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Local Government Issues Arising from the Impact of the Globalization of Insolvency

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Local Government Issues Arising from the Impact of the Globalization of Insolvency[1]

> "… in these three crucial areas, of environment, war and peace, and extreme poverty, we are facing life and death issues. We are not facing normal politics." Jeffrey Sachs, Reith Lectures, 2007[2]

Introduction - Cruelty, Discord, War, Fraud, Anger and Tyranny

The allegory contained in the fresco entitled "The Effects of Good and Bad Government" by Ambrogio Lorenzetti found in the Palazzo Pubblico in Siena, Italy is a pictorial representation which may be more effective in describing the recent world situation than are words or economic analysis. This painting has always impressed me[3]. The point of the allegory is that the effects of good and bad government can be readily demonstrated pictorially. As the painting shows, the impact of government is local and apparent.

There are antecedents of the municipal corporation in Italy and to this day many municipalities in Italy act through the "Comune"[4]. A community is part of a different conceptual scheme than the conceptual scheme that leads to a business corporation. After the "common sense" movement of the 1990's in Ontario, municipal corporations were invited to adopt more of the attributes of business corporations and to surrender some of their community character. Indeed, Ontario municipalities were required to take on business corporations as a shareholder.[5]

The role of government was at one time discussed in terms of the efficient allocation of resources, the redistribution of income and the maintenance of economic stabilization.[6] Are any of these issues relevant for practising lawyers advising Canadian municipal corporations? Is the consideration of resource allocation limited to the examination of the scope for privatization and potential for contracts for infrastructure funding? Is the question of economic redistribution by Canadian governments limited to the provision of

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[1] This paper is adapted from presentations to the Municipal Law class at the University of Western Ontario. The comments of Ken Strong and Rod MacDougall concerning those presentations are acknowledged here although they and the writer's employer are in no way responsible for the views expressed in this paper for which the author is entirely responsible.

[2] http://www.bbc.co.uk/radio4/reith2007/lecture5.shtml

[3] It also impressed an advocate for globalization: See Martin Wolf, *Why Globalization Works* (New Haven: Yale Nota Bene, 2005) @ p. 26.

[4] Encyclopædia Britannica. 2009. Encyclopædia Britannica Online. 29 Jul. 2009

[5] Electricity Act,, 1998, S. O. 1998, c. 15, s. 142(2). Municipal corporations had restricted investment powers for decades: *Seralanca Incorporated v. City of Sudbury*, (1982), 36 O.R. (2d) 1

[6] Richard M. Bird. N. Enid Slack, *Urban Public Finance in Canada* (2d. ed.), (John Wiley & Sons, 1993) p. 15; See also Martin Loughlin, *Legality and Locality* (Oxford: Oxford University Press, 1996) pp. 364- 419 who expresses concerns about defining the role of local government based on "the conventional understandings of political elites, the codes of ethics and working habits of administrators and the values and standards of those professions – such as engineers, accountants, social workers, education administrators and lawyers".

lottery prizes in government lotteries[7]? Can municipal governments even address economic stability when their economic circumstances appear to be dictated by national and provincial governments and business corporations?[8]

There has been little debate in Ontario concerning the role of municipal lawyers in corporate governance and questions of economic stability.[9] The role of municipal government in resource allocation, a more equitable distribution of income and a more sustainable economy has not received any particular attention.[10] The present situation presents an opportunity to examine these issues from the perspective of a municipal lawyer.

When was the first time it occurred to anyone that there might be trouble in the economy which would not bode well for municipalities?

In 2008, the latest housing bubbles burst in various countries[11], leading to defaults, foreclosures and a plunge in the stock market[12]. Up to the point where Treasury Secretary Paulson and Federal Reserve Chairman Bernanke made their historic

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[7] Nicholas Leonidas Georgakopoulos, *Principles and methods of law and economics* (Cambridge: Cambridge University Press, 2005) p. 83. Infrastructure funding much like a government lottery constitutes a form of government redistribution. A government lottery although voluntary is the most regressive (in a tax policy sense) governmental measure one can imagine. The effectiveness of various types of government infrastructure stimulus funding varies by income bracket: Richard A. Musgrave, Peggy B. Musgrave, *Public Finance in Theory and Practice* (New York: McGraw-Hill, 1973) p. 373.

[8] David L. Imbroscio, *Reconstructing City Politics: Alternative Economic Development and Economic Regimes* (Thousand Oaks, Cal: Sage Publications, 1997); Severyn T. Bruyn and James Meehan (Eds) *Beyond the market and the State: New Directions in Community Development* (Philadelphia: Temple University, 1987).

[9] The role of municipal lawyers in corporate governance was considered in the Bellamy report at pages 36-37, 103, 237, 298-299 and 387 in Toronto http://www.toronto.ca/inquiry/ and in the Waterloo RIM report at pp. 182, 213 http://waterlooinquiry.ca/final_report.asp. As to the role of lawyers as enablers in relation to the interests of their clients, see Phillip Slayton Moral Neutrality Is No Longer Enough - Canadian Lawyer, February 2009 CanadianLawyer.com) The Thick View of Professionalism - Canadian Lawyer, April 2009 and http://www.macleans.ca/homepage/magazine/article.jsp?content=20070806_108073_108073

[10] This conclusion is based upon a review of the grant program literature surrounding 2009 stimulus infrastructure funding for Canadian municipalities: http://www.bcfontario.ca/english/ISF/guide.html. Ontario's go-green fund is described at http://www.ene.gov.on.ca/en/air/climatechange/cggf.php.

[11] See Mark Landler, "Housing Woes in U.S. Spread Around Globe", *N.Y. Times*, (April 14, 2008) http://www.nytimes.com/2008/04/14/business/worldbusiness/14real.html ; Matt Taibbi, "The Great American Bubble Machine" Rolling Stone (July 2, 2009); Rachuriam Ragan and Luigi Zingales, *Saving Capitalism From the Capitalists* (Princeton University Press, 2004) pp. 99-101; Guillermo Calvo, *Emerging Capital Markets in Turmoil: bad luck or bad policy* (Cambridge, Mass.: MIT Press, 2005) pp. 52-3 "Regulations could also make banks less vulnerable to speculative bubbles in other markets (like equity and real estate markets) that are the by-product of massive capital inflows. In particular, by limiting the investments of banks in these markets, the banking system would be better insulated when the bubble bursts."; Joseph Stiglitz, *The Roaring Nineties: A New History of the World's Most Prosperous Decade* (New York: W.W. Norton & Co., 2003) p. 8; Peter Hartcher, Bubble Man: Alan Greenspan and the Missing 7 Trillion Dollars (New York: W.W. Norton & Co., 2006)

[12] Paul Krugman, "Cash for Trash" *N.Y. Times* (September 22, 2008) http://www.nytimes.com/

announcement, it appeared that the general public was not generally aware of the scope of the problem.[13] The Canadian government was conducting an election in which, at the outset, the economy was not even a major issue for any of the three parties which ultimately elected members.

What was more remarkable was that the global business failures stemmed from the banking, automobile and housing sectors of various economies. If the auto and housing sectors are operating according to a dysfunctional business model, that fact does not bode well for Ontario cities whose employment is generated in these sectors and whose planning is premised on an urban form based upon the prevalence of suburban housing and automobiles.[14] In the past, when recessions were over, things returned to normal and proceeded pretty much as before. Normality can be described as what occurred when business corporations were almost universally successful in developing North American consumption patterns in the lengthy period between the end of the Second World War and the 2008 plunge.[15]

The scope of the 2008 financial problem in the private sector may still be difficult for an average person to conceptualize. Canadians who believe in the free market understand that capitalism operates when business corporations or individuals sell things (services or products) to other corporations or people for more than it costs to produce them. It is hard to imagine that capitalism is premised on entire industries knowingly selling things that people don't want or can't afford for less than it costs to produce them.[16] It is also hard to imagine that the government would step in and acquire worthless assets from banks or buy things that businesses couldn't sell to customers, that government would invest in insolvent businesses or that government would lend banks and businesses money to cover the shortfall caused by their bad business decisions when the government knows in advance that there will be default on the loans.[17]

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[13] See Rachuriam and Zingales, op. cit., p. 101 who observe that "Bubbles are often pumped up by a whole new set of investors who do not have the experience or knowledge to invest carefully." See also Stiglitz, *Roaring Nineties*. at pp. 302-303 who describes the 1990's as follows "…much of the wealth was "stolen" property, acquired through misleading accounting and tax scams, in an economy where corporate governance had failed, and failed badly."

[14] Dolores Hayden, *Redesigning the American Dream* (New York: W. W. Norton & Company, 2002); C. A. Doxiadis and J. G. Papaioannou, *Ecumenopolis : the inevitable city of the future* (New York: Norton, 1974)

[15] Between 1954 and 1969 there was only 1 year in which as many as 3 of the largest corporations lost money: John Kenneth Galbraith, "The Corporation", in John Gilbert, ed., *The Modern Business Enterprise, Selected Readings* (Harmondsworth: Penguin Books Ltd., 1972) p. 133; "Between 1979 and 2003,.., the share of overall income received by the bottom eighty percent of taxpayers fell from fifty percent to barely over forty percent. The main winners from this upward redistribution of income were a tiny, wealthy elite: more than half the income share lost by the bottom eighty percent was gained by just one-fourth of 1 percent of the population, people with incomes of at least $750,000 in 2003": Paul Krugman, "Feeling No Pain", *N.Y. Times*, Mar. 6, 2006, at A21, See Musgrave and Musgrave, pp. 324-326 for the distribution of wealth in 1973.

[16] See J. K. Galbraith, *The Economics of Innocent Fraud: Truth for our Time* (Boston: Houghton-Mifflin, 2004) pp.6-9.

[17] Bailouts to protect investor interests are not new. See Michael M. Philips, "Government Bailouts: A U.S. Tradition dating to Hamilton" *Wall Street Journal*, September 20, 2008 p. A3 at http://online.wsj.com/article/SB122186662036058787.html

We can speculate on the causes for business failures such as structural changes in the economy (certain products may no longer be viable), trade issues (globalized trade in which production facilities are closed and production shifted elsewhere[18]), product strategies (i.e. making products for which consumer demand has drastically declined), technological problems (reliance on technologies which are outdated or inadequate), business models which are unsustainable (i.e. fuel costs, currency fluctuations) amounts paid to senior executives (i.e. bonuses and stock options), or amounts paid to employees that exceed the business's ability to pay (under collective agreements). If we accept that owing to changes in available resources, changing technologies, consumer preferences, or other factors a generalized insolvency could occur, we may find it easier to accept that business corporations in a municipality could become insolvent.

Owing to the lengthy period in which the most recent housing bubble persisted[19], individuals and businesses had become accustomed to regular cash flows based on their employment and investment income. The resulting global recession has (as global recessions do) impacted those cash flows such that incomes from work, pensions, and investments were reduced. People's expectations from previous recessions are that the cash flows will rebound when the recession is over (as long as people continue to behave more or less as they did before).

Under present insolvency laws in most jurisdictions, the consequence of insolvency for business corporations in a municipality is that the business of the corporations will be restructured under statutes providing insolvency protection. As a result of restructuring, shareholders may lose all of part of their investment, the officers and employees may lose their jobs or have their compensation significantly reduced, creditors may not be paid what they are owed and debt-holders may lose their security. Further, there may be limited business opportunities for corporations struggling with insolvency. This process has been described by some economists using the term "creative destruction"[20] in that businesses that are unworkable cease to exist and new businesses take their place.

The rationale for the present government infrastructure schemes appears to be to provide economic stimulus to avoid the dislocation associated with "creative destruction" i.e. the reorganization of business using bankruptcy and insolvency laws. Other approaches to such problems include private takeovers of failing business corporations, government

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[18] Trade treaties like NAFTA are argued to function as "charters of corporate rights" which impede governmental decisions by democratically elected governments but in no way inhibit private decisions to relocate or abandon businesses: Adam Harmes, *The Return of the State* (Douglas & McIntyre, 2004) p 70. The word "corporation" does not appear in the Canadian Charter of Rights and Freedoms although "citizen" does appear.

[19] See John K. Galbraith, *A Short History of Financial Euphoria* (Penguin, 1994). See also Taibbi, *loc. cit.*, supra, and Hartcher, Bubble Man, *op. cit.*, supra.

[20] Schumpeter quoted in Wolf p. 42; Raghuram & Zingales, p. 1, 300; Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus & Giroux 1999) p. 10 who suggests, "Those countries that are the most willing to let capitalism quickly destroy inefficient companies, so that money can be freed up and directed to more innovative ones, will thrive in the era of globalization. Those which rely on their governments to protect them from creative destruction will fall behind in this era."

grants to individuals and businesses[21], the nationalization of defunct corporations which are restructured and then sold back to the private sector[22] and letting unprofitable businesses fail so they can be replaced with something else.[in] There is some debate about the proper role of government (including municipal government) when boards of directors and shareholders of businesses risk default to seek substantial short term returns and then government steps in to address the long term problem created by their short term gains. It is apparent that many of the corporate executives, directors and shareholders who were enriched by pre-2008 events are keeping all of the money they received.[23]

After the great depression in the 1930's in which municipalities defaulted on their obligations, municipal legislation was enacted in Ontario and restrictions were placed on the ability of municipalities to incur debts.[24] These provisions were entirely successful. Such was their success that these restrictions were relaxed over time and were largely removed in 2001. The relaxation of these standards immediately led to dubious financing schemes in several municipalities.[25] The municipal sector is comparable to the private sector in the sense the relaxation of financial controls led to some abuses.

The 2008 recession has so far generated a new approach to potential local insolvency in that municipalities have been empowered through the borrowing of other levels of government and their own to provide economic stimulus by building municipal infrastructure. The choice of infrastructure has been mandated by the federal and provincial governments in Canada. What is the role of municipal law and municipal lawyers, if any, in assessing how the funding contributes to the efficient allocation of resources, the distribution of income or economic stabilization? If these questions aren't addressed should municipalities be surprised if the outcomes of this new approach are not what they hoped for.

What is the difference between business purposes and municipal purposes in assessing the actions of each in relation to economic stabilization?

People shouldn't be surprised when business insolvency occurs as it is the inevitable consequence of allowing businesses in free markets to operate. Municipal lawyers frequently have to contend with major bankruptcies involving vacant properties and tax arrears. The present financial crisis represents an unusual public relations problem for advocates of liberal globalization who had pretty much won the propaganda war in terms of justifying market-driven corporate activity unfettered by government.[26] It was argued that the economic dislocation might have been extreme but for the intervention of

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21 As stimulus funding Canada has offered home improvement grants: http://oee.nrcan.gc.ca/residential/personal/home-improvement.cfm

22 See "How to Accelerate Corporate and Financial Restructuring in East Asia" in *Public Policy for the Private Sector, Note No. 200* at http://rru.worldbank.org/documents/publicpolicyjournal/200claes.pdf

23 Paul Krugman, "The Joy of Sachs", *New York Times*, July 17, 2009

24 Municipal Act, R.S.O. 1990, c. M-45; s.147; Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s 65

25 See the inquiry reports referenced in note 9.

26 See for example, Thomas L. Friedman, op. cit., supra; Jagdish Bagwati, *In Defence of Globalization* (Oxford: Oxford University Press, 2004) or Martin Wolf, *op. cit., supra*

national governments in bailing out their banks.[27] Those who accept a model of corporate conduct based on a free unregulated market ideology may have found this troubling.

While the appropriate role of government is questioned in newspapers on a day to day basis, the appropriate role of business is less frequently debated. The actions of the private sector have a significant role to play in shaping the form of municipalities. Was the elimination of the urban electric streetcar network undertaken so that cars and/or diesel powered municipal buses could be substituted? Do the decisions by municipal councils to abandon their electric trolley streetcars in favour of diesel-powered buses look as sensible as they did more than half a century ago?[28] Do municipalities have any role to play in moving to a new model of delivery for transportation if consumers choose unsustainable products and services on the basis of lower initial cost and effective marketing?[29]

There is no legal requirement that businesses or markets be sustainable.[30] Evidence of this is the frequency of business failures[31] leading to unemployment, worthless stocks, the liquidation of assets[32] and underfunded pensions [33]. Some economists suggest that this is exactly the manner in which the economy is intended to operate.[34] Books on business

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[27] Dean Baker, "Was the bank bailout necessary?" *The Guardian*, May 18, 2009 at http://www.guardian.co.uk/commentisfree/cifamerica/2009/may/18/us-economy-bank-bailout**; See also** "Bank bailout could end poverty for 50 years – Oxfam tells G20" 1 April 2009 at http://www.oxfam.org/pressroom/pressrelease/2009-04-01/bank-bailout-could-end-poverty **;** Joseph E. Stiglitz, "A Bank Bailout That Works" *The Nation*, .March 23, 2009 at http://www.thenation.com/doc/20090323/stiglitz; Jeffrey Sachs, "A Proposal on How to Clean up the Banks", The Huffington Post, February 12, 2009**,** http://www.huffingtonpost.com/jeffrey-sachs/a-proposal-on-how-to-clea_b_166303.html

[28] See "Who Killed the Electric Car" http://www.sonyclassics.com/whokilledtheelectriccar/. See also Maurice Yeates, Barry Garner, *The North American City* (New York: Harper & Row, 1976) at pp. 186-191 for a description of the proliferation and impact of the electric streetcar in North American cities following its introduction in Boston in 1889.

[29] See the recent feasibility studies for reintroducing streetcar corridors for Miami (http://www.miamigov.com/MiamiStreetcar/pages/Study.asp), Seattle (http://www.cityofseattle.net/transportation/streetcarreport.htm), Minneapolis (http://tcstreetsforpeople.org/node/174). As in U.S. cities, electric streetcars were in operation in London, Ontario between 1895 and 1940: http://www.londontransit.ca/Pubs/History.pdf .

[30] The emphasis of the shareholder value revolution on unsustainable short term gains is discussed in Allan A. Kennedy, *The End of Shareholder Value* (Cambridge, MA: Perseus Publishing, 1999).

[31] See L.C.B. Gower, *The Principles of Modern Company Law* 3d. ed. (Stevens, 1969) p. 49 "In effect the legislature had adopted Lord Bramwell's recommendation and accepted his view that those who dealt with companies knowing them to be limited had only themselves to blame if they burnt their fingers."

[32] For GM the bankruptcy website is http://www.motorsliquidationdocket.com/ ; For Nortel, the bankruptcy website is http://www.nortel.com/corporate/restructuring.html

[33] Pensioners are another class whose rights may be subordinated to other interests: See *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd*., 2007 ONCA 600; *Ivaco Inc., Re*, 2006 CanLII 34551 (ON C.A.)

[34] See Raghuram & Zingales, *op. cit*., p. 19; See also Milton Friedman, Capitalism and Freedom, (Chicago: University of Chicago Press, 1962) p. 133 and subsequently in "The Social Responsibility of Business is to Increase its Profits", *The New York Times Magazine*, September 13, 1970:. "There is one and only one social responsibility of business–to use it resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free

finance call people who suffer the consequences of insolvency "losers". [35] Are the bankers, executives and investors who received magnificent salaries, stock options and bonuses while the companies in which they were interested were falling into bankruptcy or insolvency the "winners"?

Businesses which fall into difficulty do various things to restructure. They shed employees who require more social services from the municipality. While the shedding of employees resurrects the business bottom line, it worsens the bottom line of municipal governments. Businesses consolidate operations and close plants. This has an undesirable effect of the municipal tax base of the jurisdictions where plants are closed. Businesses delay paying their taxes and demand loans or concessions from government in order to continue to operate. The appropriate response according to economic orthodoxy is for the municipality to cut expenses and privatize its services to make itself more attractive to business.[36]

As far as business corporations are concerned, the law views shareholders of a business corporation as "simple, unidimensional, time-indifferent, fungible, uninterested and disinterested -- uncommitted to any particular place, project or community, cosmopolitan, deracinated, lacking religion, language, nation or civilization".[37] The prevailing legal orthodoxy mirrors neoclassical economics and requires a board of directors to pursue a corporate goal of maximizing profits for the shareholders. There is a considerable debate as to whether business corporations should be bound by any ethical requirements or whether they have a legal obligation to sacrifice the public good to the private interest of their shareholders where they are in conflict.[38]

The Supreme Court of Canada has established that the corporate decisions of business corporations are entitled to judicial deference by reason of the business judgment rule.

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competition without deception or fraud." For a more recent contrary view, see John K. Galbraith, *Innocent Fraud* at pp. 51-52 "The corporation, to repeat, is an essential feature of modern economic life. We must have it. It must conform, however, to accepted standards and requisite public restraints. Freedom for beneficial economic activity is necessary. Freedom should not be a cover for either legal or illegal misappropriation of income or wealth."

[35] Raghuram & Zingales, op. cit., p. 19 "Markets will always create losers if they are to do their job";

[36] James Heilbrun, *Urban Economics and Public Policy* (New York: St. Martin's Press Inc., 1987) pp. 474-479; 165-167

[37] Daniel J.H. Greenwood, "Fictional Shareholders: for Whom Are Corporate Managers Trustees, Revisited", 69 Southern California Law Review 1021 @ 1027; A recent book and film suggested that business corporations have the characteristics of a psychopath: Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Barnes & Noble, 2005); http://www.thecorporation.com/

[38] These kinds of considerations raise questions as to how a public/private partnership functions in the interest of the citizens of a municipality given the legal obligation of any business corporation partner to maximize its return to its shareholders at the expense of other stakeholders. S. 10 of the *Interpretation Act*, R.S.O. 1990 was reenacted and the term "public good" was eliminated from the statutory rule of interpretation in s. 64 of the Legislation Act, 2006, S.O. 2006, c. 21 , Sched. F.

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.[39]

Any Canadian municipal lawyer will have noted that business corporations are viewed quite differently by Canadian courts from municipal corporations.[40] Municipal corporations aren't like "other citizens" in the same way that business corporations are[41]. The corporate decision making of municipal councils isn't subject to the same principles of judicial deference from the courts as is the decision-making of business corporations.[42] Municipal corporations as governments are obliged to provide services to actual people[43]. Municipal corporations purchase goods and services in the open market using purchasing practices which are open and transparent on the basis of tenders which are awarded to the lowest bidder[44]. Municipal governments are expected to be responsive, transparent, and

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[39] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 (CanLII), [2004] 3 S.C.R. 461, 2004 SCC 68 @ para. 67 but see *Kerr v. Danier Leather Inc*., 2007 SCC 44 (CanLII) where the business judgment rule was held to be inapplicable to disclosure obligations

[40] See Allan C. Hutchinson, *The Companies We Keep: corporate governance for a democratic society* (Toronto: Irwin Law, 2005) We could mandate the interpretation of statutes in favour of business corporations based on the public good by adopting principles such as those found in Hutchinson at pp.241-245; See also Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) p. 232 who suggests that we should neither expect nor desire judicial initiatives on public policy issues.

[41] *See London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 @ para 42: "Further, while RSJ did not have the right to notice of the City's intention to pass the by-law nor any right to make representations at a public hearing, it did have the right, ***along with other citizens***, to a transparent and open process."[emphasis added] See also *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 per Sopinka "In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government. Any ambiguity or doubt is to be resolved in favour of the ***citizen*** especially when the grant of power contended for is out of the "usual range"". [emphasis added] Can the notion of corporate citizenship developed by Canadian courts be extended? *See Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at para 78; "A citizen, corporate or otherwise, who wishes to stay within the law may have no choice but to err on the side of caution." Given that people are beginning to fall into the category "or otherwise" in these decisions, should legislatures begin to address corporate citizenship in the statutes constituting corporations?

[42] See *RSJ* @ para. 38 "The dissent of McLachlin J. (as she then was) in *Shell Canada* is often cited as a broad statement of the deference that courts owe to municipal governments. In large part, this deference is founded upon the democratic character of municipal decisions. McLachlin J. stated that deference to municipal decisions "adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them" (p. 245). "

[43] See *Westcoast Landfill v. CVRD*, 2009 BCSC 53, where the court observes at para. 78 : « In *Pacific National***,** [2000 SCC 64 (CanLII)] the majority [of the S.C.C.] declares that legislative powers are entrusted to municipalities for the public good and that municipalities must always be in a position to exercise them as the public good requires. "

[44] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 270

accountable to their citizens in providing services and imposing taxes or fees for those services. Municipal corporations aren't supposed to become insolvent[45].

A business corporation does not look or act like a municipal corporation.[46] The ephemeral nature of the business corporation which can cease to exist at any time is something that has to be considered when dealing with one. The effect of the actions of business corporations on the persistence of their income streams would seem to be a significant factor that the shareholders evaluate in measuring the consequences of corporate actions. The executives of Enron or Lehman Brothers before their bankruptcies may have had a short term view of the corporation more coincident with the early history of corporations where the corporation would be incorporated for a limited time and the fruits of the venture distributed at the end to the entrepreneurs. By contrast, there is no expectation that city governments in Canada will abandon their governmental role and be wound up after paying the officers, employees and creditors and the remaining assets distributed among the citizens.

In regulating the corporate form of a business corporation and that of a municipal corporation, a balance is struck between the amount of regulation and the societal goals to be achieved through regulation. Even financial economists believe that there is a significant role for the government in regulating private markets. [47] These same economists also recognize that there are public goods where consumption is not rival which are more efficiently provided by the government although they may disagree about the degree of government regulation or how or whether particular public goods should be provided.[48] This question is significant in the area of municipal sustainable infrastructure projects where it can be argued that sustainable infrastructure includes both a private and public element.

Does global insolvency have anything to do sustainable infrastructure *per se*?

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[45] LCB Gower in *Modern Company Law*, 3d. ed. p. 71 observed that the position with respect to municipal corporations is that in the absence of express provision to the contrary, the members will be completely free from personal liability.

[46] See *Caring for the Earth, A Strategy for Sustainable Living*, (Gland, Switzerland: IUCN, UNEP, WWF, 1991) p. 96 where it is suggested that the goals of a corporation might be to adopt practices to avoid damage to the environment, involve communities and promote an equitable distribution of wealth, minimize the use of raw materials and provide products and services that are environmentally friendly. See also Daniel J.H. Greenwood, "The Dividend Problem" Research Paper No. 05-10 at http://ssrn.com/abstracts=799144, at p. 154 who presents several views of the corporation one of which is that business corporations should define corporate objectives in terms of profit maximization. On this view, the officers, directors and shareholders should treat customers, employees and creditors as outsider stakeholders whose interests are protected only by their agreements with the corporation and laws protecting stakeholder interests.

[47] See Ragan and Zingales, *op. cit*., pp. 311-312; Geoffrey Garrett, 1998; See also Friedman, *Lexus*, pp. 131-137 who describes how countries like Albania with rudimentary free market institutions can fall prey to things like Ponzi schemes in contrast to countries with " sophisticated, honest and credible financial and legal infrastructures".

[48] Daniel A. Farber, *Eco-Pragmatism* (Chicago: The University of Chicago Press, 1999) pp. 58-59; Musgrave and Musgrave, *op. cit.*, pp. 52-55

Globalized insolvency presents difficult problems for municipal governments that are responsible to provide local government for local citizens and to manage public affairs in the interests of the local population. Some argue that global corporations and investors working through global markets will force the reduction or elimination of local regulations and standards by reason of open borders for goods, services and capital ("the race to the bottom").[49] There was a considerable movement in the 1990's suggesting that greater privatization and contracting out in local government should be encouraged.[50]

> Individuals and companies would move to regions that provide public goods that match their preferences. In addition, governments would be forced to compete in providing services and rules that meet the needs of their citizens. Inefficient and excessively burdensome government bureaucracies would find their tax bases eroded.[51]

Owing to the public reaction to the theses which were advanced by proponents of globalization, researchers now have examined the thesis that regulation may increase with globalization ("the race to the top").[52]

Municipal corporations are charged to provide good government and public services to their citizens. If a municipality is fortunate, its tax base includes corporations which are engaged in the race to the top as opposed to those which are engaged in the race to the bottom. If a municipality is unfortunate, its businesses will be engaged in or have won the race to the bottom by being at the bottom (the benefits of victory go to shareholders who likely reside elsewhere). Municipal lawyers should be sensitive to the existence of both races.

Although there seems to be little study of the impact of globalization[53] on municipal regulations, it seems likely that these same factors will affect municipal governments in

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[49] This is apparently called the "Delaware effect" (regulatory competition) in corporate law circles where it is argued that corporations incorporate in the least confining regulatory jurisdiction. In municipal economics, a variant of this is called the Tiebout effect whereby a citizen can move to the locality that best suits her tax and services preferences: See also R. Z. Lawrence, A. Bressand, T. Ito, *A Vision for the World Economy* (Washington: The Brookings Institute, 1996) p. 29 – 31; Daniel C. Esty, Damien Geradin**,** *Regulatory competition and economic integration* (Oxford: Oxford University Press, 2001) pp. xxii – xxv; Adam Harmes, *op. cit*., p. 69.

[50] David Osborne and Ted Gaebler, *Reinventing Government* (Reading, MA: Addison-Wesley, 1992); David Osborne and Peter Plastrik, *Banishing Bureaucracy* (New York: Penguin Group, 1997), John D. Donahue, *The Privatization Decision* (Basic Books, 1989), John A. O'Looney, *Outsourcing State and Local Government Services: Decision-Making Strategies and Management Methods*, (Westport, Conn: Quorum Books, 1998)

[51] Lawrence, Bressand, Ito, *op. cit*., p. 31

[52] The "California effect" (regulatory harmonization) is the export of regulatory standards where one jurisdiction insists that its own standards be met by other jurisdictions. The imposition of new local regulatory standards may be impaired by trade agreements like NAFTA: David Vogel**,** Robert A. Kagan, *Dynamics of regulatory change: How Globalization affects National Regulatory Policy* **(**University of California Press, 2002) pp. 1-41**;** David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, MA: Harvard University Press,1995); Dale D. Murphy, *The Structure of Regulatory Competition* (Oxford: Oxford University Press 2004) pp. 3 - 24

the long term. The use of unusual financial instruments by some municipalities has resulted in losses and considerable litigation in Canada[54] and at least one municipal bankruptcy in the United States.[55] Unlike the United States, bankruptcy laws do not apply to Ontario's municipal corporations which become subject to provincial government supervision if they default on their obligations.[56] Although it appears that some American cities have become insolvent, this does not appear to be the case so far in Ontario.

If corporate insolvency becomes widespread in the economy, people in a local municipality could go from prosperity to poverty in short order. This collapse will have a lagged impact on municipal government.[57] The results of a general financial collapse in the larger economy for municipal government will be uncollectible taxes, shortfalls in investment revenue, inability to borrow, and higher welfare costs. As the "race to the bottom" literature indicates, the economically disadvantaged will locate in cities where the availability of social assistance, food, energy, housing, and jobs is the greatest. To avoid an influx of economically disadvantaged people, governments may be encouraged to assure an equal level of social assistance regardless of where people are located.

Local measures taken by municipalities in Ontario to combat the recession to date have included a contradictory combination of cost-containment measures with respect to operating expenses and spending measures with respect to capital expenses. This contradiction arises from the fact that operating expenses are funded from the municipal tax base and the capital expenses are funded by senior levels of government with both grants and loans. Federal governments in both the United States and Canada have encouraged spending on municipal capital projects in the hope that the private contractors who build the projects will employ sufficient numbers of persons so that those who have lost employment will be taken up somewhere.

Localization has been defined as a state of affairs whereby the economy is under local control and there is discrimination in favour of local businesses and workers.[58] Ontario municipal law is hostile to localization. Ontario municipalities cannot give bonuses to businesses such as grants or loans.[59] Infrastructure funding by municipalities for the purpose of bailing out particular businesses would appear to be contrary to law. On the other hand, the creation of infrastructure to benefit business and employees is not

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[53] "Globalization" is characterized as "the closer integration of countries and peoples of the world which has been brought about by the enormous reduction of costs transportation and communications". Joseph E. Stiglitz, *Globalization and its Discontents*, (New York: Norton, 2002) at p. 9 or "the integration of economic activities across borders, through markets" Wolf, *op. cit., supra*, p. 14.

[54] See note 9.

[55] Orange County, California.

[56] The Municipal Affairs Act, R.S.O. 1990, c. M. 46

[57] Levine, Helisse, "Subprimes, Shortfalls, and Spillovers: The Impact of the Financial Crisis on Mortgage-Related Revenues in NYS Counties", Municipal Finance Journal, Volume 29, Number 4, Winter 2009 , pp. 87-99(13)

[58] For a critical view see Wolf, *Why Globalization Works*, pp. 194-199; for a different definition and view (i.e. public goods provided by the lowest level of government) see Sachs, *Common Wealth*, p. 334

[59] Municipal Act, 2001, s. 106

apparently contrary to law when the funds are provided by both the federal and provincial governments.[60]

Municipalities in Ontario have adopted established localized infrastructure funding plans which create or improve municipal infrastructure. These projects are to be entirely carried out by the private sector based upon tenders and proposals by the municipalities. In approving funding, the federal and provincial governments in Canada did little to tie funding to the provision of local jobs or to legacy projects involving more sustainable technologies.[61] This is not surprising because a shift to more advanced technologies[62] would disadvantage businesses that are invested in current technologies and which have considerable production capacity and would have created uncertainty around the value of unsustainable assets. There was scant evidence of "shovel-ready" legacy projects in many municipalities and the funding has gone to rehabilitating aging existing infrastructure.

Will current Canadian municipal localized infrastructure funding lead to anything that is sustainable?

Strategies for a sustainable[63] economy involve basically three kinds of technologies. Technologies which do nothing or very little to achieve sustainability but are called "sustainable" or "green"[64], technologies which involve potentially less damaging

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[60] Various public and private infrastructure funding seminars have indicated how this will all work: "The Legal and Business Guide to Infrastructure Projects" Osgoode Professional Development, May 28, 2009; .

[61] Despite the funding program in Ontario which required projects to be shovel ready and completed in at most two years, many municipal councils including London's looked at the long term viability of the projects.

[62] See Antony Taubman, "Sharing Technology to Meet a Common Challenge", WIPO Magazine Special Issue 2/2009. The eco-patent commons website is discussed at http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?ClickMenu=special&type=p&MenuId=MTU1OQ

[63] I make a distinction between things that are "sustainable" and "sustainable development". "Sustainable" according to its ordinary dictionary meaning "to keep in being; to cause to continue in a certain state; to keep or maintain at the proper level or standard" SOED 3d. Edition. Sustainable development has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University, Press, 1987) p. 43; See Paul Hawken, *The Ecology of Commerce: a declaration of sustainability* (New York: HarperBusiness, 1993) p. 139 who defines sustainability in terms of products or services that reduce "consumption, energy use, distribution costs, economic concentration, soil erosion, atmospheric pollution, and other forms of environmental damage". By contrast Robert M. Solow, "Sustainability: An Economist's Perspective" in Donald Van DeVeer, Christine Pierce eds., *The Environmental Ethics and Policy Book*, 2d ed., (Belmont, CA: Wadsworth Publishing, 1998) at p. 451, suggests "If you define sustainability as an obligation to 'leave the world as we found it in detail, I think that's glib but essentially unfeasible. It is, when you think about it, not even desirable. To carry out literally the injunction of UNESCO would mean to make no use of mineral resources; it would mean to do no permanent construction or semi-permanent construction; build no roads, build no dams, build no piers. …" See also W. Neil Adger and Andrew Jordan, *Governing Sustainability* (Cambridge: Cambridge University Press, 2009) p. 8.

[64] Vehicles using biofuels have been called "green". Biofuels have resulted in the substitution of fuel production for food production: Lewis Smith and Francis Elliott, "Rush for biofuels threatens starvation on a global scale", *The Times*, March 7, 2008

unsustainable substitutes for unsustainable technologies (battery powered instead of gasoline powered cars[65]) and technologies which are actually sustainable[66].

A review of Canadian municipal infrastructure projects[67] would suggest that the projects by and large do not involve the substitution of new sustainable technologies but rather the upgrading of aging municipal services (roads, sewers, waterlines). This reflects the policy of all levels of government which established rules at the outset which have favoured existing business corporations and established technologies. While many municipalities considered projects with more of a legacy value, the application of the federal and provincial rules made such projects ineligible.

To the extent that private resources are available to be commercially marketed, it would be astonishing if the sale and use of those resources were limited until those businesses whose products are currently in use have written off their current assets and exhausted their inventories.[68] Corporations will demonstrate that the unsustainable impacts of their products and services are being mitigated[69]. If fully exploiting refinery assets and exhausting private inventories of the world's hydrocarbons will assure profits for business corporations, it is in the interest of their shareholders that this continue. Corporate law requires that directors and managers act legally and honestly in the best interests of the corporation to exhaust their inventories.

Municipal corporations also feel pressure to generate the maximum return from their own infrastructure. Where cities and their utilities have placed sewer pipes and gas lines in the ground and hydro wires on poles in the air, they will be disinclined to explore servicing solutions which do not involve the collection of waste at some central location or utility solutions which involve small CHP plants, thermal heating through design or

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[65] To reduce short term carbon dioxide emissions, such substitutes might be desirable: Sachs, Common Wealth, p. 99. International Collaboration. With a Case Study in. Assessment of *World's Supply* of. *Lithium*. James Barnes. Office of Vehicle Technologies, 21 May 2009 The world's supply of lithium is sufficient to allow for the use of lithium-ion batteries in all appropriate HEVs, PHEVs, and EVs likely to be produced in the next several decades. http://www1.eere.energy.gov/vehiclesandfuels/pdfs/merit_review_2009/energy_storage/es_13_barnes.pdf

[66] See Sachs, *Common Wealth*, pp. 31-41; Hawken, *Ecology of Commerce*, pp. 144-149;

[67] http://www.york.ca/Regional+Government/Stimulus+Funding.htm;

[68] Andrew Clark, "Exxon Investors Reject Green Initiatives" *The Guardian*, May 29, 2008 @ http://www.guardian.co.uk/business/2008/may/29/exxonmobil.oil ; Robin Pagnamenta, "Anger as Shell reduces Renewables Investment", *The Times*, March 18, 2009 @ http://business.timesonline.co.uk/tol/business/industry_sectors/natural_resources/article5927869.ece

[69] See "Walmart Announces Sustainable Product Index" @ http://walmartstores.com/FactsNews/NewsRoom/9277.aspx with 15 questions for suppliers. The World Business Council for Sustainable Development developed the term "eco-efficiency" to describe corporate best practices which involve reductions in material and energy intensity, reduced dispersion of toxic materials, improved recyclability, and maximum use of renewable resources. The WorldWatch Institute, 2008 State of the World, Innovations for a Sustainable Economy (New York: W. W. Norton & Company, 2008) p. 34; See also http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=MQ&doOpen=1&ClickMenu=LeftMenu

other on-site measures that are not dependent on some kind of central distribution through a municipal grid[70].

Sustainability obviously means drastically different things to different people and depends upon the geographic and climatic region in which people are living.[71] For some, slowing the rate of climate change to some acceptable level represents sustainability. Few are advocating the immediate substitution of completely sustainable societal practices for the present western way of life.[72] Those who lived through the gasoline shortage in the '70's may be cynical about the extent to which there will be any quick change in the long term approach to energy usage in the western hemisphere absent significant cost pressures.[73]

In a globalized world, local government officials are called upon to explain how they will preserve economic prosperity for their local citizens. While the needs of their citizens at a local level would seem reasonably easy to identify, in a globalized world local needs are no longer met by local production.[74] The role of municipalities in addressing sustainable development will depend on the time frame over which possibilities are evaluated by governments, the impact of sustainability on the sale and use of privately owned and governmental resources and assets and the preferences of voters who are responsible for the governments that are elected. Of these factors, the willingness of voters to accept the costs of sustainable development would seem to be the major factor.

Are there any examples of worthwhile sustainable projects that could have been funded?

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[70] As a consequence, local government or utility managers may be just as unsympathetic to new technology which reduces their workforce or infrastructure as business corporations are to new technology that reduces their market share or profits.

[71] See Farber, *op. cit., supra*, pp. 160—162 who seriously questioned sustainability planning much beyond the next generation. Given the probability that we have already gone beyond the tipping point for carbon dioxide in the atmosphere for the next generation one view might be that government initiatives now should be based on other considerations like national security, national economic renewal or energy self-sufficiency which also present a compelling rationale to adopt what have been called sustainable practices. (Thomas E. Graedel and Paul J. Crutzee, *Atmosphere Climate and Change* (New York: Scientific American Library, 1995); Andrew Goudie, *The Human Impact on the Natural Environment* (Oxford: Basil Blackwell, 1981); Nick Middleton, *The Global Casino, An Introduction to Environmental Issues* (Oxford: Oxford University Press, 1981); James Lovelock, Crispin Tickell, *The Revenge of Gaia: Earth's Climate Crisis and the Fate of Humanity* (Perseus Publishing 2007) .

[72] See Lovelock, Tickell, *Revenge, supra*, who propose nuclear energy as the best alternative to address climate change; See also Jeffrey Sachs, *Common Wealth: Economics for a Crowded Plant* (New York, The Penguin Press, 2008).

[73] Anyone who doubts this should reexamine J. E. Lovelock, *Gaia, a new look at life on earth* (Oxford, Oxford University Press) 1979; E.F. Schumacher, *Small is Beautiful*, 1973, Ivan Illich, *Energy & Equity*, @ http://evans-experientialism.freewebspace.com/illich02.htm , Gordon Rattray Taylor, *The Doomsday Book*, (London: Thames and Hudson, 1970) or Charles Reich, *The Greening of America* (New York: Random House, 1970). The price of crude oil dropped dramatically after the 70's oil shock resulting in the abandonment of alternate energy projects. History is repeating itself after the high crude oil prices reached in the summer of 2008.

[74] See Wolf, *op. cit*., pp.173-219; For a less sanguine view of the impact of globalized trade see *Our Common Future*, pp. 122-144 and Joseph Stiglitz, *Discontents, supra*, pp. 73-80

There are examples of substitutes for existing unsustainable practices which have already been adopted all over the world which could be the subject of private or government funding[75]. The use of PV solar cells in numerous cities, bicycling infrastructure and urban transit, and windmill technology are examples of legacy projects that have reduced the consumption of fossil fuels.[76] Sustainable best practices might have included the following kinds of projects had they been shovel-ready to proceed.

Building Construction and Subdivision Design

An existing best practice for cold climates which has been achieved could involve a low-energy housing construction standard being incorporated into all building requirements.[77] Designs exist for mass producible energy self-sufficient houses or houses producing energy surpluses which are more consistent with pragmatic North American individualism than are collective utility grids controlled by monopolistic providers.[78] Energy improvements can also be achieved by retrofitting existing houses using energy saving technology and by reorienting buildings in the subdivision design process to make use of solar and geothermal energy for heating and cooling.[79]

Decisions concerning standards for energy usage for individual buildings are made by building code authorities, planning authorities, developers and home builders.[80] Private energy conservation decisions may be influenced by those marketing coal, gasoline, natural gas and electricity from private and municipal utilities that have a limited interest in reducing consumption dramatically. While manuals on design may not address standards for energy use, they do indicate how improvements in energy efficiency and

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75 See Municipal World, August 2009 for a variety of potential initiatives. For various cost analyses relating to sustainable development see: http://www.prres.net/Papers/Robinson_Property-Valuation_Of_Esd.Pdf. The sustainable public procurement manual for local governments in the European Union can be found at www.procuraplus.org.

76 Nature of Things, Volume 1: Visions of the Future @ http://www.cbc.ca/documentaries/natureofthings/visionsofthefuture/

77 Neil B. Hutcheon, Gustav O.P. Handegord, *Building Science for a Cold Climate*, (National Research Council, 1983); Brenda and Robert Vale, *The New Autonomous House*: *Design and Planning for Sustainability*, (Thames and Hudson, 2000); Enermodal Engineering Limited, *Performance of the Brampton Advanced House*, (Energy, Mines and Resources Canada, 1993); for the Waterloo Green Home see http://www.architecture.uwaterloo.ca/faculty_projects/terri/pdf/Doesburg.pdf; for a film about the subdivision planning obstacles to the development of autonomous houses in New Mexico see "Garbage Warrior": http://www.garbagewarrior.com/ ; See also Carol Venolia and Kelly Lerner, Natural remodelling for the not-so-green house (New York, Lark Books, 2006)

78 http://www.c40cities.org/bestpractices/buildings/freiburg_housing.jsp; For London, Ontario initiatives in this regard see http://council.london.ca/meetings/Planning%20Agendas/2009-07-20%20Agenda/Item%2014.pdf and http://council.london.ca/meetings/Archives/Agendas/Planning%20Committee%20Agendas/Planning%20Committee%20Agendas%202007/2007-04-23%20Agenda/item%205.pdf

79 The Canadian Government program is called EcoAction: http://www.ecoaction.gc.ca/ecoenergy-ecoenergie/retrofithomes-renovationmaisons-eng.cfm . See "Getting to Zero", Final Report of the Massachusetts Zero Net Energy Buildings Task Force**,** March 11, 2009 at http://www.mass.gov/Eoeea/docs/eea/press/publications/zneb_taskforce_report.pdf

80 Miami Green Commission http://www.miamigov.com/cms/mayor/2674_3599.asp ; Canada Green Building Council: http://www.cagbc.org/leed/what/index.php

energy usage for buildings can be achieved if the environment is indeed a life or death issue.

Energy Production

There are currently examples in many countries of distributed energy in the form of sustainable and renewable energy installations which could be expanded in any municipality.[81] Distributed energy resources are small-scale power generation technologies located closer to homes and businesses where electricity is used to provide a substitute for or to enhance the traditional electric power system.

Distributed energy resources at the household level can include individual solar PV photovoltaics, solar thermal for hot water and heating, solar sunrooms or "wintergardens", passive solar design homes, solar cooling, and transparent solar insulation.[82] Municipal projects can include PV systems, energy from waste, geothermal and solar thermal water heating.[83] By-laws could require that new buildings, and those undergoing major renovation meet a portion of their energy demand with renewable energy although the writer is not aware of any such by-laws in Canada.[84] Another option to encourage renewable energy use is for utility customers to be given the option of receiving all or part of their power from renewable energy.[85]

Transportation

Cities and individuals might have replaced their existing vehicles with electric and electric-hybrid vehicles and light rail or buses comprised of zero-emission vehicles.[86] They might have developed their infrastructure to increase bicycle transportation.[87]

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[81] William S. Fyfe, "Needed New Systems For Truly Sustainable Life Support", Ward Chesworth, Michael R. Moss, Vernon G. Thomas eds. in *Malthus and the Third Millennium*, (Guelph: Faculty of Environmental Sciences Guelph, 2001) pp. 26-30

[82] London, Ontario's proposed energy efficient subdivision is described in a report at http://council.london.ca/meetings/Planning%20Agendas/2009-07-20%20Agenda/Item%2014.pdf. For a description of successful renewable energy utilization in a Canadian residential project see http://www.dlsc.ca/ For a description of how insufficient funding may limit such projects see http://www.mcgilldaily.com/view.php?aid=6873

[83] http://www.c40cities.org/bestpractices/energy/freiburg_ecocity.jsp; Several London, Ontario initiatives respecting energy use are described at http://council.london.ca/meetings/ETC%20Agendas/2009-07-20%20Agenda/Item%2032.pdf; http://council.london.ca/meetings/ETC%20Agendas/2009-07-20%20Agenda/Item%2033.pdf ; London, Ontario's failed experiment with generating energy from waste was the subject of an OMB hearing: *Re Victoria Hospital Energy From Waste Plant* (1983), 15 O.M.B.R. 129

[84] The writer was involved in litigation in which Ontario Hydro to protect its monopoly tried to restrain the sale of locally generated energy by a private utility in London, Ontario. http://www.c40cities.org/bestpractices/renewables/barcelona_solar.jsp

[85] http://www.c40cities.org/bestpractices/renewables/la_renewable.jsp; London's energy initiatives can be found at http://council.london.ca/meetings/ETC%20Agendas/2009-07-20%20Agenda/Item%2023.pdf

[86] http://www.c40cities.org/bestpractices/transport/sanfran_vehicles.jsp; See Ted Wilson, "Local links to Global Sustainability" *Municipal World*, August 2009 for initiatives relating to biofuels The

Waste

Many Ontario municipalities have instituted programs to eliminate waste disposal in landfills by reducing waste or finding uses for it. Some large European cities put as little as 3 - 5% of their waste into landfills. New energy recovery achieved by the incineration of domestic waste to generate power and heat was banned in Ontario in 1991.[88] Alternatively, waste can be recycled or composted and sold to fertilizer companies.[89]

There are also a variety of initiatives respecting the use of grey water for a variety of household purposes.[90]

How taxpayers could encourage municipalities, developers and homebuilders to move to sustainable best practices

Municipalities have instituted residential programs which involve rating homes for energy efficiency, heat loss, water efficiency, and materials efficiency. Residential services have included new home energy ratings which can be used on resale, consulting services, technical seminars, sustainable design workshops for homeowners, a directory of sustainable building professionals and other resources including books, periodicals, videos, material samples and presentations.

While municipalities have instituted programs for aesthetic urban design or to speed up development approvals, a more effective initiative could be a sustainable building program to assist developers and homebuilders with developing sustainable practices during the construction and operation of commercial and residential buildings.[91] A sustainable building program as part of the planning process encourages planners, engineers, and other professionals to establish goals for things such as energy use, electricity, gas, and water utilization, building designs and systems in order to reduce long term costs for taxpayers.

A market transformation is necessary toward more sustainable residential, commercial and multi-family buildings in efficient subdivisions[92] with a basis for incentives for

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reaction of the Canadian Federal Energy Minister to Toronto's request for electric streetcar funding was negative: http://www.cbc.ca/canada/toronto/story/2009/06/09/infrastructure-baird-toronto.html . See also Fyfe, loc. cit., p. 36.

[87] http://www.c40cities.org/bestpractices/transport/copenhagen_bicycles.jsp

[88] http://www.americanhealthstudies.org/wastenot/wn146.htm; See however http://www.c40cities.org/bestpractices/waste/copenhagen_landfill.jsp; http://www.c40cities.org/bestpractices/waste/oslo_system.jsp; See Fyfe, loc. cit., pp. 32-34.

[89] http://www.c40cities.org/bestpractices/waste/dhaka_organic.jsp; http://council.london.ca/meetings/ETC%20Agendas/2009-07-20%20Agenda/Item%2030.pdf

[90] For a recent London city council report respecting grey water see: http://council.london.ca/meetings/ETC%20Agendas/2009-07-20%20Agenda/Item%2031.pdf

[91] See http://www.smartcommunities.ncat.org/buildings/gbprogrm.shtml for a listing of green building programs across the U.S. See also http://www.epa.gov/dced/2009-0616-epahuddot.htm for the interagency partnership for sustainable communities.

[92] The ubiquitous, inefficient and costly curvilinear subdivision has amazingly not yet come under much serious scrutiny in terms of its environmental impact: Koichi Mera, "On the Urban Agglomeration

increased energy and resource efficiency. Sustainable-rating systems evaluate the effectiveness of programs and quantify results. A marketing plan to create strong consumer demand for the benefits of sustainable building and to educate building and municipal professionals on how to build sustainable buildings is likely necessary for such programs to be successful. [93]

There are examples of potential Canadian legacy projects in Montreal, QC , Victoria, BC. and Okotoks, AB.[94] Further, it is clear that expanded municipal regulatory powers enable municipalities to do far more in terms of moving from unsustainable sprawl to sustainable development. There are a variety of ways in which municipalities can now regulate and purchase services which would involve the creation of local markets for sustainable dwellings, products and services. Small municipalities would appear to have greater flexibility to adopt green initiatives as has occurred in Freiburg[95] in Germany. Municipalities can combine to create regulatory standards in order to take advantage of the "California" effect.

If government funding had been linked to greater sustainability, Canadian businesses would have been forced to develop or purchase new technologies in order to take advantage of the funding. Unfortunately, this initiative coincided with the current downturn when their ability to invest was most constrained. As well, a shift to purchased new technologies may have resulted in a transfer of wealth to other jurisdictions in the same way that the purchase of foreign oil or manufactured products involves wealth transfers to other jurisdictions.[96] As municipal councillors in London suggested in their debates, the question that funding municipal infrastructure based upon established technologies raises is whether such funding promotes the kind of innovation that will result in job creation and continuing economic stimulus in the community.

It should be noted that Canadian municipalities have been leaders in developing sustainable technologies. The decision to electrify Ontario in the 1920's by way of renewable hydro-electric power was as a result of the initiatives of Sir Adam Beck[97]. This could occur again and may be occurring through initiatives like the Ontario Green

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and Economic Efficiency" in L.S. Bourne, J.W. Simmons, eds. *Systems of Cities* (Oxford: Oxford University Press, 1978); Dolores Hayden, Jim Wark, *A Field Guide to Sprawl* (New York: W. W. Norton & Co., 2004). For alternatives, see Denmark: http://www.google.com/search?q=inefficient+subdivision+design&rls=com.microsoft:*&ie=UTF-8&oe=UTF-8&startIndex=&startPage=1;

[93] http://www.c40cities.org/bestpractices/buildings/austin_standards.jsp

[94] Benny Farms, Montreal, Quebec, http://www.bennyfarm.org/en/home.php ; Drake Landing, Okotoks, Alberta, http://www.dlsc.ca/ ; Riverbend Heights, London, Ontario http://council.london.ca/meetings/Planning%20Agendas/2009-07-20%20Agenda/Item%2014.pdf ; Dockside Green, Victoria, British Columbia http://docksidegreen.com/index.php?option=com_frontpage&Itemid=1

[95] Andrew Purvis, "Is this the Greenest City in the World" The Observer, March 23, 2008 http://www.guardian.co.uk/environment/2008/mar/23/freiburg.germany.greenest.city

[96] See IPCC Special Reports, "Methodological and Technological issues in Technology Transfer" @ http://www.grida.no/publications/other/ipcc_sr/?src=/climate/ipcc/tectran/ for a sectoral analysis of the potential for technology transfer.

[97] Former Mayor of London, Ontario 1902-1904

Energy Act. In addition, by their regulatory requirements or by purchasing more sustainable technologies from the private sector, municipal governments encourage innovation by the private sector and lower costs for the more sustainable technologies that are developed. It should be noted that the cost/kilowatt hour of power from solar cells has plunged recently.[98]

By contrast, many governments and business corporations have been leaders in unsustainable production. It is important to note that the private sector can make profits by selling unsustainable inefficient products (like certain passenger motor vehicles, disposable water bottles or plastic garbage bags) which are made efficiently at the lowest possible cost to ensure that profits to shareholders are maximized. Ironically, unsustainable disposable products are, by virtue of the operation of the market, made as efficiently as possible (if the cost of disposal is ignored). As long as there is a market for the products they currently make, there is no reason why business corporations would adopt more sustainable technologies or make sustainable products unless this is a regulatory requirement or consumer tastes shift dramatically to sustainable products so as to encourage mass production.

Presumably, there is some way to induce business corporations to produce sustainable goods and services as efficiently as they produce unsustainable goods and services. Are business corporations compelled by the operation of the market to use unsustainable technologies and to make unsustainable products as long as such technologies lower their costs and the sale of their products maximizes the monetary returns to their shareholders?

It appears that it is only when corporations have gone outside the pale by engaging in illegal or unconscionable business practices leading to insolvency for their investors that governments are even willing to step in to examine the utility of the business practices and the products and services provided by them. This was happening as a consequence of the corporate economic dislocation resulting from the 2008-2009 recession.[99]

How are municipalities supposed to fit into globalization?

A municipal corporation in Ontario is a different kind of corporation from a business corporation. It is the antithesis of a business corporation in many respects.

There has been a historical evolution of the law with respect to municipal corporations. Municipal corporations existed as corporations as the "body politic" for the purposes of

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[98] Kate Galbraith, "More Sun for Less: Solar Panels Drop in Price" N.Y. Times, August 26, 2009 @ http://www.nytimes.com/2009/08/27/business/energy-environment/27solar.html

[99] Although the shock associated with the 2008 economic downturn appears to have completely worn off, the effect of shock in achieving political change has been considered by various commentators from various points of view in the political spectrum: Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, (New York: Metropolitan Books/Henry Holt & Company, 2007); Jeffrey Sachs, *Understanding Shock Therapy*, Social Market Foundation *Occasional Paper No. 7*, (London: Social Market Foundation, 1994)

assertion of group rights[100]. At the same time as private corporations proliferated in North America, public corporations were invested with subordinate legislative powers to be exercised for local purposes connected with the public good.[101] Cities were viewed by Jefferson as the home of "mobs". In order to protect private property they had to be subject to state power and strict judicial control through the doctrine of ultra vires according to the thesis propounded by Dillon in his 1872 treatise on municipal government.[102] This view represented the law in Ontario[103] from the family compact until the decision of the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)* [1994] 1 S.C.R. 231.[104]

The enactment of the *Municipal Act, 2001* in Ontario was intended in part to encourage privatization in service delivery by enabling municipalities to contract more of their services out. The Minister's statement suggested that the new Act was motivated by various factors including the desire to privatize municipal services.[105] There was at that

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[100] Gerald E. Frug, "The City as a Legal Concept" 93 Harvard Law Review 1059 @ 1098 ; See also Charles M. Haar and Daniel Wm. Fessler, *Fairness and Justice, Law in the Service of Equality* (Touchstone, 1986) concerning common law doctrines requiring courts to assure equal provision of municipal services.

[101] Frug, p. 1104

[102] Frug, p. 1111

[103] The narrow interpretation of municipal legislation was described in R. v. Greenbaum, [1993] S.C.J. No. 24 per Iacobucci J. commencing at p. 14 citing Makuch:

"The courts, as a result of this inferior legal position [of municipalities] formerly interpreted statutes narrowly respecting grants of powers to municipalities. This approach may be described as "**Dillon's rule**", which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation."

[104] See note 42, *supra*. See also *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37 (S.C.C.) @ para. 66 "Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen**.** However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation."

[105] Minister's statement, The Honourable Chris Hodgson. http://www.ontla.on.ca/house-proceedings/transcripts/files_html/2001-10-18_L053.htm#PARA569

"If it is passed by the Legislature, the new Municipal Act would give municipalities the tools they need to tackle the challenges of governing in the 21st century. It would allow municipalities to organize and deliver their services as they see fit, involving the private sector where appropriate in keeping with local needs.

The proposed act would also contribute to Smart Growth by giving municipalities more authority to set up corporations and to involve their private sector partners in financing and undertaking public projects."

time a prevalent view that the private sector could undertake the provision of municipal services allowing for greater efficiencies.[106] The Ontario municipal privatization adventure is similar in many ways to the recent worldwide corporate shareholder/CEO adventure. The recent cataclysmic corporate failures have led to recommendations with respect to possible reform of the model of the business corporation. One question is whether any of the proposed reforms with respect to the business corporation have any bearing on the municipal corporation.

What is the role of municipal corporations in advancing a sustainable economy? Justice, Temperance, Prudence, Strength, Peace, Charity, Faith and Hope[107]

During my practice of municipal law, it was never suggested to me until recently that there is any legislative basis for municipalities to be significant actors in relation to economic stabilization or recovery from economic recessions. A prolonged depression arising out of corporate conduct may have significant impacts on the viability of municipalities. These kinds of considerations may lead municipal governments to assess their role in relation to corporate conduct and to the adequacy of measures taken by other levels of government.

Some writers on corporate law suggest that the governmental role in governing business corporations is primarily to provide efficient default rules from which shareholders can choose to depart.[108] Courts generally defer to the judgment of business. Contrast this with the recent approach taken by the Canadian courts with respect to the interpretation of municipal statutes. They have devised a generous, deferential standard of judicial review[109], the *ultra vires* rule is still applied to municipal corporations[110], and many of the various common law grounds for by-law invalidity have been considered in various cases evaluating municipal legislation since the *Municipal Act, 2001* was enacted.[111] Depending upon its scope, judicial review in relation to municipal corporations has been called in other jurisdictions "judicial managerialism"[112].

Principles of stakeholder protection are largely found outside of their constituent statutes for both municipal corporations and business corporations. These principles have shaped the choices available to corporations concerning their basic operational and organizational decisions. All corporations are subject to legal rules of general application

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106 Osborne and Gaebler, *Reinventing Government, supra.*

107 Ambrogio Lorenzetti, The Effects of Good Government

108 Adam Winkler, "Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History", Law and Contemporary Problems, Vol. 67:109 Autumn 2004

109 See note 42 , *supra*; See also *Toronto Livery Assn. v. Toronto (City)*, [2009] O.J. No. 2725;

110 See ss. 9 and 10, Municipal Act, 2001, as amended. *Toronto Livery Assn. v. Toronto (City), supr*a. By contrast the *ultra vires* rule is taken to have been abolished for business corporations: Bruce Welling, Corporate Law in Canada: The Governing Principles, (Toronto: Butterworths, 1991) p. 224

111 *Toronto Livery Assn. v. Toronto (City), supr*a; *Fourth Generation Realty Corp. v. Ottawa (City),* 2005 CanLII 16568 (ON C.A.); *R. v. Konakov*, 2004 CanLII 12707 (ON C.A.); *The Adult Entertainment Association of Canada v. Ottawa (City)*, 2007 ONCA 389 (CanLII)

112 Loughlin, *op. cit*., p. 405

embodied in employment and labor law, workplace safety law, environmental law, consumer protection law, and pension law.[113] A question that arises is whether legislators including municipal corporations should include sustainability in new stakeholder protection laws that apply to all corporations?

If business corporations have government-like characteristics, some seem to be remarkably bad examples of how to govern. This is all the more significant when municipalities are required to take business corporations on as subsidiaries. Poor corporate government has been as disastrous as poor state government because badly-run corporations simply cease to exist leaving their stakeholders including the municipality to deal with the consequences of their collapse. When a bank or major automobile company ceases to exist, many people suffer, losing jobs, pensions, and communities. Many may have doubts recently about whether business corporations are working to create a more sustainable future if their role is limited to the kind of personal wealth creation which has occurred through the recent spectacular efforts of Enron and Bernard L. Madoff Investment Securities LLC.

There is considerable literature concerning the development of the modern business corporation and its role. As J.K. Galbraith once observed[114]:

> "This image – that of 'an association of persons into an autonomous legal unit with a distinct legal personality that enables it to carry on business, own property and contract debts" is highly normative (Guthmann and Dougall, 1948). …
>
> The answer is that there is no such thing as *a* corporation. Rather there are several kinds of corporations all deriving from a common, highly accommodating legal but very loose framework."

This description can be read in light of the reasons of the Supreme Court of the United States in *Dartmouth College and Woodward* limiting state power over corporations:

> The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant. [115]

A.A. Berle described the historical evolution of the corporation which started as an instrument and act of the state for the combined purpose of profit-making enterprises and political government in the 1700's. Berle observes that "wholesale disgust at the manoeuvring and corruption attending the granting, revision and renewal of special

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113 Winkler, p. 111.

114 John Kenneth Galbraith, "The Corporation" in *The Modern Business Enterprise, Selected Readings, supra*, p. 126

115 *The Trustees of Dartmouth College v. Woodward* 17 US 518 (1819)

charters led to revolution"[116]. By 1950, Berle concluded that legal doctrine has swept away the social control of the corporation which our ancestors thought necessary[117]. Corporations became private entities which were seen not as a part of the state but instead more like citizens and they required protection from the government like other citizens[118]. As we have seen, the legal position in Canada seems to be a business corporation ought to act based upon its best interests of the corporation where its interests conflict with its stakeholders or the public at large.[119]

Should one of the ultimate duties for all corporations as prescribed by legislation be to serve the interests of society as a whole as was the case when they were initially conceived? [120] To answer that question at the moment one need only contrast the provisions of section 134[121] of the Ontario *Business Corporations Act* with section 224[122].

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[116] A. Berle, "Historical Inheritance of American Corporations" in John Gilbert, ed., *The Modern Business Enterprise, Selected Readings* (Harmondsworth: Penguin Books Ltd., 1972) pp. 49-50

[117] Berle, *loc. cit*., p. 52

[118] Greenwood, The Dividend Problem, p. 109 – 110 Corporations were no longer understood as existing to promote important public projects, but rather to promote the private interests of their shareholders.

[119] *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37 (S.C.C.) @ para. 66; Hutchinson, *op. cit*. pp. 54-56, 123-124; F. A. Hayek, "The Corporation in the Modern Society: In Whose Interest ought it and will it be run?" in H. Igor Ansoff, ed. *Business Strategy* (Harmondsworth: Penguin Books Ltd.,1972) pp. 225-239

[120] See Ronald J. Brooks, "Earthworms and the Formation of Environmental Ethics and Other Mythologies, A Darwinian Perspective" in *Malthus and the Third Millennium*, op. cit. pp. 59-91 "… extinction is the inevitable fate of species, like death is the fate of individuals, …" @ p. 88.

[121] **Standards of care, etc., of directors, etc.**

134. (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. R.S.O. 1990, c. B.16, s. 134 (1); 2006, c. 34, Sched. B, s. 24.

Duty to comply with Act, etc.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement. R.S.O. 1990, c. B.16, s. 134 (2).

[122] **Role of council**

224. It is the role of council,

(a) to represent the public and to consider the well-being and interests of the municipality;

(b) to develop and evaluate the policies and programs of the municipality;

(c) to determine which services the municipality provides;

(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;

(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act. 2001, c. 25, s. 224; 2006, c. 32, Sched. A, s. 99.