THE ALBERTA MUNICIPALITY: THE NEW PERSON ON THE BLOCK

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This article discusses the impact of Alberta's Municipal Government Act *(1994) on municipalities. Specifically, the article describes how the* Act *grants municipalities natural person powers, whereas the previous* Municipal Government Act *defined all municipal powers within the enabling legislation. The article further discusses how natural person powers will affect a municipality's business function and some problems municipalities may face in light of judicial interpretation of these powers.*

Le présent article traite de l'impact de la Municipal Government Act *(1994) de l'Alberta sur les municipalités. Il décrit plus particulièrement comment la Loi leur accorde les pouvoirs d'une personne physique, alors que le texte précédent définissait tous les pouvoirs des municipalités dans le cadre de la loi habilitante. Il montre également en quoi ces pouvoirs de personne physique auront une incidence sur la fonction de gestion des municipalités, et les problèmes que pourrait susciter l'interprétation judiciaire de ces pouvoirs.*

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I. INTRODUCTION

In Alberta, every city, town, village, summer village, municipal district or specialized municipality is deemed by the *Municipal Government Act*[1] to constitute what is termed a "municipality." This statute is the enabling legislation for all municipalities and prescribes the powers and duties of the municipality. These powers and duties may be classified along function lines and consist of a legislative, quasi-judicial and business function.[2]

As a statutory creation, the municipality is restricted in the conduct of its functions by the *Act*; the general rule being that if it is not specifically permitted by the enabling

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1 *Municipal Government Act*, S.A. 1994, c. M-26.1, s. 1(s) [hereinafter *Act*].

2 See *Shell Canada Products Ltd.* v. *Vancouver (City of)*, [1994] 3 W.W.R. 609 at 620 (S.C.C.) [hereinafter *Shell*].

statute, then it is not within the municipality's scope of power.[3] This fundamental principle was recently restated by Loukidelis J. in *Chaperon* v. *Sault Ste. Marie (City)* as follows:

> Canadian courts have often had to consider what are the powers a municipal corporation may exercise. Are they strictly limited to those conferred in an enabling statute, or do they have broader or residual powers? That issue has been thoroughly discussed in decisions of the Supreme Court of Canada for nearly a century. One of the recent Supreme Court of Canada decisions is that of *R.* v. *Greenbaum* [1993] 1 S.C.R. 674, 79 C.C.C. (3d) 158. In *Greenbaum*, Iacobucci J. reaffirmed the principle that municipalities are entirely creatures of provincial statutes, and have only those powers which are thereby conferred upon them. At pages 167 to 169 [D.L.R.], the following passage, which merits full quotation, appears:
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> > Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.[4]

Prior to January 1, 1995, the law which governed Alberta municipalities was contained in the previous *Municipal Government Act*.[5] This statute set out in great detail the powers and duties of the municipality. With its repeal and the proclamation of the *Act*, the pertinent statute law underwent a drastic change, the most notable of which was the granting of natural person powers to a municipality.[6] Pursuant to the *Act*, a municipality was now to enjoy the same capacity, rights, powers and privileges accorded a natural person.[7] Any limitation of the municipality's natural person status was specifically confined to express limitations in the *Act* or some other enactment.[8]

When the provincial legislature granted natural person powers, the perceived goal was to permit municipalities to achieve the same functional freedom as that enjoyed by an individual and with limited statutory interference. Under the *previous Municipal Government Act*, the municipality's business function was so restricted as to be practically non-existent.[9] Presumably, the granting of natural person powers would

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3 See *R.* v. *Greenbaum*, [1993] 1 S.C.R. 674 at 687 [hereinafter *Greenbaum*]; *Wahl* v. *Medicine Hat (City of)* (1977), 5 M.P.L.R. 209 at 211 (Alta. C.A.); *Lamb* v. *Estevan (Town of)*, [1922] 3 W.W.R. 1187 at 1190 (Sask. C.A.) and *Swift Current (City of)* v. *Leslie*, [1920] 1 W.W.R. 467 at 470 (Sask. C.A.).

4 (1994), 21 M.P.L.R. (2d) 1 at 14 (Ont. Ct. (Gen. Div.)) [hereinafter *Chaperon*].

5 R.S.A. 1980, c. M-26 [hereinafter *previous Municipal Government Act*].

6 *Act, supra* note 1, s. 6. In addition, pursuant to s. 602.1 of the *Act*, a regional services commission has also been granted natural person powers.

7 Pursuant to s. 1(t) of the *Act, supra* note 1, the term "natural person powers" is defined as meaning "the capacity, rights, powers and privileges of a natural person."

8 *Act, supra* note 1, s. 6.

9 One specific example of this strict control can be seen in s. 131(b) of the *previous Municipal Government Act, supra* note 5, where the municipality was permitted to operate a municipal day care centre. As a municipality can only do that which the statute specifically permits, in the absence of s. 131(b), the municipality would be statute barred from carrying on this particular business activity. Given this statutory stricture, previous to the *Act*, there was little opportunity for competition in business between the municipality and the private sector.

eliminate this restriction and abolish any commercial disparity between the municipality and the natural person. As an individual lacks the capacity for a legislative or quasi-judicial function, and as both the municipality and the individual share the common capacity to conduct business, natural person powers could only assist in achieving this functional equality in the common function of business.

The *Act* does not place any specific limitations on the manner and circumstances under which the municipality is to exercise its natural person powers. As a result of this undefined latitude, it may be difficult for a municipality to know if it has the requisite statutory authority to exercise its natural person powers in the expansion of its business function into areas previously reserved for individuals and certain corporate forms. In order for the municipality to properly and successfully conduct its day-to-day business, there must be certainty as to the legal limitations that will govern its business affairs. In the absence of this certainty, the municipality may be reluctant to venture into new areas of business. In addition, parties who would otherwise contract with the municipality may, as a result of this uncertainty, be leery to do so.

The concept of applying natural person powers to a municipality is not novel.[10] However, in terms of provincial legislation, its application to municipalities has received limited legislative acceptance.[11] Due to this fact, there is little jurisprudence available to assist in deciphering the rules under which the municipality is to exercise these new powers. The problems associated with the municipality's exercise of its natural person powers therefore remain unknown. In this article, the writer proposes to discuss what it means to the municipality to have natural person powers, and in the context of the municipality's business function, the potential problems which may accompany these powers.

II. NATURAL PERSON POWERS

A. THE NATURAL PERSON

In order to appreciate the benefit that natural person powers may have to the municipality, the meaning of the term "natural person" must first be understood. In this respect, the law recognizes two entities capable of creating legal relations: the natural

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[10] See *S.M.T. (Eastern) Ltd.* v. *Saint John (City of)* (1946), 4 D.L.R. 209 at 217 (N.B.S.C.) where Harrison J., in commenting on the origin of the City of St. John, stated that it had been incorporated by a Royal Charter granted by Sir Thomas Carleton, the first governor of New Brunswick, dated April 30, 1785 and that pursuant to its Charter, the City had "a capacity resembling that of a natural person."

[11] From the writer's research, it would appear that Alberta is the only jurisdiction which has passed legislation whereby natural person powers have been granted to the municipality. In this respect, although the Manitoba legislature had a draft of the *Act* available for its review prior to passing *The Municipal Act*, S.M. 1996, c. 58, it failed to adopt the "natural person" concept for its municipalities. For a discussion of the Manitoba experience, see R. Singleton, *"Municipal Governance in Alberta and Manitoba — New Tools and Flexibility?"* (1996) 3 D.M.P.L. 333.

person and the corporation.[12] The obvious difference between the two is that a natural person has a physical being, in comparison to a corporation, which although composed of natural persons, lacks physical being.[13] For this reason, a corporation is said to be considered as constituting an artificial, rather than a natural person.[14] In *Hague* v. *Cancer Relief & Research Institute*, Dysart J., in discussing these two classes of "persons" had this to say:

> In law "a person" is any being that is capable of having rights and duties, and is confined to that. Persons are of two classes only — natural persons and legal persons. A natural person is a human being that has the capacity for rights or duties. A legal person is anything to which the law gives a legal or fictitious existence and personality, with capacity for rights and duties. The only legal person known to our law is the corporation — the body corporate.[15]

The primary difference between a natural person and a corporation is one of capacity.[16] A natural person is born with the capacity to acquire powers and rights; he or she has the capacity to contract and therefore to conduct business.[17] On the other hand, a corporation, being an artificial person, will only enjoy those powers and rights which its life-giving legislation will permit.[18] Given this fact, a corporation's capacity can be stated as being limited or unlimited, depending on the nature of incorporation. To understand the applicability of this logic to a municipal corporation, the law which has developed concerning corporations must be reviewed.[19]

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12 *Interpretation Act*, R.S.A. 1980, c. I-7, s. 25(1)(p), the term "person" in an enactment is defined to include a corporation. See also *Hague* v. *Cancer Relief & Research Institute* (1939), 4 D.L.R. 191 at 194 (Man. K.B.) [hereinafter *Hague*].

13 See *Maclab Enterprises Inc. (Midwest Property Management)* v. *Rawdah* (1983), 27 Alta. L.R. (2d) 164 at 168 (Q.B.) [hereinafter *Maclab Enterprises*]. See also *Prince George (City of)* v. *British Columbia Television System Ltd.* (1979), 95 D.L.R. 577 at 582 (B.C.C.A.) [hereinafter *British Columbia Television System Ltd.*] where Aikens J.A. held that although only a natural person could maintain an action for a wrong such as an assault, a municipal corporation had a reputation and therefore had the statutory power to maintain an action for libel. *Contra*, *R.* v. *Deslauriers*, [1993] 2 W.W.R. 401 at 413 (Man. C.A.) where Twaddle J.A. held that a natural person has a character but not a corporation.

14 See *R.* v. *Army and Navy Veterans in Canada (Victoria Unit)*, [1921] 3 W.W.R. 594 at 594 (B.C. S.C.).

15 *Hague*, *supra* note 12 at 193.

16 See *Waterous Engine Co.* v. *Capreol (Town of)*, [1923] 3 D.L.R. 575 at 582 (Ont. C.A.) and *Hague*, *supra* note 12. See also the commentary of Veit J., in *Maclab Enterprises*, *supra* note 13, where she quotes earlier authorities on the subject of the difference between a corporation and a natural person.

17 See *Bonanza Creek Gold Mining Co.* v. *Canada (A.G.)* (1916), 26 D.L.R. 273 at 284 (P.C.) [hereinafter *Bonanza Creek*]; *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280 at 286 (Ont. C.A.) [hereinafter *Edwards*]; *The Real Estate Investment Company* v. *The Metropolitan Building Society*, [1883] O.R. 476 at 492 (Div. Ct.); *New Brunswick (A.G.)* v. *Saint John (City of)* (1948), 3 D.L.R. 693 at 708 (N.B.C.A.) and *Walton* v. *Bank of Nova Scotia* (1964), 43 D.L.R. (2d) 611 at 619 (Ont. C.A.).

18 See *Canadian Bank of Commerce* v. *Cudworth Rural Telephone Company Limited*, [1923] W.W.R. 458 at 466 (S.C.C.) [hereinafter *Cudworth Rural Telephone Company*] and *British Columbia Television System Ltd.*, *supra* note 13 at 580.

19 For an excellent overview of the history of corporations *vis-à-vis* natural person powers, see the judgment of Ferguson J.A. in *Edwards*, *supra* note 17 at 288.

B. CORPORATE HISTORY

In England, the first known corporations came into existence by way of a charter which had been granted by the Crown.[20] In accordance with the common law, a corporation created by charter or a "charter corporation," as it was called, was said to be endowed with the capacity of a natural person to acquire powers and rights.[21] As time progressed, corporations were created by means other than a Crown charter. These corporations owed their existence to a specific statute and were termed "statutory corporations."[22]

Unlike a charter corporation, a statutory corporation did not possess the general capacity of a natural person and was limited in its powers to those which the enabling statute dictated.[23] A municipal corporation is a statutory corporation and because the *Act* provides that every municipality is to be considered as constituting a corporation,[24] the Alberta municipality, would, without more, suffer from this same statutory limitation.[25]

In Alberta, corporations which were created under the relevant corporate legislation have for some time enjoyed the same natural person powers as that of their charter counter-parts.[26] With the *Act* and the granting of natural person powers, municipalities were now to be elevated to this same corporate status. Nevertheless, this may be where the similarity ends.

In the case of a corporation which has been created under the relevant corporate legislation any restrictions on the corporation's activities have been delegated to the makers of the corporation and are contained within the corporation's constituting documents.[27] On the other hand, because a municipality embodies a corporation created by statute, its constituting documents are contained solely within the enabling statute. Due to this fact, there is no discretion as to what these powers might consist of and the enabling statute will solely determine the powers by which the municipality will operate. What then are these powers and what are their permitted purposes?

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20 *Ibid.*

21 See *Bonanza Creek*, *supra* note 17 at 284, where Viscount Haldane explains that the fundamental difference between a charter corporation and a statutory corporation is one of having the capacity of a natural person to acquire powers and rights.

22 See *Edwards*, *supra* note 17 at 288.

23 See *Cudworth Rural Telephone Company*, *supra* note 18 at 466 and *Silver's Garage Ltd.* v. *Bridgewater (Town of)* (1970), 17 D.L.R. (3d) 1 at 7 (S.C.C.).

24 *Municipal Government Act*, *supra* note 1, s. 4.

25 See *Journal Printing Co.* v. *McVeity* (1915), 21 D.L.R. 81 at 81 (Ont. S.C.).

26 *Business Corporations Act*, R.S.A. 1980, c. B-15, s. 15(1) states that subject to the provisions of that Act, a corporation incorporated thereunder has the capacity, rights, powers and privileges of a natural person.

27 *Ibid.* s. 16(2) states that a corporation shall not carry on any business or exercise any power that may be restricted or contrary to the corporation's articles.

III. MUNICIPAL POWERS AND PURPOSES

A. MUNICIPAL POWERS

The powers available to the municipality are those expressed or implied by the enabling legislation and those essential to the permitted purposes of the municipality.[28] This statement of law has come to be known as Dillon's rule and it owes its existence to the case of *The Ottawa Electric Light Company* v. *Ottawa (City)*, where Garrow J.A. in quoting *Dillon* on *Municipal Corporations*, stated:

> The rule of construction to be followed is, I think, correctly set forth in Dillon on Municipal Corporations, 4th ed., sec. 89, where he says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others, first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied": a summary of the rule not at variance, I think, with the cases referred to in the judgment of the learned Chancellor as I understand them.[29]

In terms of the *Act*, the powers of the municipality are set out in s. 5(a), which states that a municipality "has the powers given to it by this and other enactments." As s. 6 of the *Act* grants the municipality the powers of a natural person, these specific powers would form part of the overall powers given to the municipality by the *Act*.

B. MUNICIPAL PURPOSES

Municipalities are restricted in the exercise of their powers for municipal purposes.[30] In determining the permitted municipal purposes, reference must be made to the purposes expressly stated in the enabling statute and to those which are compatible with the purposes and objects of the enabling statute.[31]

Pursuant to s. 1(1)(r) of the *Act*, the municipal purposes under which a municipality must operate are defined as consisting of "the purposes set out in section 3" of the *Act*. Section 3 provides that the purposes of a municipality are to "provide good government, to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and to develop and maintain safe and viable communities."

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28 See *Greenbaum*, *supra* note 3 at 688.

29 (1906), 12 O.L.R. 290 at 299 (C.A.).

30 See *Shell*, *supra* note 2 at 622 and *Chaperon*, *supra* note 4 at 21.

31 See *Shell*, *supra* note 2 at 622.

C. JURISDICTION

Recently, the jurisdictional extent to which a municipality may exercise its statutory powers in relation to the municipal purposes as defined in the *Act* was the subject of debate in the Alberta Court of Queen's Bench decision of *Peter Kornelson and Oil Sands Hotel (1975) Ltd.* v. *Wood Buffalo (Regional Municipality of)*.[32] In determining this jurisdiction, Mason J. used the following analysis:

> It seems to me that the proper analysis should be what is, first, the course of conduct and, second, the resulting action or contemplated action of the municipality; whether either puts the municipality outside the express powers or those powers necessarily or fairly implied as incidental and indispensable to the powers expressly granted, or if the course of conduct or the action is outside the express purposes, powers or functions of the municipality or such compatible purposes, powers or functions as are necessarily incidental thereto, or essential to the clear objects of those purposes, powers or functions.
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> All this, it seems to me, needs to be assessed in light of the recent *Municipal Government Act of Alberta*, and the dictates of the Supreme Court of Canada in the *Shell* v. *Vancouver City* case.[33]

After considering the relevant provisions of the *Act* and the guidelines set down by the Supreme Court of Canada in *Shell*, Mason J. defined jurisdiction under the *Act* as follows:

> The present statute has completely changed the scheme of the *Municipal Government Act*. Yet the basic question remains how to define "jurisdiction" under Section 236, so that what is put to the citizen of a municipality in the form of a question is relevant to the legitimate needs and wants of its citizens in terms of municipal government. It seems appropriate to me to look to the purposes of Section 3, the powers, duties and functions pursuant to Section 5 as granted by the *Municipal Government Act* to municipalities including its resolution and by-law making powers as set out in the *Act*, particularly Section 7 and to interpret these in accordance with the statutory mandate set out in Section 9. In doing so, I deem it appropriate to define the jurisdiction of the municipality in putting non-binding questions to its citizens as follows. The questions must address the civil and common law rights and interests of its citizens and their property rights, that are within the boundaries of the municipality. The questions must relate to the purposes, powers, duties and functions of a municipality in a broad sense that will enable councils to respond to present and future interests of its own citizens and the property within its boundaries.
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> For my part, in the circumstances of this case, I cannot think of an issue more germane to the expression of opinion of its citizens than the questions put by Wood Buffalo to its electors. They go to the very heart of what the society of this municipality needs, wants or believes is important to good government and/or the creation of a safe and viable community, as defined by Section 3, and/or the safety, health and welfare of people and their protection as set out in Section 7(a) of the by-law passing

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[32] (18 July 1997), McMurray 9713-006957 (Alta. Q.B.) [unreported]; (April 2, 1998), Edmonton 9703-0400-AC (Alta. C.A.) [unreported], appeal dismissed.

[33] *Ibid.* at 25.

> power. The questions address only the concerns of the citizens of Wood Buffalo. They are confined to its geographical boundaries and those who live there.[34]

With respect to the municipality's natural person powers as provided under s. 6 of the *Act*, Mason J. was of the opinion that "the natural person powers do not extend beyond the jurisdiction of the municipality as I have defined it."[35] Based on this statement and the judgment of Mason J. in *Wood Buffalo* as a whole, it may be concluded that if the municipality exercises its natural person powers in its business function and within the confines of the municipal purposes as prescribed by the *Act*, it should have the unlimited ability to conduct any lawful business that a natural person could — without fear of judicial intervention. Alternatively, do limitations still exist and if so, what are they?

IV. LIMITATIONS

A. STATUTORY

Common elements to the majority of business decisions are property and funds. By reason of this fact, any statutory limitations on the use of the municipality's property and funds may have a profound effect on the municipality's business function. Prior to the *Act*, the legislative tendency was to place stringent controls on the exercise of the municipality's powers in business decisions which involved municipal property and funds.[36] Although the *Act* is less restrictive than its predecessor, vestiges of this control remain.

In terms of municipal property, the *Act* is restrictive only in the areas of disposition and use. As to disposition, s. 70(1) of the *Act* provides that a municipality is prohibited from transferring or granting an estate or interest in land for less than its market value or in a public park or recreation or exhibition grounds, without first advertising the proposal. The only exceptions to this statutory requirement are where the estate or interest is to be used for the purposes of supplying a public utility, or where the property is to be used by a non-profit organization as defined in s. 241(f) of the *Act*.

With respect to use, ss. 671 and 677 of the *Act* prescribe the permitted uses of property which has been dedicated to the municipality for reserve purposes through the subdivision process. Pursuant to these sections, reserve property is specifically restricted in its use to use in its natural state, as a public park, recreation area, school authority purposes or to separate areas of land, roadway, public utility, pipeline or for purposes of the maintenance and protection of the reserve property.

In regards to municipal funds, s. 248(1) of the *Act* provides that a municipality may only make an expenditure that has been included in a budget, otherwise approved by

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[34] *Ibid.* at 27.

[35] *Ibid.* at 31.

[36] See s. 127 (restrictions on the disposal of real property) and s. 328 (capital expenditures) of the *previous Municipal Government Act*, *supra* note 5.

council for an emergency, or that is legally required to be paid. The *Act* further restricts a municipality in the administration of its funds in the areas of investment,[37] use of borrowed funds[38] and the lending of funds.[39]

Aside from the above listed statutory restrictions, the *Act* would appear to permit the municipality to engage in the same business activities as would a natural person.

B. FIDUCIARY RELATIONSHIP

In business, a common practice is to offer financial incentives to the other party. Should the municipality decide to compete with the private sector in business, it may be required to grant the same kind of incentives.[40] To remain competitive, the municipality must have the right to bargain and make business decisions, free from judicial scrutiny. This right was discussed by Clement J. in *Re United Buildings Ltd. and Vancouver (City of)*,[41] as follows:

> But if when the proposal was made the council considered it honestly with an eye to the public advantage ... and it seems clear they did so consider it ... that again is an end of the matter so far as the courts are concerned. They were entitled to use their corporate powers to carry out what they honestly considered was a good bargain for the city. They may be, though I don't suggest for a moment that they are, all wrong: but self-government, it has been said, involves the right to make mistakes.
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> What I have said practically disposes of the argument that this is a *bonus* by-law and as such should in order to its validity be voted upon by the property owners of the city. If I were to accede to this argument every bylaw the enactment of which enured to the particular advantage of some individual over and above any general advantage to the public would be a *bonus* by-law. A by-law for the purchase of any property by the city would be a *bonus* by-law in the eye of a willing vendor. In short I can see no principle to prevent the city from making bargains and exercising their corporate powers to carry out such bargains even if in the opinion of some people the city is not benefiting to as great an extent as the other party to the bargain. If they get what they honestly think is a good *quid pro quo* this court has no right to call the other party's *quid pro quo* a bonus.[42]

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37 *Act*, *supra* note 1 at s. 250.

38 *Ibid.* s. 253.

39 *Ibid.* s. 264.

40 In the past, these incentives would have constituted the granting of a bonus and under the *previous Municipal Government Act*, *supra* note 5, would have been prohibited. Unlike its predecessor, the *Act* is silent on the subject of bonusing. Further, the courts have yet to recognize the existence of a common law rule against municipal bonusing. See *Ward* v. *Edmonton (City of)*, [1932] 3 W.W.R. 451 at 457 (Alta. S.C.) where Ewing J. considers the meaning of the term "bonusing." See also *Keay* v. *Regina (City of)* (1912), 6 D.L.R. 327 at 329 (Sask. S.C.) where Wetmore C.J. stated that "a bonus may be given just as well by a transfer of land, either without consideration or for a totally inadequate consideration, as by payment of a specified sum of money or by exemption from taxation." For a discussion of "bonusing," see Professor F.A. Laux's article entitled, "*Municipal Bonuses and Tax Exemptions to Entice Private Development*" (1987) 25 Alta. L. Rev. 224 at 245.

41 [1913] 3 W.W.R. 908 at 910 (B.C.S.C.) [hereinafter *Re United Building Ltd.*].

42 *Ibid.* at 909.

As a rule the Court will not sit in judgment as to whether or not the municipality obtained the best bargain[43] or acted in a particular manner.[44] Unlike any other entrepreneur, municipalities must have the right to discriminate in their business activities.[45] However, there exists a fine distinction between what may be considered as an invalid, as opposed to a valid act of business on the part of the municipality.[46]

Where a municipality acts beyond its statutory powers in the administration of its property and funds, the courts have been known to intervene[47] and permit an action by an aggrieved citizen to have the municipality's actions declared a nullity.[48] Past judicial authorities have justified the granting of this *locus standi* to an individual, on the premise that the municipality, as a municipal corporation, together with its council,

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43 *Ibid.* at 910. See also *Kendrick* v. *Nelson (City of)* (1997), 38 M.P.L.R. (2d) 175 at 195 (B.C.S.C.) [hereinafter *Kendrick*] where McEwan J. held that a provision in the enabling legislation was not an "available mechanism to obtain a review of the contract, weighing the tangible and inchoate benefits, to determine if the municipality has made a good deal or not." See also *Liberatore* v. *St. Thomas (City of)* (1995), 28 M.P.L.R. (2d) 261 at 275 (Ont. C.J.) where Killeen J. held that it was not for the Court to dismantle the transaction after the fact.

44 See *Parsons* v. *London (City of)* (1911), 25 O.L.R. 172 at 179 (D.C.) [hereinafter *Parsons*] where Middleton J. held that the Court could not dictate the manner in which municipal property was to be disposed of and therefore the Court could not require that the municipality sell the property "by public auction or by tender after due advertisement, and not in a private way, but only after adequate steps have been taken to ensure competition."

45 See *Shell*, *supra* note 2 at 627, 628, where Sopinka J. held that in order for a municipality to effectively carry out its business affairs, it must have the right to discriminate "for commercial or business reasons" and that this right is "incidental to the powers to carry on business or acquire property." The ruling of Sopinka J. in *Shell* on the right of a municipality to discriminate in its business affairs was recently followed by the Alberta Court of Queen's Bench in *Cox Bros. Contracting & Assoc. Ltd.* v. *Big Lakes (Municipal District of)* (22 July 22, 1997), Edmonton 9603 12525 (Alta. Q.B.) [unreported].

46 See *Kendrick* v. *Nelson (City of)*, *supra* note 43 at 194 where McEwan J. held that the actions of the municipality "represented an attempt to coordinate public objectives (e.g. the enhancement of civic amenities) with a form of private enterprise."

47 See *Cluff* v. *Cameron* (1922), O.W.N. 245 at 246 (S.C.) and *Davis* v. *Winnipeg (City of)*, [1914] 6 W.W.R. 703 at 705 (Man. K.B.). See also *Howard* v. *Toronto (City of)* (1928), 1 D.L.R. 952 at 964 (Ont. C.A.) where Masten J.A. gives a review of the judicial authorities on the issue of judicial intervention in the affairs of the municipality. See also *Re United Buildings Ltd.*, *supra* note 41 at 909; *Ladner* v. *Vancouver (City of)* (1992), 8 M.P.L.R. (2d) 40 at 42 (B.C.S.C.); *Ingledew's Limited et al.* v. *Vancouver (City of)*, [1967] 58 W.W.R. 641 at 669 (B.C.S.C.) and *Leitch* v. *Strathroy (Town of)* (1923), 53 O.L.R. 665 at 669 (C.A.). *Contra*, *Shell*, *supra* note 2 at 621 where Sopinka J. held that, "the exercise of a municipality's statutory powers, whatever the classification, is reviewable to the extent of determining whether the actions are *intra vires*" and that the relevant judicial authorities do not support the position that the exercise by the municipality of its business or corporate powers is immune from judicial review. For an excellent review of the judicial authorities which support or oppose the review by the judiciary of municipal business decisions, see the dissenting judgment of McLachlin J. in *Shell* at 631.

48 See *MacIlreith* v. *Hart*, [1908] 39 S.C.R. 657 at 661 [hereinafter *MacIlreith*]; *Barber* v. *Calvert and Calvert (Town of)*, [1969] 71 W.W.R. 124 at 134 (Man. Q.B.); *Kendrick*, *supra* note 43 at 188 and *Affleck* v. *Nelson (City of)*, [1957] 23 W.W.R. 386 at 390 (B.C.S.C.). *Contra*, *Robertson* v. *Montreal (City of)*, [1915] 52 S.C.R. 30 at 31 [hereinafter *Robertson*].

holds the municipal property and funds in a fiduciary capacity, with the *cestuis que trust* being the municipality's inhabitants.[49]

The significance of the requirement of this trust relationship was aptly stated by the Chancellor in *Toronto (City of)* v. *Bowes*[50] as follows:

> I cannot accede to that argument. Reason and authority are against it. The large estates belonging to the City of Toronto, and the income which they produce; the ample public revenue derived from taxation; all their complicated transactions, pecuniary and otherwise, are under the management of the Common Council. Now it is impossible to deny that these important rights have their corresponding duties. This is in substance and effect a trust. There is no magic in a name. The Common Council is in fact entrusted with the management of the affairs of the city of Toronto, and I am at a loss to discover why the rule applicable to every other case of trust should not be applied to this. If the rule be one of pressing necessity in cases of ordinary trust, why is it to be abrogated where the trusts are of such vast magnitude and importance? Why is the principle to be held inapplicable when the probabilities of an abuse of trust are so greatly multiplied? Such a determination in a country, the local concerns of which are managed to so large an extent by corporations of this sort, possessed of such extensive powers, would be productive, in my opinion, of the worst consequences to the moral and material interests of the community.[51]

The judiciary has not always been in agreement on the recognition of this fiduciary relationship. If anything, the relevant jurisprudence can be described as being fractionated along lines which either support the relationship,[52] oppose its recognition,[53] or those which acknowledge the relationship but maintain that it is one involving a trust relationship in the "broad" sense of the word and not to be considered in its "legal" sense.[54] It is this latter position which presently represents the attitude of the judiciary on this point. This fact was recently confirmed by the British Columbia Supreme Court in *Seaton* v. *Vancouver (City of)*, where Saunders J. stated:

> There is no doubt a municipal council is a trustee of municipal property, including funds, for all inhabitants of the municipality; see, for example, *Toronto (City)* v. *Bowes* (1854), 4 Gr. 489 (U.C. Ch.),

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49 See *MacIlreith*, *ibid.* at 670 and *Cleary* v. *Windsor (Town of)* (1905), 10 O.L.R. 333 at 335 (S.C.). See also ss. 249(4) and 275(3) of the *Act*, where, in recognition of the rights of an elector or taxpayer, the legislature has seen fit to permit an elector or taxpayer of the municipality to bring an action against a councillor who has either made an unauthorized expenditure, voted to spend borrowed or grant money on something that was not within the purpose for which the money was borrowed or the grant given, or voted on a bylaw which authorizes a borrowing, loan or guarantees the repayment of a loan that causes the municipality to exceed its debt limit.

50 (1854), 4 Gr. 489 (Chan.).

51 *Ibid.* at 507.

52 See *Paterson* v. *Bowes* (1853), 4 Gr. 170 at 180 (Chan.) [hereinafter *Paterson*]; *Toronto (City of)* v. *Bowes*, *supra* note 50 at 507 (Chan.); *Parsons*, *supra* note 44 at 178 and *McMillan* v. *Winnipeg (City of)*, [1919] 1 W.W.R. 591 at 592 (Man. K.B.).

53 See *Gallagher* v. *Armstrong*, [1911] Alta. L.R. 443 at 453 (S.C.) and *Norfolk* v. *Roberts* (1913), 13 D.L.R. 463 at 466 (Ont. S.C.).

54 See *Seaton* v. *Vancouver (City of)* (1993), 14 M.P.L.R. (B.C.S.C.) 247 at 254 [hereinafter *Seaton*]; *Robertson*, *supra* note 48 at 62 and *Scarborough (Borough of)* v. *R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255 at 257 (Ont. C.A.) [hereinafter *R.E.F. Homes*].

and *MacIlreith* v. *Hart* (1908), 39 S.C.R. 657. However, the trust relationship is a broad one, and only requires that funds or property be used by the municipality as set out in the municipal legislation. There is no breach of trust simply because moneys were spent in ways not contemplated when they were accumulated, provided the purpose for which the moneys are spent is a lawful purpose under the enabling legislation and the method of expenditure is lawful.[55]

Although the relevant judicial authorities would appear to have lessened the significance associated with this trust relationship by characterizing it as a "broad one," the fact remains that the judiciary has, and continues to recognize the relationship.[56] Recently, the Alberta Court of Appeal in *Bailey* v. *Parkland 31*[57] confirmed the existence of a fiduciary relationship between the municipality and the defaulting taxpayer with respect to tax forfeited property.[58]

In light of *Bailey* v. *Parkland 31*, it is submitted that if the judiciary is willing to impose a trust in regard to tax forfeited property, then there is reason to assume that the judiciary will eventually impose a like trust in all cases where property has come under the municipality's care and control, irrespective of the property's origin.[59] If and

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55 *Seaton*, *ibid.* at 254.

56 The recognition of this fiduciary relationship would appear to be expanding. In this respect, see *R.E.F. Homes Ltd.*, *supra* note 54 at 257, where the Court recognized that the municipality is a trustee of the environment for the benefit of the residents. See also *The Bell Telephone Company* v. *Owen Sound (Town of)* (1904), 8 O.L.R. 74 at 78 (H.C.) and *Goudreau* v. *Chandos (Township of)* (1993), 16 M.P.L.R. (2d) 224 at 226 (Ont. C.J.) where in both cases the Court held that the municipality was the trustee of the highways within its boundaries. See also *Carlsen* v. *Gerlach* (1979), 9 M.P.L.R. 229 at 237 (Alta. D.C.) where the Court held that a municipal councillor occupies a fiduciary position. See however, *Monogram Properties Ltd.* v. *Etobicoke (City of)* (1996), 34 M.P.L.R. (2d) 48 at 53 (Ont. C.J.) where the Court refused to extend the recognition of this fiduciary relationship to a municipal official.

57 (1986), 45 Alta. L.R. (2d) 225 (C.A.) [hereinafter *Bailey*].

58 *Ibid.* at 227. See also *McCarthy* v. *Inuvik (Town of)*, [1990] N.W.T.R. 215 at 226 (S.C.), where the Court, without reference to *Bailey*, held that where the municipality had taken title to the forfeited property there was nothing in the relevant legislation to exclude the imposition of a constructive trust on the part of the municipality. See also *Massingberd* v. *Montague* (1862), 9 Gr. 92 at 93 (U.C. Ch.) where Vankoughnet C. describes the duty of care owed by the municipality to the defaulting taxpayer towards the tax forfeited property and the attending fiduciary relationship.

59 See *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 102 where Wilson J. in her dissenting judgment states that relationships in which fiduciary obligations are imposed must possess the following characteristics:

(1) the fiduciary has the scope for the exercise of some discretion or power;

(2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest;

(3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Applying the above criteria to a municipal scenario, it can be seen that a fiduciary relationship exists between the municipality acting through its counsel as the trustees and the inhabitants of the municipality as the beneficiaries, with the subject of the trust being the municipality's property and funds. In this respect, the municipal relationship embodies the three essential characteristics: the municipality has discretion in the use of its powers, it can unilaterally exercise its powers without sanction by its citizens, and in the absence of an invalid act, its citizens must accept the decision of the municipality. To hold that a municipality does not stand in the capacity of a fiduciary

when this judicial recognition materializes, how is the municipality and its council to know which acts will, or will not, result in a breach of their fiduciary duty?

Of possible assistance in answering this question is the decision in *Paterson* v. *Bowes*.[60] In that case, Esten V.C. maintained that unless the purposes for which the municipal property is to be administered are expressly defined in the enabling legislation, the Court cannot affix a trust to such property. In this respect, Esten V.C. stated:

> It is true that when a municipal corporation is established and invested with property or the power of acquiring it for the purposes of local government, although it undoubtedly possesses such property for corporate purposes, and it is its duty to apply it to such purposes, yet unless they are to a certain extent defined, it is impossible to affix a trust to such property so as to enable this court to call the corporate body to account for any use of it inconsistent with those purposes. Before the passing of the Corporation Reform Act in England, a corporate body could dispose of its property as it pleased. It could, in the language of counsel in argument in reported cases, have "wasted, alienated or destroyed it."
>
> If a corporation neglected its duty, the remedy to compel its performance was by mandamus, but corporate purposes were considered too undefined to enable a court of equity to say what they were or recognize them as trusts. The Corporation Reform Act however defined the purposes to which corporate property was in future to be applied in such a manner as to impress it with a trust, which gave the Court of Chancery jurisdiction to prevent its misapplication; and a number of cases almost immediately arose, (many of them cases in which the old corporations in the interval between the announcement of the corporation act and the period fixed for its coming into operation, attempted to dispose of the corporate property in a manner inconsistent with the purposes to which by that act it was rendered applicable), in which corporate property, which had been applied in a manner inconsistent with the provisions of the act, was reclaimed on the ground of trust, and the jurisdiction of the court to compel the restitution of such property was established.[61]

If you apply the reasoning of Esten V.C. in *Paterson* v. *Bowes* to the *Act*, it may be concluded that in the absence of a specific provision in the *Act* which defines the manner in which municipal property and funds are to be used,[62] the municipality should, by virtue of its natural person powers, have the unqualified right to make

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vis-à-vis its property and funds could possibly lead to the unintentional mismanagement of municipal property and funds by allowing the municipality to remain unaccountable for its actions, provided the actions were within the scope of the permitted powers and purposes as set out in the enabling legislation.

60 *Supra* note 52.

61 *Supra* note 52 at 181.

62 Although the *Act* is somewhat deficient in defining specific ways and means that municipal property and funds are to be used, portions of the *Act* do provide definition. As mentioned previously in this article, ss. 671 and 677 of the *Act* provide the manner of use of lands and moneys which have been dedicated to the municipality for reserve purposes through the subdivision process. Based on *Paterson* v. *Bowes*, these lands and moneys are now the subject of a trust for the benefit of the citizens of the municipality and any use of these dedicated lands and moneys which does not comply with ss. 671 and 677 would result in a breach of trust and be subject to judicial review at the insistence of an aggrieved citizen.

business decisions affecting its property and funds, without fear of the imposition of a trust. In spite of the fact that this conclusion may be in line with the thinking of Esten V.C. in *Paterson* v. *Bowes*, I can find no authority which supports, or for that matter, has raised this argument.

In view of *Seaton* v. *Vancouver (City of)*,[63] *Bailey* v. *Parkland* 31[64] and like decisions, it is foreseeable that there may be a revitalization of the judicial recognition of the trust relationship between the municipality and its council *vis-a-vis* municipal property and funds.[65] The extent and impact of this revitalization remains to be seen. Because the *Act* is less restrictive than its predecessor, the extent to which a municipality may exercise its natural person powers in its business function also remains unknown. Given these unknowns, Alberta municipalities and their elected councils would be well advised to acknowledge that although the *Act* may grant natural person powers, due to the special relationship which exists between the municipality and its citizens, the courts may choose to extend the present "broad" trust relationship to one which may have consequences.

V. CONCLUSION

From the previous discussion, it is apparent that there is more involved in the granting of natural person powers to the municipality than that which the drafters of the legislation may have initially contemplated. Although natural person powers may enhance the municipality's ability to conduct its business function, one must remain cognizant of the fact that as a level of government, the municipality is charged with the responsibility of ensuring that municipal property and funds are administered in a prudent manner. The attaining of natural person powers does not alter this responsibility.

To further complicate matters, recent judicial pronouncements have confirmed the existence of a fiduciary relationship between the municipality and its council in regards to the municipality's property and funds. This fact, when combined with the present attitude of the judiciary which favours judicial interference in the affairs of the municipality, may prove problematic in terms of the use of natural person powers in the performance of the municipality's business function.

As the drafters of the *Act* have failed to provide guidelines by which the municipality's natural person powers are to be exercised, these powers may, if anything, serve only to increase interference by the judiciary. This possibility is especially so in cases involving the municipality's business function. From the municipality's perspective, this is not a desirable conclusion. With the threat of judicial interference comes uncertainty, and uncertainty in the business world spells failure.

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63 *Supra* note 54.

64 *Supra* note 58.

65 See *Wahl* v. *Medicine Hat (City of)*, *supra* note 3 at 211 where McDermid J.A., in his dissenting judgment, acknowledged the fiduciary relationship of the municipality towards its property.

In order for natural person powers to benefit the municipality, the enabling legislation must ensure that these powers may be exercised by the municipality in ways which will enhance its business capability in the manner intended — without undue judicial interference. This assurance must come in the form of statute amendment whereby the *Act* will provide clear guidelines under which the municipality is to exercise its natural person powers. This amendment can only come from the provincial legislature. In attaining this goal, it is hoped that the discussion in this article of the potential problems associated with the municipality and its natural person powers is of some assistance.