within "a range of acceptable outcomes" and demonstrate "justification, transparency and intelligibility"?[70] A municipal decision will generally be found to meet the reasonableness standard. Municipal decision-making finds moral justification in the reality that municipal decisions are a reflection of community values. These decisions are made by individuals elected to represent the community. Municipal decision-making finds logical justification in the elaborate modern municipal decision-making process, which, in many municipalities, is increasingly comprehensive and sophisticated. Municipal decision-making is transparent, because council meetings are "subject to intense media scrutiny,… lobbying by citizens groups … [and] the public is entitled to attend council meetings."[71] As well, municipal decision-making is generally intelligible because modern municipal governments have increasing expertise in determining intricate and complex matters of public policy. Where municipal authority is exercised with prudence, and in accordance with responsible democracy, it would be difficult to argue that a municipal decision is unreasonable.[72]

In short, when a court applies the new "standard of review analysis," it will generally see fit to afford great deference to municipal decision-making. Municipal decision-making will generally attract a standard of reasonableness. A court will not generally deem a municipal decision to be unreasonable where that decision is made in the community interest and is

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67 However, as LeBel J. mentions in his concurring judgment in *Chamberlain*, *supra* note 9 at para. 193: "[o]ne would not expect to find a privative clause in connection with the Board's [an elected school board] decisions, and the absence of one in the statute in no way signals that the legislature expected intervention by the courts in the Board's day-to-day business to be possible." Indeed, in the search for legislative intention, it could be argued that the absence of a privative clause in an enabling municipal statute would be a nominal consideration.

68 See *MGA*, *supra* note 24, s. 539; *Cities Act*, *supra* note 21, s. 322; *MA*, *supra* note 24, s. 384(a).

69 Core municipal statutes grant broad discretionary powers to municipalities. Consider for instance the *Cities Act*, *ibid.*, s. 3(2)(a) [emphasis added]: "the purposes of this Act are … to provide the legal structure and framework within which cities must govern themselves and make the decisions *that they consider appropriate* and in the best interests of their residents." See also *Cities Act*, s. 4(2)(b) [emphasis added]: "The purposes of cities are the following: to provide services, facilities and other things that, *in the opinion of council*, are necessary and desirable for all or a part of the city."

70 *Supra* note 2 at para. 47.

71 *Supra* note 6 at 87.

72 See generally *RSJ Holdings*, *supra* note 34.

made in a responsible and accountable manner. However, municipalities may still have cause for concern. The reality of post-*Dunsmuir* judicial review is that governmental, policy, and legislative decisions of local government bodies will, at best, be reviewed on a standard of reasonableness. In light of such a reality, it may well be time to reconsider the position of municipal governments in Canadian society, and the manner in which a court of law reviews municipal authority.

IV. HOW SHOULD MUNICIPALITIES BE TREATED AFTER *DUNSMUIR*?

It is clear that municipalities are entitled to great deference under the new "standard of review analysis." However, *Dunsmuir* will also spark debate about the appropriate role of municipalities in Canadian society. After *Dunsmuir*, it might be necessary to consider the following three points: (1) the position of municipalities in Canadian society needs to be reoriented and reconsidered; (2) a clear message needs to be sent that *Dunsmuir* must not reduce the deference to which municipalities are entitled; and (3) it may be the case that a threshold test for judicial interference will need to be established to shield certain governmental decision-making from reasonableness review.

A. REORIENTING THE POSITION OF MUNICIPALITIES IN CANADIAN SOCIETY

Inevitably, Canadian courts will be asked to review the substantive decisions of municipalities. When a court reviews a municipal decision, it may find it useful to orient, and perhaps reorient, the position of municipalities in Canadian society. In doing so, a court may find it useful to consider three points that reinforce calls for great deference. First, municipalities are not administrative tribunals. They are governmental bodies. Second, the unwritten constitutional principle of democracy demands that local governance be afforded great deference. Third, interference with certain municipal decisions may involve unwarranted judicial interference in the political realm.

Municipalities are not administrative tribunals. Administrative tribunals are specialized governmental agencies established under federal or provincial legislation to implement legislative policy. Municipalities are a local *government*.[73] Municipalities hold periodic elections. Canadian citizens vote in these elections. Constituents vote for candidates who will make important local decisions in their behalf. It is through these elected officials that each citizen has a voice in intimate and local matters that affect their daily lives. It is through this voice that an individual is able to shape the local character and personality of the community

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[73] A municipality *is* a government. It has been suggested that government is a body which attains its right to exist and to govern through the consent of the governed. Such consent involves a relationship between government and governed in the form of a "social contract." See generally Jean-Jacques Rousseau, *On the Social Contract*, trans. by Donald A. Cress (Indianapolis: Hackett, 1987), specifically Books III & IV. A municipality is elected by Canadian citizens. The majority of voting municipal constituents consent to be governed by the councillors they elect. Indeed, there is no question that a municipality is a "government" in any sense of the term. Further the lack of a direct constitutional source of power does not undermine the consent of the governed or the governmental status and *function* of municipalities. On the contrary, however, administrative tribunals do not attain their right to exist through the consent of the governed. In fact, they do not even "govern" in the traditional sense. They are generally appointed tribunals with specialized administrative functions.

in which she lives. In *RSJ Holdings*, the Supreme Court implied that when a court reviews the decision-making power of a locally elected body, the manner in which a democratic function is exercised is a relevant consideration.[74] Indeed, this recognition may represent the emergence of promising judicial consciousness toward the democratic dimensions of municipal decision-making and the implications those democratic dimensions have for judicial deference.[75]

Given the democratic dimensions of municipal decision-making, the unwritten constitutional principle of democracy should inform judicial review of municipal decision-making. In *Reference re Secession of Quebec*, the Supreme Court stated that the principle of democracy is integral to the "internal architecture" of the Canadian *Constitution*.[76] Although the principle of democracy is elusive and subject to varying rhetorical political conceptions, at its roots democracy represents the ability of citizens to provide meaningful input into decisions that affect their lives. The principle of democracy "can be traced back to the *Magna Carta* (1215)."[77] It is manifest through "effective representation,"[78] is sustained by "political institutions which enhance the participation of individuals and groups in society,"[79] and is affirmed through "the promotion of self-government."[80] Consequently, a "sovereign people exercises its right to self-government through the democratic *process*."[81]

Unfortunately, there are critics who are wary of the present state of Canadian democracy. Such critics caution that political participation is waning.[82] Further, they warn that even where a citizen does participate, such participation may be seen as "limited to choosing the elites who make the choices for them."[83] Indeed, others caution that

> the twenty-first century has ushered in an era of homogeneity. Canada's distinctive local communities appear to be weighed down with baggage from the post-industrial world. Urbanization, globalization, amalgamation, media conglomeration,… [have a] cumulative affect effect … [on the] interwoven tapestry of diverse communities situated in their own social, political, economic, and physical landscapes.[84]

Given such developments, active and legitimate participation in responsive, local government is surely vital to the constitutional underpinnings of democracy. It is difficult to envision a purer form of democracy than the decision-making process of responsible community representatives, actively and responsibly shaping the local character of Canadian

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74 *RSJ Holdings*, *supra* note 34 at para. 38.

75 *Ibid.*

76 [1998] 2 S.C.R. 217 [*Quebec Secession*] at para. 54.

77 *Quebec Secession*, *ibid.* at para. 63. For a useful explanation of the historic origins of unwritten constitutional principles, see Mark Carter, "'Black*stoned*' Again: Common Law Liberties, the Canadian Constitution, and the Principles of Fundamental Justice" (2007) 13 Tex. Wesleyan L. Rev. 343.

78 *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 186, cited in *Quebec Secession*, *ibid.* at para. 63.

79 *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, cited in *Quebec Secession*, *ibid.* at para. 64.

80 *Quebec Secession*, *ibid.* at para. 64, referring to *Switzman v. Elbling*, [1957] S.C.R. 285.

81 *Ibid.* at para. 64 [emphasis added].

82 See generally Allan C. Hutchinson & Patrick Monahan, "Democracy and the Rule of Law" in Allan C. Hutchinson & Patrick Monahan, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 97.

83 *Ibid.* at 97.

84 Mary Louise McAllister, *Governing Ourselves? The Politics of Canadian Communities* (Vancouver: University of British Columbia Press, 2004) at 3.

communities. Given the importance of foundational unwritten democratic principles in Canadian society, the responsible exercise of local governance may well implore more active judicial affirmation.

Fortunately, unwritten constitutional principles are "not merely descriptive."[85] They are "invested with a powerful normative force."[86] They are "binding upon *both courts* and governments."[87] These unwritten constitutional principles delineate the "spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions."[88] Further, while these principles are commonly perceived as tools which limit governmental authority, they are also used to sustain it,[89] and have been seen to inform the deference to which public decision-making is due.[90] Consequently, it is critical that the unwritten principle of democracy inform the role which municipal government plays as a political institution in Canadian society. It has been duly noted that a municipality is not a sovereign government, does not possess an independent constitutional source of power, and therefore does not have a constitutional right to exist.[91] However, where local governments *do* exist, and where they have been delegated legislative powers to represent their community, it is their democratic *function* that is entitled to constitutional protection. Indeed, it would be a mistake to suggest that the lack of a constitutional source of power, in itself, offers any sort of positive justification for judicial interference in the responsible *process* of governmental decision-making.[92] Consequently, in the modern age of limited political participation and malignant

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85 *Quebec Secession*, *supra* note 76 at para. 54.

86 *Ibid.*

87 *Ibid.* [emphasis added]. Needless to say, however, there is much academic debate surrounding the appropriate use of unwritten constitutional principles. See generally Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389; compare Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91. Consider further, Sujit Choudhry, "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 Can. Bus. L.J. 113; Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13 Can. J.L. & Jur. 143; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67.

88 *Quebec Secession*, *ibid.* at para. 52. It is important that these statements not be seen to be taken out of context. When referring to the principle of democracy, and unwritten principles in general, the court contemplates the constitutional dimensions of government and its relations to the written text of the *Constitution*. Specifically, the Court discusses the provincial and federal levels of government. However, it could still be argued that the underlying principle of the discussion clearly applies to local government, as by virtue of the Preamble of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, unwritten constitutional principles find expression in the written *Constitution*, but remain "exterior" to it (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 83 [*Re Judges*]).

89 *New Brunswick Broadcasting v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319. Compare *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

90 *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.). See also Marc Cousineau, "L'Affaire *Montfort*: Confirmation de la Valeur des Principes Fondamentaux de la Constitution," Case Comment, (2001-2002) 13 N.J.C.L. 485, in which the author responds to criticisms about the application of unwritten constitutional principles to government action.

91 *East York*, *supra* note 8. See also *PSBAA*, *supra* note 8; *OECTA*, *supra* note 8, quoting Campbell J. in *OPSBA*, *supra* note 8.

92 Consider for example the Scottish Parliament, which is a creature of British statute. While the Scottish Parliament is not a "sovereign" government in traditional constitutional terms, it would seem out of stride with modern democratic conceptions to suggest that on such grounds the decisions of Scottish

cultural homogeneity, the principle of democracy demands that a court of law show heightened deference to the responsible and representative exercise of local democracy. When the democratic process is one "that is transparent, accessible to the public, and mandated by law,"[93] a court would be remiss to interfere in political governmental decisions, without at least weighing the impact of that interference on the principle of democracy.[94]

Finally, interference in certain municipal decisions may also represent an unwarranted intrusion into the political realm. It is essential to maintain a degree of separation between judicial decision-making and governmental decision-making.[95] In his concurring judgment in *Chamberlain*, LeBel J. expressed concern about subjecting municipal decisions to a standard of reasonableness. He suggested that

> [the] danger that the reasonableness standard could be overused leads … to the danger that the line dividing the role of a local government body from that of a reviewing court will be blurred. It is important to keep that line distinct, for it helps to maintain the separation between the judiciary and representative government.… Courts should not be tempted to replace the decisions of such bodies with their own view of what is reasonable, or to become unduly involved in the management of towns [or] cities.[96]

Indeed, as the Supreme Court stated in *Nanaimo*, municipalities are more "conversant with the exigencies of their community than are the courts … [and] often balance complex and divergent interests in arriving at decisions in the public interest."[97]

Further, there are authors that caution about the dangers of excessive judicial interference in the political realm.[98] They argue that under the vague guise of the "rule of law," a court may indeed engage in "moralistic window-dressing for otherwise naked attempts to seize political power."[99] While it is clear that a court plays a critical role in defending the rule of law, "there is a distinction between constitutional safeguards which constrain democratic activity in the name of democracy and those which constrain democratic activity in the name of 'right answers.'"[100] Clearly, many broad governmental policy or legislative decisions are political matters in which a court, without sufficient justification, should be reluctant to interfere. Excessive judicial interference in these political matters stands to "inhibit the flourishing of any governmental system."[101]

Parliament ought to be subject to more exacting judicial review than its British counterpart. The focus must be on the function. See generally Jo Eric Murkens, Peter Jones & Michael Keating, *Scottish Independence: A Practical Guide* (Edinburgh: Edinburgh University Press, 2002).

93 See *RSJ Holdings*, *supra* note 34 at para. 38.

94 *Ibid.*

95 See *Re Judges*, *supra* note 88, cited in *Chamberlain, supra* note 9 at para. 205, LeBel J.

96 *Chamberlain*, *ibid.* Note that this section of LeBel J.'s judgment was cited by the majority in *Dunsmuir*, *supra* note 2 at para. 33, to illustrate the impracticability of applying the pragmatic and functional approach to all forms decision-making.

97 *Nanaimo*, *supra* note 19 at para. 35.

98 See Hutchison & Monahan, *supra* note 82. See also F.L.Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002).

99 Hutchinson & Monahan, *ibid.* at 99.

100 *Ibid.* at 122.

101 *Ibid.* at 100.

In conclusion, it is clear that the position of municipalities within Canadian society is in need of reconsideration. A regime in which local government is made to stand side by side with appointed administrative tribunals, and in which courts take lightly the democratic mandate of these elected officials and substitute their own views for those of the community representatives, disregards the fundamental value of democracy. When a municipal government is discharging its mandate in a responsible manner, and shaping the local nature and character of the community on behalf of its members, a judge should be quick to stay their hand, even if a decision may appear, in the court's view, to be unreasonable. Such considerations may well inform a finding that municipalities ought to be entitled to a great deference under the new "standard of review analysis."

B. ESTABLISHING A DEFERENTIAL *DUNSMUIR* STANDARD

It is essential that Canadian courts establish a deferential *Dunsmuir* standard for municipal decision-making. As explained, the necessity of such a standard is bolstered by a recognition of the nature of local government, and the democratic and political dimensions of such decision-making. However, in establishing such a standard, there are matters which ought to be addressed. First, there are certain minor, technical questions as to how a court ought to review municipal decisions. Second, there is a serious concern about how the unique role of and mandate of municipalities will fit within a single "reasonableness" standard. Third, it is *crucial* that the Supreme Court send a clear message that *Dunsmuir* is not an open invitation for increased judicial interference of municipal decision-making.

As a preliminary matter, there are a few technical concerns about how the *Dunsmuir* decision applies to municipal decision-making. What is a jurisdictional question? Is it an independent question which will always be determined on a standard of correctness, or is it merely a question which, under the new "standard of review analysis," is to be determined on a standard of correctness? In short, when a court reviews municipal authority, will there always be an independent question of jurisdiction?[102] In *Dunsmuir*, the Supreme Court

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[102] *Pushpanathan*, *supra* note 62 at para. 28, Bastarache J.:

> [I]t is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

However, the subsequent decisions of *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *United Taxi*, *supra* note 20, call into question this proposition. See also *Dalhousie Legal Aid Service v. Nova Scotia Power*, 2006 NSCA 74, 245 N.S.R. (2d) 206. Bryden also states: "it seems to me that a case could be made for deference to the expertise of a regulatory body in interpreting the scope of its statutory authority to make rules, regulations or other forms of administrative legislation": *supra* note 38 at 238. This contention is further supported by comments in *Dunsmuir*, *supra* note 2, that a tribunal may be afforded deference in its interpretation of its home statute. That home statute may well be a statute extending legislative power. However, such comments must also be contrasted with the decision of *United Taxi* and the suggestion that "[t]here is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised": *supra* note 20 at para. 5. Suffice it to say that, as Mullan notes, "[h]ow to identify a truly jurisdictional question remains a highly speculative exercise": Mullan, "Standard of Review," *supra* note 38 at 83.

suggested that jurisdictional questions ought to be construed "narrowly," however, further guidance would be helpful.[103] Moreover, how will nominate grounds of municipal review such as "bad faith," "improper purpose," "discrimination," and "unreasonableness" play into the new "standard of review analysis"? The Supreme Court has offered some guidance. In *Baker v. Canada (Minister of Citizenship and Immigration)*,[104] the Court suggested that, as Philip Bryden puts it, "[j]ust as the categorical exceptions to the hearsay rule may converge with the result reached by the *Smith* analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional [now standard of review] analysis."[105] Indeed, there is some indication that traditional nominate grounds of review may well be *examples* of "unreasonableness" under the new "standard of review analysis." However, considering a new legal test for judicial review, further guidance in this regard would also be informative. While these "metaphysical" concerns are vexing, and while clarification might prove useful, such matters are peripheral to the most important issue at hand.[106] Will a municipality be afforded the deference to which it is due under the *Dunsmuir* analysis? There is serious concern that it may not be.

In light of *Dunsmuir*, it may be difficult to reconcile the unique role and mandate of municipalities within a single reasonableness standard. If the majority in *Dunsmuir* is indeed altering "the structure and characteristics of the system of judicial review as a whole,"[107] then the "reasonableness" standard applies not only to the decisions of a traditional administrative tribunal, but also to a "minister, a board, a public servant, a commission, [or of] an *elected council*."[108] Consequently, an intra vires municipal decision is subject to reasonableness review. However, this may be troublesome. Indeed, the courts and the legislature have indicated that municipal decision-making should *not* be reviewed on a standard of reasonableness.[109]

There may be promise in this regard, however. The new "reasonableness" standard may be a spectrum. It may allow for degrees of deference. There is some indication that the new reasonableness standard is an amalgam of the former reasonableness *simpliciter* and patent unreasonableness standards.[110] Further, Binnie J. speculated that this single reasonableness standard will become a "big tent"[111] which contains various degrees of deference.[112] Also,

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103 *Dunsmuir*, *ibid.* note 2 at para. 59.

104 [1999] 2 S.C.R. 817 [*Baker*].

105 Bryden, *supra* note 38 at 230, citing *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 24; *Baker*, *ibid.*

106 See *Dunsmuir*, *supra* note 2. Specifically, see Binnie J.'s comment that "[j]udicial review is an idea that has lately become unduly burdened with law office metaphysics" (at para. 122). This may seem to suggest that emphasis may shift from such considerations, to animating principles and truly pragmatic considerations about how the new "standard of review analysis" will operate in practice.

107 *Ibid.* at para. 120, where Binnie J. argues that the majority actually focus only on administrative tribunals.

108 *Ibid.* at para. 123 [emphasis added].

109 See e.g. *Nanaimo*, *supra* note 19. See also *Rogers v. Toronto (City of)* (1915), 33 O.L.R. 89 (S.C.), in which it was found that the courts cannot assess the reasonableness of a particular exercise of municipal power. See also *Chamberlain*, *supra* note 9 at para. 205.

110 This can be assumed from the majority's statement that they do not intend to return to pre-*Southam* formalism (*infra* note 116): *Dunsmuir*, *supra* note 2 at para. 48.

111 *Ibid.* at para. 144.

112 *Ibid.* at para. 139.

Deschamps J. suggested that this standard will more closely resemble "a rainbow than a black and white situation."[113] However, the majority of the Court stopped short of stating that a single standard of review will contain various degrees of deference, a proposition the Supreme Court explicitly rejected in earlier decisions.[114]

If there is only one standard, and if municipalities are subject to this standard, how will the reasonableness review of municipal authority be justified, especially in view of strong legislative and judicial statements opposing it? In addition, the traditional nominate grounds of municipal review have been thought to vitiate jurisdiction.[115] Since "[t]he [former] standard of patent unreasonableness is [also] principally a jurisdictional test,"[116] when a court adopted the approach advocated in *Baker*, these nominate grounds of review would have seemed to fit comfortably within the "patent unreasonableness" standard. Indeed, in *Nanaimo*, the Supreme Court insightfully suggested that intra vires municipal decision-making ought *only* be disturbed where it is patently unreasonable.[117] Justice Binnie stated that the Court intended the patent unreasonableness standard to indicate a greater degree of deference, or higher "hurdle" to having a "decision quashed on a ground of substance."[118] However, *Dunsmuir* eliminates this standard. Municipal decision-making is now subject to reasonableness review. Consequently, before *Dunsmuir*, it might be suggested that there was often a higher "hurdle" to clear, before municipal decisions would be quashed. After *Dunsmuir*, are municipalities going to be afforded the same deference? Given recent trends, it would seem that they ought to be afforded *more*, but it is possible that this may not be the case.

Clearly, there is some apprehension that a court may see *Dunsmuir* as an open invitation for greater judicial interference in municipal decision-making. Even if reasonableness is a spectrum, and even if municipalities are granted the greatest deference which this standard allows, this concern still looms large. It is possible a court may see a standard of "reasonableness" as an open invitation to substitute its views for those of locally elected officials. As Binnie J. cautioned in his concurring *Dunsmuir* judgment:

> The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues … but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts.[119]

Given the democratic foundations of the Canadian *Constitution*, the clear intention of the legislatures, and the recent movement towards defending the democratic legitimacy of

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113 *Ibid.* at para. 167.

114 *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paras. 24-26.

115 Consider for example the statement in *Kruse*, *supra* note 1 at 99-100: if a municipal bylaw involves "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'"

116 *Canada (Director of Investigation and Research, Competition Act) v. Southam*, [1997] 1 S.C.R. 748 at para. 55 [*Southam*].

117 As mentioned above, *Nanaimo*, *supra* note 19, suggests that the intra vires decisions of municipalities ought only be reviewed on the standard of patent unreasonableness.

118 *Supra* note 2 at para.141.

119 *Ibid.*

elected bodies, Canadian courts ought send a clear message that under no circumstance will it lightly interfere with the decision of a local government.

As such, it is desirable that Canadian courts develop a deferential *Dunsmuir* standard. Indeed, in the interest of simplicity and consistency, it would be preferable to subject municipal decision-making to the new "standard of review analysis." However, this may not be possible. In order to adequately accommodate broad policy and discretionary municipal decisions within a single reasonableness standard, it would inevitably be necessary to establish very broad degrees of deference. Such a development may well undermine the Supreme Court's worthy goal of simplifying judicial review analysis, specifically the goal of establishing a single, simplified reasonableness standard. As Binnie J. colourfully suggested, incorporating such broad degrees of deference may result in a "shift [of] rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense."[120] If it is not possible to accommodate the unique role and mandate of municipalities within a single standard, it may be necessary to consider other options.

C. CONSIDERING A THRESHOLD TEST FOR JUDICIAL REVIEW OF MUNICIPAL DECISIONS

It may *not* be possible to incorporate degrees of deference into the "standard of review analysis." If this is the case, it may be time for Canadian courts to introduce a threshold test for interference in municipal decision-making. In her *Shell Products* dissent, McLachlin J. (as she then was) stated that it may be the case that

> as jurisprudence accumulates, a threshold test for judicial intervention in municipal decisions will develop. For the purposes of the present case, however, I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases.[121]

In the absence of other possibilities, such a test may be desirable. It is useful to consider four points. First, a threshold test would not limit the ability of a court to review all municipal decisions. Second, a threshold might act to limit traditional judicial review of responsible governmental decision-making. Third, there is little constitutional or practical justification for a court to interfere in certain forms of municipal decision-making. Fourth and finally, a threshold test for interference in municipal decision-making is not unprecedented. It is a desirable development, which may be necessary to bring the law into line with emerging trends and fundamental constitutional values.

It is important to note, at the outset, that the majority in *Dunsmuir* claimed not only to modify the manner in which a court reviews the decisions of adjudicative tribunals, but to consider "the structure and characteristics of the system of judicial review as a whole."[122] This may well include review of municipalities. However, as Binnie J. argued, the majority predominantly focused on adjudicative, administrative tribunals.[123] It might be argued that

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120 *Ibid.* at para. 139.
121 *Supra* note 12 at 248.
122 *Supra* note 2 at para. 120.
123 *Ibid.*

the majority of the Court may not have squarely contemplated the judicial review of governmental functions. In reviewing governmental decision-making, a court may still see fit to refine the "standard of review analysis" and its extension to certain political, governmental forms of public decision-making.

As an important preliminary matter, an argument is not being advanced that all municipal decision-making should be free from judicial interference. Creating a threshold test for judicial interference would not leave it open to municipalities to push the limits of their jurisdiction or to trample on civil liberties. Judicial interference is *always* justified where municipal legislation or action offends the *Canadian Charter of Rights and Freedoms*,[124] encroaches upon exclusive federal jurisdiction,[125] is otherwise unconstitutional, or where a municipality acts in a clear and obvious absence of jurisdiction and blatantly abuses its power.[126]

A threshold test would only act to limit judicial review of responsible, representative governmental decision-making. While it would be the place of a court to fashion an appropriate threshold test, it could be argued that there is little justification, constitutional or otherwise, for *traditional* judicial review of an authorized, governmental decision which is made in accordance with responsible democracy. Each factor warrants consideration.

Whether government action is authorized would be a jurisdictional question, construed narrowly. Was the municipal action within the general scope of what the legislature contemplated when it granted power to the municipality? Is a municipality clearly acting beyond its powers or for a clearly improper purpose?

Whether a municipality is acting as a government, may depend on the nature of the decision. As is the case with municipal liability, there are certain government decisions with which a court will decline to interfere.[127] By analogy, there are certain political, legislative, or policy decisions, which, in the absence of constitutional dimensions, ought to remain beyond the purview of the courts.[128] Where a municipality is making broad legislative or policy decisions, in its representative capacity, and in the public interest, it is acting as a

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124 Part I of the *Constitution Act, 1982*, being Schedule to the *Canada Act 1982* (U.K.), 1982, c. 11; *Godbout v. Longueuil (City of)*, [1997] 3 S.C.R. 844.

125 *Re Try-San International Ltd. v. Vancouver (City of)* (1978), 83 D.L.R. (3d) 236 (B.C.C.A.); *Cal Investments Ltd. v. Winnipeg (City of)* (1978), 84 D.L.R. (3d) 699 (Man. C.A.).

126 See generally *Crevier v. Québec (A.G.)*, [1981] 2 S.C.R. 220 [*Crevier*], which grants a court of law constitutional jurisdiction to review administrative decision-making even in the presence of a full privative clause. See also *Constitution Act, 1867*, *supra* note 88, ss. 96-101.

127 *Welbridge Holdings Ltd. v. Winnipeg (City of)*, [1971] S.C.R. 957 [*Welbridge*]. See also *Just v. British Columbia*, [1989] 2 S.C.R. 1228 [*Just*].

128 Indeed, the courts have indicated that there are situations in which a court ought rightly decline to enter the political arena. While interference may well be necessary when the constitutionality of the conduct is a central concern (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441), in the absence of such considerations, there may be some doubt. Specifically, Wilson J. states at 472: "if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline."

government. When a municipality is acting as a government, it ought to be treated as a government.[129]

Finally and most importantly, to be immune from traditional judicial review, a governmental decision must affirm the legitimacy of responsible local democracy. Where a decision is made in an accountable, transparent, and responsible manner, it will generally have been made in accordance with responsible democracy.[130] In such circumstances, the unwritten constitutional principle of democracy would demand that this responsibly exercised, democratically bestowed power ought to be free from traditional judicial review. However, where a decision is polluted with a hue of irresponsibility, and is clearly made in bad faith, for an obviously improper purpose, or based on manifestly irrelevant considerations, a court might rightly hold that the legislature never intended to grant governmental powers for such a purpose, and that such a decision has not been made in accordance with responsible democracy.[131] Where the constitutional basis for such a governmental function erodes, it would no longer seem appropriate to defend such a decision from traditional judicial review.

In short, where an authorized governmental decision is made in accordance with responsible democracy, it ought not be subjected to traditional judicial review analysis. In creating a threshold test for traditional judicial review, a court would not abdicate its constitutional, supervisory duty to ensure that government policy is not manifestly unreasonable. There would simply be a shift in emphasis. A preliminary debate would focus predominantly on whether the local government discharged its governmental function in accordance with its democratic and representative function. It would not focus on the "reasonableness" of these governmental policy decisions. Indeed, to avoid the creation of Binnie J.'s "big [or potentially enormous] tent,"[132] it may be necessary to move out some of the unruly inhabitants which take up a good deal of space. It may be desirable to create several smaller, adjacent tents. Such accommodations would allow for the better and more efficient storage of unique inhabitants. Further, while it may seem unorthodox to remove

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129 For example, both policy and legislative decisions may be seen as governmental decisions. A legislative decision may be seen as a decision which is generally reserved for Parliament or the legislatures. A policy decision is a decision which balances various, convergent, and polycentric factors in the community interest. While policy decisions and legislative decisions clearly run together, deference to either type of decision would be predicated on the requirement that the decision affirm the legitimacy of responsible local democracy. On the other hand, where a decision is specific in nature, where it is adjudicative, the decision-maker looks less like a government and more like a provincial tribunal. In such circumstances it would seem more appropriate to proceed with traditional standard of review analysis. See also *Homex Realty and Development v. Wyoming (Village of)*, [1980] 2 S.C.R. 1011 at 1031 [*Homex*], where Estey J. found that the bylaw represented the "culmination of an *inter partes* dispute" and was not a legislative decision. Further, where the decision under consideration is one of a municipal *tribunal*, it stands to reason that such a decision would be subjected to traditional judicial review principles. See *CLC*, *supra* note 39; *Ayerswood*, *supra* note 39.

130 See also *RSJ Holdings*, *supra* note 34. Also for examples of a threshold test for a duty of procedural fairness which eliminates procedural protections for legislative decisions on similar grounds, see e.g. *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735. Note that the grounds of review for procedural fairness would not be identical to those for substantive review, as there are different considerations. There would, however, clearly be some overlap.

131 Further, such a decision may well be found to be unreasonable under the "standard of review" analysis.

132 *Supra* note 2 at para. 144.

certain public decisions from universal judicial review analysis, there is little justification for traditional judicial review analysis where a body is discharging a governmental function.[133]

Indeed, there is little justification, constitutional or otherwise, for judicial interference in municipal governmental decision-making. Ann McDonald suggests that if a court is to interfere in the process of local democracy, it "must have a positive justification for doing so and that justification must relate to [its] own peculiar nature and function."[134] While a superior court has the constitutional power to determine the jurisdiction of administrative tribunals,[135] does this power extend to second-guessing the wisdom of constitutional governmental legislation or policy?[136]

Is there compelling justification for a reasonableness review of constitutional, intra vires municipal bylaws? Federal legislation cannot be challenged on the grounds that it is unreasonable. Provincial legislation cannot be challenged on the grounds that it is unreasonable. Why is a court entitled to quash constitutional municipal legislation where it sees that legislation as unreasonable?

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133 It should be conceded that it might seem a stretch to argue that municipal policy decisions ought to be exempt from traditional judicial review. Such an approach might be seen to put municipal governments on more protected footing than even the provincial or the federal government: see e.g. *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539. Indeed, since federal and provincial governments have a constitutional source of power and are a sovereign government, it may be difficult to justify exempting municipal policy decisions from judicial supervision. However, review of federal or provincial governmental decision-making has generally been on the deferential standard of patent unreasonableness. Further, such decisions were decided pre-*Dunsmuir*. "Reasonableness" review of such governmental decisions may well need to be re-evaluated after *Dunsmuir*. It would seem strange to review the decision of a deputy minister, a minister, or even the prime minister in the same manner that a court would review the decision of an expert administrative tribunal. In any event, after *Dunsmuir*, the reasonableness standard is either going to need to involve a very broad spectrum, or accept that broad, political, governmental decisions, including cabinet decisions and potentially even the decisions of the prime minister, will be subject to reasonableness review by a court of law. This might require further consideration. That being said, a threshold test for interference in municipal policy decisions would not eliminate all judicial supervision of municipal decision-making on policy matters; it would simply change the focus. The threshold test would emphasize the importance of local democracy, as opposed to the reasonableness of a policy decision. There would clearly be overlap with former grounds of review that were thought to vitiate jurisdiction. Indeed, it would never be in the interest of local democracy to make a decision which is blatantly and manifestly unreasonable, or which is made for clearly and obviously irrelevant considerations in light of the interests of the community. Such a decision, and it would be rare, would clearly be contrary to the interests of responsible local democracy. In such circumstances, the decision would be subject to the standard of review analysis, and may well be quashed on subsequent judicial review (in the event that the parties to such litigation are unable to reach some further arrangement after a preliminary determination that the threshold had been met).

134 *Supra* note 7 at 101, cited in *Shell Products*, *supra* note 12 at 246, McLachlin J., dissenting.

135 See also *Crevier*, *supra* note 126.

136 However, while *Crevier*, *ibid.*, states that courts are entitled to review administrative tribunals on questions of jurisdiction, it is important to note that the concept of "jurisdiction" has been a slippery one, and has been subject to great debate. However, after *Dunsmuir* it is clear that matters of jurisdiction are to be construed narrowly. Further, in *Crevier*, the Court also defines jurisdictional questions narrowly, such that "they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, *on other issues not touching jurisdiction*" (at 236-37 [emphasis added]).

Further, is there compelling justification for reasonableness review of governmental policy decisions? In his concurring judgment in *Chamberlain*, delivered prior to *Dunsmuir*, LeBel J. stated that "[i]t is beyond the scope of legitimate judicial review to apply a standard of reasonableness to the actions of local policy-making entities like municipalities."[137] A court may not be in a suitable position to second-guess these community-based decisions, and it ought not to be tempted to interfere in what it perceives, in its inward looking, to be unreasonable government policy.

Indeed, *reasonableness* review of governmental, legislative, and policy decisions runs intuitively counter to the principle of democracy. It is inherently offensive to the legitimacy of local self-representation. A municipal decision or bylaw may never satisfy everyone. There will always be individuals who see governmental action as unreasonable. Recourse for "unreasonable" but otherwise constitutional legislation or policy lies in the ballot box, not in a court of law.[138] Further, where parties utilize litigation as a private platform to challenge the policy and legislative decisions of elected representatives, it is often the community which will bear the ultimate cost.[139] A threshold test stands to curtail litigation in its early stages. It stands to promote the efficiency and legitimate administration of the municipal decision-making process.

It is not unprecedented or undesirable to introduce a threshold test for judicial review of substantive municipal decision-making. There are several threshold-style tests which limit judicial interference in political and legislative municipal decision-making. As mentioned, municipalities are not exposed to liability in negligence resulting from a true policy decision.[140] Further, a municipality does not owe a duty of procedural fairness when it is acting in its legislative capacity.[141] A similar test is desirable for substantive judicial review. As Iacobucci J. stated "in appropriate circumstances, courts must not abdicate their judicial duty to decide on incremental changes to the common law necessary to address emerging needs and values in society."[142] In the event that a *Dunsmuir*-type analysis is not compatible with evaluating responsible governmental action, a threshold test would be such a development. Such a test would represent an incremental change to the law. This change would be necessary to bring the law into accordance with emerging democratic and unwritten constitutional principles. Such a development would also promote the efficient and legitimate operation of responsible local democracy.

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137 *Chamberlain*, *supra* note 9 at para. 205. It should be noted that this decision was decided before *Dunsmuir*. Depending on the development of the new "reasonableness" standard, it is possible that reasonableness under *Dunsmuir* may mean something different than it did before *Dunsmuir*.

138 See McDonald, *supra* note 7 at 101, cited in *Shell Products*, *supra* note 12 at 246, McLachlin J., dissenting.

139 In her *Shell Products* dissent, McLachlin J., (as she then was) stated that "[e]xcessive judicial interference in municipal decision-making can have the unintended and unfortunate result of large amounts of public funds being expended by municipal councils in the attempt to defend the validity of their exercise of statutory powers": *supra* note 12 at 245.

140 *Welbridge*, *supra*, note 127; *Just*, *supra* note 127.

141 When discharging a quasi-judicial function, council may have a duty of fairness that does not apply to the use of its legislative powers: *Wiswell v. Winnipeg (City of)*, [1965] S.C.R. 512; *Homex*, *supra* note 129.

142 *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 44, citing *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 760-61; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 665-70.

V. CONCLUSION

Canadian attitudes toward local self-representation are changing. However, Canadian jurisprudence has yet to develop a test for judicial review that brings the law squarely in-line with these trends. While the recent decision of *Dunsmuir* may well demand that municipalities be entitled to great deference, the position of municipalities in Canadian society is still in need of reorientation and re-evaluation. A clear message must be sent that *Dunsmuir* "reasonableness" does not reduce the deference municipalities are due. Further, a threshold test for interference in municipal decision-making may be desirable to curtail unwarranted and undesirable interference in local decision-making.

A municipality is a locally elected government. It makes important decisions on behalf of its electorate. In light of evolving conceptions of local self-representation and foundational democratic principles upon which the Canadian legal system is founded, it is time that the defenders of its *Constitution* take a stand in *defence* of city hall, and not against it.