

Putting an End to Unreasonableness: Judicial Review and Local Governments

FEATURE ARTICLE

MICHELLE LAWRENCE

STUDIED AT THE UNIVERSITY OF WESTERN ONTARIO'S SCHOLAR'S ELECTIVE PROGRAM BEFORE ATTENDING THE UNIVERSITY OF VICTORIA. SHE WILL COMPLETE HER LAW DEGREE AT THE UNIVERSITY OF OTTAWA LAW SCHOOL.

Local government by-laws are subject to rigorous judicial scrutiny in Canada. Under the cover of the “unreasonableness doctrine,” courts engage in a strict form of judicial review and, at times, excessive interference with the delegated decision-making authority of local governments. This paper will examine the roots of the unreasonableness doctrine and its application as a vehicle for judicial intervention in local government affairs. It will be argued that an attitude of suspicion and distrust underlies the judiciary’s use of the unreasonableness doctrine. This attitude is premised on the historic belief that judicial supervision is required to prevent local governments from acting irresponsibly. With this in mind, it will be further argued that the unreasonableness doctrine, as applied by Canadian courts to local government by-laws, is an arcane tool for judicial paternalism which ought to be abandoned.

The Unreasonableness Doctrine

Courts have long held that by-laws may be invalidated if they are “unreasonable.” The classic judicial pronouncement on the unreasonableness doctrine, as it relates to local government by-laws, is *Kruse v. Johnson*.¹ This case concerned a prosecution under a by-law which made it an offense to “sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable ... to desist.” The English Divisional Court was asked to quash the by-law on the ground that it was unreasonable.

In a celebrated judgment, Lord Russell cautioned against the use of the unreasonableness doctrine as a conduit for excessive judicial interference and, accordingly, established a strict legal test:

I think courts of justice ought to be slow to condemn as invalid any by-law ... on the ground of supposed unreasonableness. ... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws ... as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved 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

1 *Kruse v. Johnson*, [1898].

2 Queen’s Bench [Reports]

91 (Divisional Court).

With municipal governments taking on a larger role
– especially after amalgamations in Toronto
and Ottawa – the tendency of courts to usurp
democratic decisions is increasingly unjustifiable

unreasonable and *ultra vires*.” But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.²

As this excerpt suggests, the Divisional Court used “unreasonable” as an umbrella term encompassing the exercise of bad faith, discrimination, and oppressive conduct.

A regulation, to be reasonable, must survive scrutiny on all these substantive sub-grounds.³

Lord Russell further held that the unreasonableness doctrine applies more rigidly to private corporations than public bodies.⁴ Private enterprises, he found, were not subject to adequate levels of parliamentary or electoral control.⁵ On the contrary, the decision-making power of these businesses was virtually unfettered. Hence, the judiciary must assume a supervisory role and, through the unreasonableness doctrine, restrain private corporations when necessary to protect the public interest. Public governments, however, deserved greater deference by virtue of their representative nature and public-interest purpose. Therefore, local by-laws, he wrote, generally should be interpreted benevolently and supported if possible. The unreasonableness doctrine, then, should only be used to quash the enactments of local governments if, despite generous judicial treatment, they continue to be unreasonable.⁶

The English Court of Appeal in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*⁷ (“*Wednesbury*”) narrowed the application of the unreasonableness doctrine. The plaintiff in this case challenged the reasonableness of a local authority’s decision to license the Sunday opening of a cinema on the condition that children under 15 years of age be excluded. Lord Green M.R., in his decision, held that the unreasonableness doctrine should be applied only to extreme and overwhelming cases:

It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, the courts can interfere ... but to prove a case of that kind would require something overwhelming.⁸

It appears that Lord Green intended to preserve the decision-making ability of local governments and immunize them from the political whims of the judiciary. This sentiment accords generally with Lord Russell’s approach in *Kruse v. Johnson* and indicates an underlying desire to defer to local decision-makers on public-interest matters.

2 See above at 99-100.

3 Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 225-27.

4 *Kruse v. Johnson*, see note 1 at 97-100.

5 See above at 97-99. Lord Russell enumerated provisions in The Local Government Act, 1888, which safeguard against the irresponsible exercise of delegated authority of public bodies. In particular, he cited section 23 which provided that a by-law could not be made without two-thirds of council members present. As well, a by-law could not come into force immediately. A copy of the by-law first had to be placed on the town hall for not less than forty days and another copy had to be sent to the Secretary of State. Within forty days of the delivery of this document, the Queen could disallow the proposed enactments or extend the forty-day consideration period.

6 See above at 99-100.

7 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1947), [1948] 1 King’s Bench [Reports] 223 (English Court of Appeal).

8 See above at 230.

9 *Moloney v. Victoria (City)* (1907), 6 Western Law Reporter 627 (British Columbia Court of Appeal). The decision of Justice Irving was reversed by the Supreme Court of Canada, but not on this point.

10 Other cases to adopt the *Kruse v. Johnson* model include *Shaddock v. Calgary (City)* (1959), 29 Western Weekly Reports 49 (Alberta District Court); *Edmonton (City) By-law No. 1546, Re* (1953), 10 Western Weekly Reports (New Series) 407, [1954] 1 Dominion Law Reports 253 (Alberta Court of Appeal); *Winnipeg Merchandisers Ltd. v. Winnipeg (City)*, [1963] 3 Western Weekly Reports 530 (Manitoba Court of King's Bench); *Kelly v. Edmonton (City)*, [1931] 2 Dominion Law Reports 705 (Alberta Supreme Court Trial Division); *Howard v. Toronto (City)* (1927), 61 Ontario Law Reports 563, [1928] 1 Dominion Law Reports 952 (Ontario Court of Appeal); *Rogers v. Toronto (City)* (1915), 33 Ontario Law Reports 89 (Ontario High Court); *By-law 8030, Winnipeg (City), Re* (1914), 6 Western Weekly Reports 1430 (Manitoba Court of King's Bench); and *Stark v. Schuster* (1904), 14 Manitoba Reports 672 (Manitoba Court of Appeal).

11 *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1994), 1 British Columbia Law Reports (3d) 375, 29 Administrative Law Reports (2d) 97 (British Columbia Supreme Court), affirmed (1996), 26 British Columbia Law Reports (3d) 81, 140 Dominion Law Reports (4th) 23 (British Columbia Court of Appeal).

12 *Delegated Legislation in Canada*, see note 3.

13 See above at 226.

14 *Bell v. R.* (1979), 2 Supreme Court Reports 212, 98 Dominion Law Reports (3d) 255 (Supreme Court of Canada) as cited in *Delegated Legislation in Canada*, *supra*, note 3 at 226 (hereinafter cited to Dominion Law Reports).

The Application of the Unreasonableness Doctrine in Canadian Law

In 1907, Lord Russell's judgment in *Kruse v. Johnson* was officially adopted in Canada by Justice Irving of the British Columbia Court of Appeal in *Moloney v. Victoria (City)*.⁹ A solid line of jurisprudential authority subsequently emerged in support of the *Kruse v. Johnson* and *Wednesbury* approach to unreasonableness considerations.¹⁰ Most recently, for example, the British Columbia Court of Appeal in *Canadian National Railway Co. v. Fraser-Fort George (Regional District)*¹¹ affirmed the lower court's application of the *Wednesbury* test for unreasonableness. In this case, the Regional District of Fraser-Fort George passed a taxing by-law enabling it to provide telephone services to a local community. However, the by-law had the effect of imposing 95 per cent of the tax burden on the petitioner, the Canadian National Railway Company. CN Rail argued that the by-law was unreasonable. The court agreed. It held that the regulation was a transparent attempt by the regional government to create a tax base to support local telephone service at the railway company's expense. In the court's opinion, the unreasonableness of the by-law was *overwhelming*. Accordingly, it was quashed.

Holland and McGowan, in their work *Delegated Legislation in Canada*,¹² argue that, despite such jurisprudence, Canadian courts tend to quash delegated legislation for unreasonableness in circumstances which do not meet the "overwhelming" threshold set in *Wednesbury*.¹³ These authors cite *Bell v. R.*¹⁴ as an example of judicial misapplication of the unreasonableness doctrine. In this 1979 case, the Supreme Court of Canada considered the validity of a zoning by-law which stipulated that a particular type of residence in North York, Ontario could be occupied only by a "family." Bell, who lived in a home with two friends, was prosecuted because he and his roommates did not fit within the by-law's definition of family. Bell argued that the by-law was unreasonable. This submission failed at trial but was accepted by a majority at the Supreme Court.

In finding the impugned enactment unreasonable, the Court noted that the by-law, if fully enforced, would prevent all unrelated persons from living together anywhere in the city.¹⁵ With this in mind, the Court found that the circumstances of the case satisfied the doctrinal test for unreasonableness. It held that personal qualifications were not *reasonable* considerations in decisions regarding land use or zoning. The by-law's definition of "family" as persons related by consanguinity, marriage or adoption constituted "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men."¹⁶

Holland and McGowan agree that the by-law's requirements, when applied broadly, are intrusive. However, they question whether the by-law, in the circumstances of this particular case, is as "overwhelming" as that contemplated in *Wednesbury*.¹⁷

Considerations of a land user's personal characteristics, after all, are not always unreasonable. For instance, they are important in decisions regarding low-income housing and homes for people with disabilities. Holland and McGowan conclude that the Court in *Bell* adopted the language of *Kruse v. Johnson* and *Wednesbury* but did not apply those cases correctly. The Court did not interpret the by-law benevolently nor attempt to

support it. In so doing, it did not respect the deferential approach advocated by both Lord Russell and Lord Green. Rather, it exaggerated the *unreasonableness* of the by-law by removing it from the context of the case.

Assessment of the Unreasonableness Doctrine

In general terms, unreasonableness as a ground of review can be useful. For instance, the unreasonableness doctrine gives the judiciary a broad latitude to review enactments.¹⁸ As a result, subordinate decision-makers are accountable to the standards established by courts. As well, the doctrine of unreasonableness may be invoked in civil rights cases not covered by The Charter of Rights and Freedoms¹⁹ and, consequently, may operate as a substitute for some Charter arguments.²⁰

Nonetheless, authors Evans, Janish, Mullan and Risk, in their text *Administrative Law*,²¹ caution against the use of the unreasonableness doctrine as a tool for the judicial review of discretionary decisions. In particular, they note that the judiciary, in applying this doctrine, may disregard the expertise of an agency or the democratic legitimacy of an elected body and override delegated decision-making power by improperly substituting its own views of substantive *reasonableness*. In addition, Evans et. al. argue that the concept of unreasonableness is simply too vague to assist the courts in crafting appropriate orders to control abuses of discretion. Specific problems, they submit, require specific solutions.²²

These concerns are particularly problematic in the context of by-laws enacted by elected local governments. In assessing the reasonableness of a by-law, a court usurps the function of local governments elected to make such decisions on behalf of constituents. The community, in electing a particular individual or political party, entrusts this government with the power to exercise discretion in the public interest. This includes the power to determine what is *reasonable* for the community.

In fact, one may argue that modern Canadian society has little need for intrusive judicial supervision of elected governments as the democratic system itself includes safeguards against the unfettered and irresponsible use of delegated discretionary power. Governments must be reelected at the expiration of each term. They are subject to intense media scrutiny and to lobbying by citizens groups. Similarly, the public is entitled to attend council meetings. Such requirements encourage governments to exercise decision-making power responsibly, transparently, and in accordance with public opinion. Moreover, governments which are oppressive and corrupt eventually will suffer redress at the ballot-box. While these safeguards alone cannot guarantee that governments will never enact unreasonable by-laws, they will help to deter such behaviour by making decision-makers accountable to the electorate. The judicial review of by-laws for reasonableness, then, is not required to ensure that local governments act reasonably.

The Abolition of Unreasonableness?

Legislatures have attempted, without success, to abolish the unreasonableness doctrine as it applies to municipal governments. British Columbia, for example, enacted legislation directing courts not to review Vancouver's municipal by-laws for unreason-

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15 See above at 262.

16 See above at 263.

17 *Delegated Legislation in Canada*, see note 3 at 227.

18 J. M. Evans et al., *Administrative Law: Cases, Text, and Materials*, Fourth Edition, (Toronto: Emond Montgomery, 1995) at 1051.

19 Revised Statutes of Canada 1985, App. II, No. 44, Schedule B, Part I.

20 See note 18 at 1051-52.

21 See above at 1052-53.

22 See above at 1049-52.

ableness. A prohibition on the use of unreasonableness as a ground of judicial review was included in section 148 of The Vancouver Charter:

A by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.²³

The governments of Ontario and Saskatchewan have enacted almost identical provisions.²⁴ Such provisions constitute a clear legislative direction to courts requiring them to disregard challenges to the reasonableness of a municipal by-law.

In some cases, courts have cited these prohibitive provisions as authoritative in preventing them from considering challenges based on unreasonableness.²⁵ Nonetheless, Felix Hoehn, in *Municipalities and Canadian Law*,²⁶ claims that these prohibitive sections do little to prevent courts from quashing by-laws they find to be unreasonable. Rather, such provisions lead to courts invoking and, when necessary, infusing considerations of unreasonableness into other doctrines of judicial review to achieve the result they desire.²⁷ For example, a court may find that the by-law offends another, slightly different doctrine, such as bad faith or discrimination. Other courts, with the aid of the express authority doctrine, may interpret these sections so narrowly as to render them virtually meaningless. A review of these doctrines reveals that they are vague and malleable. Courts easily can disguise within them considerations of a by-law's reasonableness.

1. The Doctrine of Discrimination

The doctrine of unreasonableness, as enunciated by *Kruse v. Johnson*, included within its definition a doctrine of discrimination.²⁸ It follows, then, that the statutory abolition of the doctrine of unreasonableness should also abolish considerations of discrimination. The Manitoba Court of Appeal in *Rex v. Paulowich*,²⁹ however, took the opposite view. It held that a provincial statute which abolished the doctrine of unreasonableness did not simultaneously eliminate the doctrine of discrimination. In this case, George Paulowich, a non-resident, was prosecuted for selling milk without a license. He challenged the validity of the municipality's by-law which required only non-residents to have licenses to sell milk within the community. Paulowich contended that the by-law was *ultra vires* because the power to discriminate between residents and non-residents was not expressly conferred to the municipal government by statute. It was argued, in response, that discrimination was a branch of unreasonableness.³⁰ Hence, section 286(2) of The Municipal Act, which barred considerations of unreasonableness, prohibited the Court from reviewing the by-law for discrimination. The Court rejected this argument and quashed the conviction.

The Court of Appeal held that, despite the abolition of the unreasonableness doctrine, by-laws still may be quashed if they discriminate improperly. Manitoba Chief Justice Prendergast adopted the 1880 decision of the Supreme Court of Canada in *Jonas v. Gilbert*³¹ which held that the power to discriminate must be expressly authorized by law.³² Thus, a discriminatory by-law is not valid unless the authority to enact such a by-law is specifically provided for in the enabling statute. It appears, then, that the court in

23 Vancouver Charter, Revised Statutes of British Columbia 1996, Statutes of British Columbia 1953, c.55, at section 148.

24 Municipal Act, Revised Statutes of Ontario 1990, c. M.45, section 101(2) and Urban Municipal Act, 1984, Statutes of Saskatchewan 1983-84, c. U-11, section 91(2).

25 *Levi v. Vancouver (City)* (1988), 40 Municipal and Planning Law Reports 219 (British Columbia Supreme Court) at 222; *Law v. Flin Flon (City)*, [1995] 101 Manitoba Law Reports (2d) 4, 4 Western Weekly Reports 108 (Manitoba Court of Queen's Bench) at 117; *Re Vancouver License By-law 4957* (1978), 5 British Columbia Law Reports 193, 83 Dominion Law Reports (3d) 236 (British Columbia Court of Appeal) at 203; and *Manitoba Association of Dog Owners Inc. v. Winnipeg (City)* (1993), 99 Manitoba Reports (2d) 100 (Manitoba Court of Queen's Bench) at 103-4.

26 Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Government* (Saskatoon: Purich Publishing, 1996).

27 See above at 26.

28 *Kruse v. Johnson*, see note 1 at 99-100.

29 *Rex v. Paulowich*, sub. nom. *Paulowich v. Dankochuck*, [1940] 2 Dominion Law Reports 106, 1 Western Weekly Reports 537 (Manitoba Court of Appeal) (hereinafter cited to Dominion Law Reports).

30 See above at 109.

31 *Jonas v. Gilbert* (1880), [1882] 5 Supreme Court Reports 356.

32 See note 29 at 108-9.

R. v. Paulowich circumvented the legislative abolition of the unreasonableness doctrine by applying the doctrine of discrimination as an independent head of judicial review rather than treating it as a subset of the unreasonableness doctrine.

2. The Doctrine of Bad Faith

In *Winton Ltd. v. North York (Borough)*,³³ the Ontario Divisional Court subsumed the unreasonableness doctrine within the legal test for bad faith:

To say that Council acted in what is characterized in law as “bad faith” is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members ... But it is to say, in the factual situation of this case, that Council acted *unreasonably* and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government.³⁴

The Court’s formulation of the doctrinal test for bad faith clearly involves considerations of unreasonableness. Hence, even though unreasonableness was not available to the Court as a separate head of judicial review, the judiciary was able to entertain it by inconspicuously integrating it into the doctrine of bad faith.

3. The Doctrine of Express Authority

The express authority doctrine is based on *Dillon’s Rule* which provides that a municipal by-law, to be valid, must emanate from a power expressly delegated to the municipality in provincial legislation.³⁵ The Ontario Court of Appeal, in *Ottawa Electric Light Co. v. Corporation of Ottawa*,³⁶ modified this rule slightly, holding that municipalities can also exercise any power implied in – or necessarily incidental to – expressly granted powers, as well as powers essential to the declared object of the municipal body. Any reasonable doubt about the existence of a power, however, will result in that power being denied. Courts, thus, are able to limit the scope of a local government’s decision-making authority by narrowly interpreting power-granting provisions and object clauses in enabling statutes.

The leading case on the interpretation of enabling statutes is *R. v. Greenbaum*.³⁷ Morris Greenbaum was convicted under a Toronto municipal by-law for unlawfully selling goods along a city road. He challenged the by-law, which regulated sidewalk use, on the grounds that it exceeded its enabling statute. The Supreme Court of Canada, in determining the scope of the municipality’s jurisdiction, declined to apply liberal canons of interpretation. Rather, the Court adopted the rule in *Sun Oil Co. v. Verdun (City)*: a bylaw that exceeds a municipality’s jurisdiction even slightly is *ultra vires*.³⁸ Thus, rather than expressly quash a by-law for unreasonableness, the court may so narrowly construe the enabling statute that the by-law is itself rendered *ultra vires*.

Why Preserve Unreasonableness?

As the jurisprudence illustrates, the judiciary has preserved its ability to consider the reasonableness of municipal enactments despite the statutory abolition of the unreasonableness doctrine. It is surprising that courts subject elected *local* governments to the unreasonableness doctrine but not federal or provincial governments nor – in some cases – certain unelected decision-makers. Local governments resemble provincial legislative assemblies and the federal Parliament in that they are elected to represent

33 *Winton Ltd. v. North York (Borough)*, sub. nom. *Re H.G. Winton Ltd. and Borough of North York* (1978), 20 Ontario Reports (2d) 737, 88 Dominion Law Reports (3d) 733 (Ontario Divisional Court) (hereinafter cited to Dominion Law Reports).

34 See above at 741.

35 *Municipalities and Canadian Law*, see note 26 at 1.

36 *Ottawa Electric Light Co. v. Corporation of Ottawa* (1906), 12 Ontario Law Reports 290 at 299.

37 *R. v. Greenbaum*, [1993] 1 Supreme Court Reports 650, 100 Dominion Law Reports (4th) 183 (Supreme Court of Canada).

38 *Sun Oil Co. v. Verdun (City)* (1951), [1952] 1 Supreme Court Reports 222, 1 Dominion Law Reports 529 (Supreme Court of Canada).

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particular constituencies and make decisions in the public interest. Hence, one might expect courts to offer the same degree of deference to local governments as they afford to provincial and federal government bodies.

The constitutional origins of Canada's governments may explain the judiciary's differential treatment of their respective enactments. Stricter standards of review for local government enactments, as compared to provincial and federal legislation, may be explained by the fact that local governments do not receive legislative authority directly from the constitution.³⁹ Rather, they are creatures of statute. Their authority to enact by-laws is delegated by provincial governments relying on the latter's power to regulate municipal institutions and govern most local matters under sections 92(8) and 92(16) of The Constitution Act, 1867.⁴⁰ Thus, it may be argued that municipalities are constitutionally inferior and, therefore, not entitled to curial deference.

This reasoning, however, fails to explain why municipal governments receive a standard of judicial review different from that applied to unelected agencies. These two types of bodies share a similar constitutional status. Both are subordinate decision-makers; neither are endowed with inherent legislative authority. Nonetheless, non-elected administrative decision-makers are not all subject to review for unreasonableness. Hence, the continued use of the unreasonableness doctrine with respect to municipal by-laws must be based on factors other than the constitutional status of the decision-maker.

A more likely explanation for the judiciary's unique treatment of local enactments stems from a historic paternalism inherited from the English judiciary. For centuries, courts in England viewed local governments with suspicion and distrust. During medieval times, English systems of local government centered around justices of the peace.⁴¹ These individuals were appointed to enforce statutes and maintain the peace. They had broad powers to fulfill this task, including exclusive jurisdiction to try offenses and supervise ordinances.⁴² Justices of the peace were also responsible for determining all accusations of negligence, misfeasance and nuisance and for imposing punitive sanctions. In this way, justices of the peace held a powerful judicial function within the community.

Elaborate local government structures subsequently emerged during the sixteenth and seventeenth centuries to deal with additional duties delegated from Parliament.⁴³ It was often necessary to divide administrative and judicial duties in order to accommodate increased responsibilities. Justices of the peace maintained a judicial function within these systems while administrative matters were delegated to community groups and, at times, local parishes.

In the eighteenth century, with the dawning of the Industrial Revolution and increased urbanization, communities demanded greater support from governments for poverty relief, policing and sanitation. Parliament recognized that such needs could be accommodated most efficiently and effectively by local groups. Hence, it entrusted local governments with significant authority to administer certain public services.⁴⁴

39 See above.

40 Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3.

41 Sir William Holdsworth, *A History of English Law* vol. X, (London: Methuen & Co., 1938) at 127.

42 See above, vol. IV, (London: Methuen & Co., 1924) at 134.

43 See above at 137.

44 Ann McDonald, "In the Public Interest: Judicial Review of Local Government" (1983) 9 *Queen's Law Journal* 62 at 88.

Widespread distrust of local groups, however, made it politically impossible for Parliament to delegate more jurisdiction.⁴⁵

This distrust stemmed from the oppression and corruption which pervaded local governments.⁴⁶ At this time, small groups of self-appointed leaders often dominated local administration and influenced decisions for their own interest. These decision-makers were subject only to the supervision of a central government and the courts. The central government, however, was largely unsuccessful in regulating local public bodies. As a result, continuous supervision by the courts was necessary to ensure their fair and effective operation. The machinery of judicial review provided courts with a vehicle for guiding and disciplining deviant governments. With prerogative writs, indictments, informations and civil actions, the courts could assess and quash enactments.

The judiciary generally was loathe to defer to local governments on public-interest matters, as it shared the community's distrust of, and suspicion toward, these bodies. Concern about corruption at the local level led courts to invoke their powers of judicial review to quash by-laws which interfered, even slightly, with the rights and freedoms of local citizens. The doctrine of unreasonableness, because it was broad and relatively undefined, provided courts with wide latitude to invalidate many offensive regulations. In this context, any attempt to abolish unreasonableness as a head of judicial review would likely have met with great resistance from the courts, as it would have significantly derogated the judiciary's ability to restrain deviant, or incompetent, local governments.

Legislative Attempts to Neutralize Judicial Distrust

Legislatures, it appears, do not share the judiciary's distrust of local governments. Rather, they prefer to confer greater power and responsibility on these decision-makers. In particular, legislatures throughout Canada have attempted to overcome the strict and narrow readings which courts give to the jurisdiction and authority of local governments by delegating broad grants of powers. Section 102 of Ontario's Municipal Act is a good example:

Every council may pass such bylaws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members and the calling of meetings.⁴⁷

Section 189 of the Vancouver Charter contains an even broader grant of power: "The Council may provide for the good rule and government of the city."⁴⁸ Comparable sections exist in the legislation of other provinces.⁴⁹ Such clauses, interpreted liberally, would give municipalities wide latitude to legislate in matters of local concern.

Unfortunately, however, the judiciary has frustrated such legislative attempts to confer greater powers upon municipalities by interpreting these power-granting provisions narrowly and restrictively. The leading case on the interpretation of such clauses is *Morrison v. Kingston (City)*.⁵⁰ Ontario's Municipal Act, as noted above, conferred upon municipal councils the power to enact by-laws and regulations on matters of health, safety, morality and welfare. The Ontario Court of Appeal read down the section. Municipalities, it held, were prohibited from enacting by-laws with respect to health,

45 See above at 88.

46 *A History of English Law* vol. X, see note 40 at 243-46. For a detailed discussion of the historical developments of local government, see K.B. Smellie, *A History of Local Government* (George Allen and Unwin Ltd., 1957) and Sir Chester Norman, *The English Administrative System 1780 - 1870* (Clarendon Press, 1981) as cited in McDonald, see note 44 at 62.

47 Municipal Act, Revised Statutes of Ontario 1990, c. M-45, section 102.

48 See note 23.

49 Urban Municipality Act, 1984, Statutes of Saskatchewan 1983-84, c. U-11, section 83; Municipalities Act, Revised Statutes of Prince Edward Island 1988, c. M-13, sections 57, 112; Dartmouth City Charter, Statutes of Nova Scotia 1978, c. 43A, section 132; City of Charlottetown Act, Statutes of Prince Edward Island 1979, c. 22, section 41. These statutes are cited in *Municipalities and Canadian Law*, see note 26 at 2.

50 *Morrison v. Kingston (City)*, [1937] 4 Dominion Law Reports 740 (Ontario Court of Appeal).

safety, and morality because these areas were the responsibility of other governments.⁵¹ As well, a municipal council could not legislate matters regarding “welfare” because the term was too vague:

The power to legislate for the “welfare” of the inhabitants is too vague and general to admit of definition. It may mean so much that it probably does mean very little. It cannot include powers that are otherwise specifically given, nor can it be taken to confer unlimited and unrestrained power with regard to matters in which a conditional power only is conferred upon the subsidiary Legislature.⁵²

As this excerpt suggests, the Court required grants of power to be specific and not confer power over areas within the jurisdiction of another level of government.

In *Shell v. Vancouver*,⁵³ the Supreme Court of Canada considered the interpretation of such enabling clauses. The Court was asked to determine the validity of resolutions passed by the City of Vancouver, in which the city undertook not to do business with Shell Canada Products Ltd. because of the company’s business interests in apartheid-era South Africa. The city argued that the impugned resolutions were authorized pursuant to section 189 of The Vancouver Charter which permitted the council to provide for the “good rule and government of the city.”⁵⁴

The case split the top court 5-4. Supreme Court Justice Sopinka’s majority decision, supported by four judges,⁵⁵ endorsed a narrow, literal interpretation of this clause. A municipal authority, Sopinka wrote, is authorized only to act in furthering municipal purposes as set out by statute, namely, those which are stated expressly in the enabling legislation and those which are compatible with the purpose and object of the statute.⁵⁶ The majority found that the resolutions related to matters outside of the city’s municipal boundaries and, therefore, did not fall within the purposes of the Vancouver Charter:

Clearly there is no express power in the Vancouver Charter authorizing the Resolutions and, if they are valid, the respondent must rely on such powers being implied ... So far as the purpose of the Vancouver Charter is concerned it is perhaps best expressed in section 189, which provides that “Council may provide for the good rule and government of the city.” In this regard its purpose does not differ from the purpose generally of municipal legislation which, as stated above, is to promote the health, welfare, safety or good government of the municipality. This places a territorial limit on council’s jurisdiction. No doubt council can have regard for matters beyond its boundaries in exercising its powers but, in so doing, any action taken must have as its purpose benefit to the citizens of the city. The Vancouver Charter is careful to expressly provide for activities in which council is permitted to engage outside of its limits even when such activities clearly redound to the benefit of the inhabitants of the city. Such activities include participation in public works projects with other municipalities (s. 188) and acquiring property required for the purposes of the city (s. 190).⁵⁷

The majority thus narrowly construed section 189 of the Vancouver Charter, finding an implied territorial limitation. It held that municipal enactments, to be valid, must be in furtherance of local issues. As these resolutions related to matters “beyond the boundaries of the city,”⁵⁸ they were outside the council’s legislative jurisdiction.

Sopinka also rejected arguments by the city that the resolutions were validly enacted under other parts of the Vancouver Charter.⁵⁹ Section 137 gave the city the ability to partake in commercial, industrial or business undertakings. Section 190 allowed the

51 Health and safety were addressed in provincial legislation and morality was dealt with in the federal government’s Criminal Code.

52 See note 50 at 744.

53 *Shell Products v. Vancouver (City)* (1994), 1 Supreme Court Reports 231, 110 Dominion Law Reports (4th) 1 (Supreme Court of Canada) (hereinafter cited to Dominion Law Reports).

54 See above at 15.

55 The majority consisted of Justices Sopinka, La Forest, Cory, Iacobucci and Major.

56 *Shell*, see note 53 at 15.

57 See above at 15-16.

58 See above at 16.

59 See above at 15.

municipal council to acquire personal property for the city's purposes. Section 199 permitted the council "to do all such things as are incidental or conducive to the exercise of the allotted powers."⁶⁰ As with section 189, the court construed these sections narrowly as well:

These sections are general sections found in most if not all municipal Acts and must be construed subject to the limitations imposed by the purpose of the statute as a whole. Any powers implied from their general language must be restricted to municipal purposes and cannot extend to include the imposition of a boycott based on matters external to the interests of the citizens of the municipality.⁶¹

Clearly, this narrow interpretation of the enabling statute had the effect of severely constraining Vancouver's municipal government to the point that it was confined to the strict and literal wording of the statute.

Justice McLachlin wrote a vigorous dissent. Along with three other judges, she criticized the majority's interventionist approach.⁶² She held that the majority undermined the legislative purpose of section 189 by construing it narrowly:

The truth of the matter is that provisions in municipal Acts for the "good government" or general welfare of the citizens, far from being mere surplussage as my colleague [Sopinka] suggests, found their origin in the desire of legislatures to prevent the decisions of municipal councilors being struck down by the courts. If the courts interpret them narrowly, they will defeat the very purpose for which these provisions were enacted.⁶³

In contrast to Sopinka, McLachlin advocated a liberal interpretative approach akin to that articulated by Lord Russell in *Kruse v. Johnson*. She held that section 189 of the Vancouver Charter did not confine Vancouver's municipal council to matters within city limits. On the contrary, when read broadly the section led to a different result.⁶⁴

Justice McLachlin also favoured a deferential standard of review for the enactments of local government. In language echoing Lord Green's decision in *Wednesbury*, she wrote that "unless a municipality's interpretation of its power is 'patently unreasonable,' in the sense of being coloured by bad faith or some other abuse, the interpretation should be upheld."⁶⁵ McLachlin was unwilling to interfere with the decisions of local governments in circumstances which are neither overwhelming nor extreme. She also criticized attempts by courts to mask excessive and improper interference within doctrines of judicial review:

Rather than confining themselves to rectification of clear excesses of authority, courts under the guise of vague doctrinal terms such as "irrelevant considerations," "improper purpose," "reasonableness," or "bad faith," have not infrequently abrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities.⁶⁶

Judicial interference in local matters, she held, was generally undesirable. The judiciary, instead, should respect the electorate's decision to entrust a public body with the freedom and responsibility necessary to make important decisions.

A deferential approach, according to McLachlin, serves a number of purposes.⁶⁷ First, it complements the democratic values upon which Canada's modern political system is based:

[A broad, deferential approach] adheres to the fundamental axiom that courts must

⁶⁰ See above.

⁶¹ See above at 15.

⁶² Chief Justice Lamer and Justices L'Heureux-Dubé and Gonthier concurred with McLachlin.

⁶³ *Shell*, see note 53 at 33.

⁶⁴ See above at 32.

⁶⁵ See above at 28.

⁶⁶ See above at 25.

⁶⁷ See above at 25-27.

McLachlin held that courts are not suitable decision-makers on public interest matters. The responsibility of assessing the needs and desires of the public is best exercised by elected governments. Judicial interference in the democratic, decision-making process usurps the efficiency and legitimacy of government.

accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values.⁶⁸

In the same vein, McLachlin held that courts are not suitable decision-makers on public interest matters. The responsibility of assessing the needs and desires of the public is best exercised by elected governments. Judicial interference in the democratic, decision-making process usurps the efficiency and legitimacy of government.⁶⁹

Secondly, judicial interference forces elected governments to be accountable to standards of reasonableness established by the courts. In an attempt to meet these standards, the government may depart from the expectations of the electorate. As a result, the local government is forced to spend time and money defending its enactments.

McLachlin held that such actions can be expensive and inefficient:

Excessive judicial interference in municipal decision-making can have the unintended and unfortunate result of large amounts of public funds being expended by municipal councils in an attempt to defend the validity of their exercise of statutory powers.⁷⁰

Finally, McLachlin noted numerous cases in which a flexible, deferential approach has been applied to non-elected administrative boards and agencies.⁷¹ Courts, she held, tend to be sensitive to the context in which these bodies operate and often defer to the special expertise of tribunals. McLachlin could not find any obvious reason why municipal governments, which also have specialized understanding of their communities, should be subject to stricter standards of judicial review than non-elected decision-makers or why they should not receive some degree of curial deference.⁷²

The Need for Reform

As *Shell* demonstrates, legislative attempts to immunize local governments from strict judicial review have failed. Similarly, earlier jurisprudence illustrates the willingness on the part of courts to manipulate doctrines of judicial review so as to retain the power to consider the *reasonableness* of a local government enactment even though the unreasonableness doctrine itself is barred by provincial statute. As McLachlin notes in her dissent, unwarranted judicial interference in the affairs of local governments severely impairs the ability of these governments to respond to community needs. Likewise, continued judicial reliance on unreasonableness considerations and the departure of Canadian courts from the spirit of deference outlined by Lord Russell, are extremely problematic. Judicial interference in this form undermines the function of a local government to determine what is *reasonable* for its own community. Local governments, through this doctrine and others, are held on judicial review to standards of reasonableness that emerge not from a grass-roots electorate, but from a detached judiciary.

At one time, when local governments were tainted by widespread corruption, judicial standards of reasonableness may have been effective in protecting citizens from oppressive enactments. However, democracy at the local level has eradicated the need for a judicial check on the *reasonableness* of local decision-makers. The democratic

68 See above at 25-26.

69 See above at 26-27.

70 See above.

71 See above at 27.

72 See above.

system may not ensure the *competent* exercise of delegated discretion, but it certainly does provide safeguards and incentives for responsible and proper use of this power. Besides, incompetence is a subjective determination which the electorate, not the courts, must assess. It appears, therefore, that no clear justification remains for preserving the unreasonableness doctrine in opposition to the direction and desire of legislatures.

Options for Change

As noted earlier, the judiciary has preserved the unreasonableness doctrine, in a variety of forms, despite its legislative abolition. How, then, can a true abolition of this doctrine be effected? How can deference be ensured? A constitutional change – elevating the status of local governments and expanding their jurisdiction – may encourage judicial deference. Alternatively, provincial legislatures may attempt to confer greater jurisdiction on local governments through select and carefully-drafted grants of power. However, the autonomy of local governments most likely will be enhanced not by constitutional or legislative amendments, but by a change in judicial attitudes. Rather than distrust local governments, the judiciary could afford them greater deference and, in doing so, honour the legislative abolition of the unreasonableness doctrine.

1. Constitutional Change

The Constitution Act, 1867, could be amended to confer on local governments direct legislative authority over municipal institutions and matters of local concern. Such an amendment would alter the constitutional status of local governments from subordinate decision-makers to sovereign powers. This kind of constitutional change would require, at a minimum, an amendment to provincial jurisdiction as set out in section 92 of the Act.

A municipality itself could not initiate such an amendment to the constitution. Pursuant to section 46(1) of The Constitution Act, 1982,⁷³ constitutional amendments must be initiated by the Senate, House of Commons or a provincial legislative assembly. The amendment must then be supported by both Houses of the federal Parliament as well as the legislatures of at least two-thirds of the provinces, provided that they represent at least half of Canada's total population.⁷⁴

Constitutional change recognizing the jurisdiction of local governments would send a strong signal to the judiciary that this level of government deserves significant curial deference. However, such a change would not address the root cause of judicial interference which, as noted earlier, appears to be the judiciary's historic distrust of this level of government. At the same time, the elevation of local governments to sovereign status threatens to completely remove "local matters" from provincial jurisdiction. Most, if not all, provincial legislatures would resist an amendment so significantly reducing their jurisdiction. Moreover, Canada's present political climate, with its recent history of unsuccessful constitutional change, is probably not conducive to any proposals for constitutional amendment. Attempts to enhance the status of local governments likely would be frustrated by the divisive politics surrounding constitutional issues in Canada.

2. Legislative Initiatives

73 *Constitution Act*, 1982, Schedule B of the *Canada Act* 1982, U.K., 1982, c. 11.

74 See above at section 38(1).

Canada's present political climate, with its recent history of unsuccessful constitutional change, is probably not conducive to any proposals for constitutional amendment.

Provinces are more likely to support legislative initiatives to increase the jurisdiction of local governments in selected areas. To this end, provincial legislative assemblies could delegate greater powers to local governments without reducing their own jurisdiction over municipal institutions and local matters. Such legislative change, unlike a constitutional amendment, may be easily effected as it requires only majority support in a provincial legislature.

The government of Alberta has pursued this option. In 1987, it established the Municipal Statutes Review Committee, with the mandate to examine emerging trends among local governments and make recommendations for legislative change.⁷⁵ The committee, in its review, foresaw increased activism on the part of municipal governments in the coming century. Overall, it envisioned the growth of participatory democracy.⁷⁶ Locally, citizens likely would become more involved in their community's affairs. Advances in technology would facilitate fast, comprehensive opinion-polling, thereby enabling governments to respond to public opinion in a timely and appropriate manner.⁷⁷ In addition, the committee predicted further downloading by provincial governments to municipalities of public services which may be administered more economically at the local level.⁷⁸ These changes would create increased expectations of accountability and place greater demands on the time and resources of local governments. As a result, municipalities would require more autonomy, flexibility and freedom from excessive judicial interference and restraint.

The work of the Alberta committee culminated in 1994 with the creation of a new Municipal Government Act.⁷⁹ This Act contained extensive changes, designed to vest greater powers in municipal governments and, simultaneously, reduce judicial intervention in local affairs. In particular, the Alberta Act bestows on municipalities "natural person powers."⁸⁰ Subject to certain conditions, municipalities in Alberta are now able to do anything that an individual legally can do. This includes hiring employees, entering into contracts, and acquiring property. Such power should liberate municipalities from the strict wording of enabling statutes and eliminate the need for detailed and express grants of powers.

In addition, the new Act explicitly recognizes the ability of municipal governments to pursue policy matters.⁸¹ In other provinces, local governments are restricted, by the doctrine of express authority, to the strict policy positions of the province as set out in their enabling statute. Explicit recognition of the ability to act on policy issues will broaden the general jurisdiction and decision-making power of municipalities by allowing them to pursue projects based on their own policy initiatives.

As well, Alberta's Municipal Government Act attempts to overcome the doctrine of express authority by delegating to municipalities entire spheres of jurisdiction.⁸² Rather than expressly and specifically enumerating municipal powers, the Act contains carefully drafted grants of power and statements of purpose. Section 3 of the new statute articulates the municipalities' purposes in general terms:

- (a) to provide good government;
- (b) to provide services, facilities or other things that, in the opinion of council, are

75 F. M. Saville and B. Cotton, "An Overview of the Proposals for a New Municipal Government Act for Alberta" (1991-92) 5 Canadian Journal of Administrative Law and Practice 93.

76 Alberta Municipal Statutes Review Committee, "The Municipal Government Act": Local Autonomy, You Want it, You Got It (Legislation Paper Nos. 1 to 6) at 4-5.

77 See above at 5.

78 See above.

79 Municipal Government Act, Statutes of Alberta 1994, c. M-26.1.

80 Saville and Cotton, see note 75 at 94.

81 See above.

82 See above at 95.

necessary or desirable for all or part of the municipality; and

(c) to develop and maintain safe and viable communities.⁸³

This section operates in conjunction with section 7 of the Act which grants municipalities authority to pass by-laws in different jurisdictional areas.⁸⁴ Drafters avoided the need to enumerate municipal powers *per se* by including in this section a general description of the jurisdictional spheres in which a municipality may legislate.

The Alberta Act retains a statutory abolition of the unreasonableness doctrine, but, unlike the legislation of other provinces, uses clear, unconditional language barring considerations of unreasonableness on judicial review: “No bylaw or resolution may be challenged on the ground that it is unreasonable.”⁸⁵ The concise use of language in this provision may minimize the opportunity for the judiciary to find implied conditions or exception to the general prohibition on unreasonableness considerations.

The enactment of the Municipal Government Act reveals a strong desire on the part of Alberta’s provincial government to increase the jurisdiction and autonomy of local governments. It remains to be seen, however, whether the judiciary will confer a corresponding amount of deference upon local governments, given its tendency to thwart past legislative efforts.

3. Judicial Deference

As long as the judiciary retains its distrust for local governments, it will continue to thwart the exercise of power by these public bodies. It has already been demonstrated that courts have overcome the express legislative abolition of the unreasonableness doctrine by cleverly infusing it into other independent heads of review. Moreover, courts have undermined legislative efforts to confer broad grants of power to these governments by applying narrow and restrictive canons of interpretation. Further legislative change, short of a constitutional amendment, also will be frustrated by judicial unwillingness to defer to local governments, unless the judiciary itself terminates its centuries-old practice of supervising local governments.

Courts must cast aside their outdated distrust of local governments, inherited from a period when local public bodies were generally oppressive and corrupt. Today’s democratic process deserves greater deference. The judiciary must follow McLachlin’s lead in *Shell* and acknowledge the representative character and democratic legitimacy of local public bodies and afford them the same degree of curial deference given to provincial legislatures and the federal Parliament.

In doing so, the courts must honour the direction of legislatures. Rather than narrowly interpret enabling statutes so as to restrain local governments, the judiciary instead can interpret grants of power both broadly and purposively. Moreover, the judiciary must respect the desire of legislatures to abolish the unreasonableness doctrine. It must honour the fact that, in the Canadian political system, local governments, not the courts, are empowered to determine what is reasonable for the electorate.

Conclusion

83 Municipal Government Act, see note 79.

84 Saville and Cotton, see note 75 at 95.

85 Municipal Government Act, see note 79 at section 539.

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The judiciary's continued use of reasonableness considerations on judicial review of local government by-laws is symptomatic of its general unwillingness to defer to this level of government on public-interest matters. Legislative efforts to bar such considerations and overcome judicial paternalism have failed. Rather than follow the direction of legislatures, the judiciary – through the manipulation of various doctrines and canons of interpretation – has maintained a paternalistic hold on these public bodies. Judicial interference in the affairs of democratically elected local governments undermines parliamentary sovereignty. Moreover, it contradicts the general practice of the courts to defer to particular administrative boards and agencies; it causes inefficiencies in government administration; and, most importantly, it offends democratic principles. Unfortunately, however, it is difficult for legislatures alone to put a stop to the judiciary's interventionist practices.

Change must begin within the courts. The judiciary must abandon its suspicions about and distrust for local governments. Instead, it must defer to public bodies, trusting both the democratic system and the electorate to restrain unreasonable decision-makers. In doing so, the courts must abandon the unreasonableness doctrine as a tool for judicial paternalism over the affairs of local governments.