The Extraordinary Employment Tenure of New Brunswick Municipal Officers: A Case of the Entrenched Civil Servant?

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Abstract

Peter McCormick has examined the evolution of the concept of judicial independence, and has noted that it is increasingly being granted to individuals who act under administrative law. This article examines the "extraordinary employment tenure" granted to municipal officers, partly through this lens. This protection for senior managers exists in its purest form in New Brunswick, Prince Edward Island, and Quebec, though I will concentrate on the first case. I will discuss the rationales for its initial adoption, its implications for council-staff relations, and the extent to which this grants clerks, treasurers, and chief administrative officers an unusually independent role within municipal government.

Résumé

Peter McCormick a examiné l'évolution du concept de l'indépendance judiciaire et a noté qu'elle est de plus en plus accordée à des personnes qui exercent des fonctions en droit administratif. Le présent article porte sur la « stabilité d'emploi exceptionnelle » accordée aux agents municipaux, en partie dans cette optique. Un tel protectionnisme des cadres supérieurs dans sa forme la plus pure existe au Nouveau-Brunswick, à l'Île-du-Prince-Édouard et au Québec, bien que je me concentrerai sur le premier cas. J'aborderai les raisons de son adoption initiale, de ses répercussions sur les relations conseil-employés, et la mesure dans laquelle cela donne aux secrétaires, aux trésoriers et aux directeurs municipaux un rôle exceptionnellement indépendant au sein de l'administration municipale.

Introduction

Broadly speaking, there are two philosophical traditions in municipal politics (and provincial and federal politics, to some extent): the populist and reform traditions. While the *substance* of politics is captured by familiar, competing ideologies, including liberalism, conservatism, socialism, and so on, these two competing traditions address the *process* of politics. In North America, the populist perspective is exemplified by the thought of U.S. President Andrew Jackson, the sentiment summed up in the well-known phrase that "to the victor belong the spoils," and the belief that "only the amateur could be trusted to run public affairs" (Ridley and Nolting x). The populist tradition emphasizes strong mayors and councils, civic party organizations and boss-machine politics, weak municipal staffs, ward systems and ethnic bloc voting, patron-client relationships, mayor-council involvement in day-to-day operations, and broad policy jurisdiction. In contrast, the reform movement, arising in the United States' Progressive Era from the late 1890s through the early 1900s, emphasizes the rule of law (rather than "of men"), strong executives, election-at-large, entrenched municipal staff, the separation of policy and

administration, legally defined and limited policy jurisdiction, the absence of municipal parties, and continuity in public affairs.

To be sure, these categories can be problematic. Some authors argue that there are elements of populism in early-twentieth-century progressive-reform thought (Griffith 11–13), which is most clearly seen in the progressive challenge to concentrated wealth. More recently, both McGerr and Valverde have focused on the elitist and seemingly anti-democratic elements of reformism; this is the tradition that is manifested in Canadian municipal politics and government. Both the commission system, in which voters elect three to five commissioners who act as municipal department heads but also have legislative authority, and its progeny, the city manager plan (Rice), were designed to curb the power of the masses over municipal government, to implement "business-like" principles, and to undermine the politically motivated inefficiency and corruption arising from the spoils system. In the context of this paper the distinction between the "democratic-populist" and "reform-progressive" traditions seems relevant.

The U.S.-style republican system lends itself more to populism than the UK-Canadian Westminster model, because the former's fixed electoral terms, separation of institutions (e.g., lack of fusion between executive and legislature), and election of numerous offices introduce more opportunities for influence by civil society. Among all of the Canadian political institutions, the municipal system comes closest to the republican model, so it should be no surprise that these two competing versions of proper process seem to compete most frequently in the municipal order of government.[1] As William Bennett Munro noted seventy-five years ago in his classic work, Canadian municipalities, unlike provincial and federal governments, have developed "checks and balances" (103) and "divided authority" (109). As the municipal order of government is said to be the closest to the people, it also tends to be most reflective of the people, for both good and ill.

This issue is of both practical and theoretical importance. In the city manager system, which is the dominant model throughout Canada, the mayor and council directly appoint only one person, styled the city manager or chief administrative officer (CAO). Apart from the annual budget, the most important decisions a council makes are to hire, discipline, or fire a CAO. Before embarking on these steps, a council must have knowledge of its options and strong legal advice on the legality and prudence of its proposed course of action. But this is also of theoretical importance. After a forty-year period of policy and administrative centralization in provincial capitals, we are experiencing the revival of the municipal sector; I argue that this revival is associated with a revival of democratic and populist ideas about government in general and the decline of the progressive-reform approach.

Yet this article is ultimately about the theoretical ambiguity of municipal government (and resistance to populism) in Canadian provinces. This ambiguity is illustrated by the contradictory sentiments surrounding municipal government. It is something of a cliché that municipal government is closest to the people, and thus implicitly the most democratic. Jack Layton (402–403), former councillor in the city of Toronto and later federal NDP leader, called the cliché a myth, because of low voter turnout, special interest influence, the unrepresentative nature (in socioeconomic terms) of municipal councils, and the power of appointed officials. Warren Magnusson (163–64) would agree, noting in addition that the problem of Canadian local government is that it never recovered from its elitist roots in the eighteenth and nineteenth centuries, during which only male property owners had a voice. In the terms of Leslie Pal, municipal government is more a "policy taker" (2) than a policy maker, since its powers are profoundly circumscribed by provincial laws.

The council-staff balance of power is also of significance for the wider society. Donald Savoie is well known as a critic of the growth of power in the hands of a single leader, power that has been taken from other elected officials as well as civil servants. Conservative traditionalists such as Michael Lind, writing with a much broader context in mind, have bemoaned the decline of the "meritocratic, humanist democratic-Mandarinate" (¶3), and fear that the "nightmare of mobocracy" (¶28) may be the result, as elected officials take on roles that they are incapable of filling. The employment protection described in this article is an antidote against both Savoie's court politics and the mobocracy that Lind fears. As the federal sponsorship scandal, the Gomery Report, and the *Federal Accountability Act* indicate, the question of the relationship between career civil servants, the political executive, and ordinary legislators has become of increasing concern for federal governments.

The rest of this article is organized as follows. I briefly survey the range of provisions in the ten Canadian provinces regarding the employment tenure of municipal officers, in order to show its cross-country significance. Second, I introduce the idea that municipal officers play an unusually strong role in New Brunswick's municipal governments, based on their defined roles and job security, and look at the evolution of this job security in this province over the last fifty years. Finally, I discuss how the courts interpret this job security, and then conclude with some thoughts on this enhanced status as a bulwark against democratic spontaneity.

Job Security of Municipal Officers in the Canadian Provinces

Little scholarly attention has been paid to the job security of municipal officers despite the fact that these provisions are widespread throughout the country. To understand the significance of these provisions as they apply to municipal officers, we should briefly consider the state of employment law more generally. Provincial laws typically allow for the dismissal of individuals from permanent employment, but, in the absence of clear cause for dismissal (wrongdoing such as dishonesty, theft, harassment, etc.), employers are typically required to provide an employee with notice or payment in lieu of notice. One benchmark is that employers should expect to provide notice or pay amounting to one month for each year of service. Employment on a contract basis has boomed in the last twenty years in part to avoid these protections. Obviously, dismissal may be more difficult for unionized employees who have access to grievance procedures, and compensation for layoffs may be stipulated in a collective agreement.

How does employment protection work for senior municipal officers compared to these expectations? I use the term "extraordinary employment tenure" to describe their position because in all cases provincial laws regulate the hiring and firing of municipal officers in a more elaborate way than other employees in the labour force. The weakest protections are in Ontario (*Municipal Act* Ontario), where a municipal council is only restricted from appointing or dismissing a municipal officer during and after a municipal election campaign. In some provinces, like Newfoundland (*Municipalities Act*) and British Columbia's regional districts (*Local Government Act*), a council can only dismiss a municipal officer with a two-thirds vote. Manitoba's *Municipal Act*, Alberta's *Municipal Government Act*, and Saskatchewan's *Municipalities Act* state that a majority vote of council is required to dismiss a municipal officer. Nova Scotia's *Municipal Government Act* affirms that a municipal officer must have more security than simply serving "at pleasure," but provides no extraordinary job security. Like Alberta and some other provinces, however, Nova Scotia does provide elaborate delineations of CAO and council job descriptions, which may prevent arbitrary treatment of CAOs. The province of Quebec

(*Cities and Towns Act*) also allows a council majority to dismiss a municipal officer, and it is unique in providing a former employee with recourse to the *Commission des relations du travail*, which can order reinstatement, salary in lieu, or any other appropriate remedy. Like New Brunswick, PEI provides the maximum protection (*Municipalities Act* PEI), by requiring that a municipality must appoint a CAO and that "just cause" is required to dismiss the office holder. Clearly, in every jurisdiction special attention is paid to the process of dismissal of the permanent head of the municipal government.

The Progressive-Reform Manager and Enhanced Administrative Independence

In December 2004, Peter McCormick published a very suggestive article on the evolution and future of judicial independence in Canada. In it he argues that the Supreme Court of Canada has articulated an innovative view of judicial independence, moving the country from the traditional British view of the matter and toward a judiciary that acts as the "protector of the constitution" (855). According to McCormick, judicial power has grown and policy makers find they must "govern *with* judges," and not "*despite* judges" or "*over top of* judges" (858–59). From the perspective of this article, the most important question McCormick asks is, "Who else might be independent?" (853). There is increasing recognition that judicial independence might go beyond the courts, because "some kinds of decision are so important that the decision maker must be independent in order to be able to act fairly" (853). There is also increasing recognition that officers of Parliament and legislative assemblies, such as the ombudsman and others, have quasi-judicial power and independence. While it would be an exaggeration to claim that municipal officers exercise judicial power, in this article I argue that we should recognize and examine the enhanced role and entrenched status of municipal officers in many Canadian provinces. In the New Brunswick case, municipal officers can only be dismissed for cause, which is protection that goes well beyond the provincial *Employment Standards Act*. It should be stated that while McCormick's work is suggestive, our purpose is not to make a detailed application of his ideas. The aim is to demonstrate that the roles and protections given to municipal officers in New Brunswick and some other jurisdictions seem to go beyond the roles and job security granted to civil servants under our typical view of the role of the civil service.[2]

The contemporary statutory functions of the municipal clerk, and also the treasurer, are clearly designed to go beyond those of mere servants to the elected. Section 76(1) of the New Brunswick *Municipalities Act* defines a number of major functions of the clerk. First, the clerk of the municipality is the "clerk of the council," and must attend all meetings of the mayor and council, public and private, and record the attendance and any decisions taken in the meeting. The council is not to meet without the presence of the clerk or the assistant clerk. It should also be mentioned that the *Act* provides, in section 76(2), that "The assistant clerk is subject to the directions of the clerk, and, in the absence or disability of the clerk or when there is no clerk, has all the powers and duties of the clerk." A council is not at liberty to bypass the clerk and use the assistant clerk, since by law the assistant reports to the clerk. One can interpret the clerk's roles as a kind of minder of the council, just as a deputy minister may be a minder of his or her minister, in that case on behalf of the premier or prime minister.

Under provincial law, the clerk is the custodian of all books, records, resolutions, and bylaws, as well as the municipality's legal seal. The clerk must sign all legal undertakings by the municipality, along with the mayor. The clerk swears in the mayor and each councillor after each quadrennial election, and the clerk may call a meeting of the council if neither the mayor nor deputy mayor is available. One can interpret the office of the clerk as one with powers that go beyond those of the

typical civil servant. He or she has job security, and essentially acts as "protector of the constitution" (McCormick 855), in this case to ensure that the municipal corporation conforms to federal, provincial, and municipal law. While the clerk does not report to Fredericton, one can argue that the municipal clerk keeps an eye on municipal affairs *for the provincial government*, or perhaps for the citizenry at large. The municipal order of government, unlike the other two orders, does not have a judiciary associated with it, though of course the provincially and federally appointed courts have jurisdiction. In the municipal sector these requirements are fulfilled by the clerk, with the help of the solicitor, who is to be consulted for legal advice. It is no coincidence that the municipality is legally required to appoint a solicitor, even if that individual remains in private practice and does little work for the municipality. As for the treasurer, section 77(1) obliges him or her to handle all the incoming and outgoing money, sign the cheques, keep the books of account, and produce audited financial statements (*Municipalities Act* New Brunswick). Like the clerk, the treasurer is granted job security as a bulwark against corrupt practices. It is interesting to note that the provincial government has given powers and protections to the municipal clerk, treasurer, and CAO that it does not give to any of its own employees outside a small number in the justice system.

The Development of Employment Protection for Municipal Officials

Extraordinary employment tenure for senior municipal employees is a recent development in the 230-year history of municipal institutions in the province and in Canada. The first distinction is that of the "officer" and the "servant," which addresses the idea that not all employees are legally alike. Ian MacFee Rogers, Canada's authority on municipal law, notes that a municipal officer "is one who holds a permanent position of responsibility with definite rights and duties usually prescribed by statute and sometimes by law" (281). Whereas a servant is simply to follow directives, an officer has "some discretionary authority" in fulfilling his or her duties (281). Under British common law, a municipal officer is to have a lifetime position, though in Canada the employment of municipal officers is usually established in a provincial statute. It has only been in the last sixty years, and particularly the last forty-five, that statutes have provided extraordinary job security.

Until the 1950s and 1960s, New Brunswick provincial statutes provided very limited or no protection for municipal officers. In the nineteenth century, before the creation of a large number of towns and villages, the provincial statutes establishing the existing cities granted "chief magistrate" powers to their mayors. Until the 1960s, much of the provincial legislature's work was to pass laws at the request of municipalities, including, especially in the nineteenth century, laws that gave minor judicial functions, in addition to legislative powers, to elected officials. For example, in the 1859 statute establishing the powers of the city of Fredericton, the mayor keeps the book "in which shall be entered a record of all proceedings before him as mayor, or as a Justice of the Peace,...to be handed over to his successor" (New Brunswick *Acts of the General Assembly* 1859: 34). (In later law, this role is assigned to the municipal clerk.) This was council-centred legislation that contained little or nothing about the municipal staff or their tenure of employment. In 1863 the legislature explicitly declared that the mayor and one alderman in the city of Fredericton had judicial power to try certain minor cases on a summary basis (New Brunswick *Acts of the General Assembly* 1863: 68).

The 1870s through the 1890s was the era of institution-building in New Brunswick (Whalen), and the approach of provincial law was to compel the appointment of certain municipal officers but also to create a tenure system in which these individuals served "at the pleasure" of their councils. Under this

model, senior municipal staff were akin to provincial deputy ministers, in terms of their employment tenure. The *County Incorporations Act*, which led to the creation of the fifteen county governments, provided that each "County Council shall appoint a Secretary-Treasurer," for example, and "such officers shall continue in office until others are appointed in their stead" (*County Incorporation Act* 775–76). Two decades later some municipal officials were given one-year contracts, at least. In the *Towns Incorporation Act*, the offices of clerk and treasurer were mandatory, and while they served at pleasure, officers below them were to be appointed to renewable, one-year terms (*Towns Incorporation Act* 2065). In the 1927 revised statutes, there is no change in these provisions for counties and towns, and the new legislation for the creation of villages adopts the same wording as the *Towns Incorporation Act* (New Brunswick *Revised Statutes of New Brunswick* 1927: s. 115).

This lack of protection for municipal officers in New Brunswick began to change in the 1950s. In 1954, K.G. Crawford (181–82) wrote in his classic work that in most provinces municipal officers had some kind of extraordinary employment protection; in the New Brunswick case he specifically mentioned the example of Fredericton, which with the passage of the Fredericton City Charter in 1951 became the model for the province. But Fredericton was not the first case. In 1950 the town of Campbellton, in northern New Brunswick, became the first to offer this protection. In that year, the legislative assembly passed Bill 35 (*An Act to Amend the Town of Campbellton Ac*t 158), which, among other things, ensured that the "said officers"—town treasurer, town clerk, commissioner of streets, manager of water and sewerage system, and manager of the lighting system—"shall not be removed from office except for cause by a two-thirds vote of council." Interestingly, in 1957, the town returned to Fredericton with an amendment that added "Drivers [sic] of Fire Trucks" to the list of protected appointees (*An Act to Amend the Town of Campbellton Act* 275). The historical record is not very detailed regarding the motivations for either of these changes. In justifying this before the Municipalities Committee of the provincial legislative assembly in 1950, Gregory T. Feeney, solicitor for the town of Campbellton, justified the change simply on the grounds that "it was designed to give a greater measure of protection to five office holders of the town," he said, for at "the present time only a majority of one was needed to have any of these employees removed from office" (New Brunswick, "Appendix—Report of Proceedings of Committees" 29). A reporter for the *Moncton Daily Times* described the bill as designed "to make more permanent the positions" in the town of Campbellton ("Campbellton City Measure" 3). In 1957 the same solicitor told the Municipalities Committee that the town of Campbellton believed that "Drivers of Fire Trucks" should be added to the list of protected positions, with no further explanation, and this was accepted. Presumably this was to protect these individuals from dismissal based on nothing more than what we might call small-town politics. Neither synoptic report makes mention of the insertion of the "cause" requirement, which is an equally profound change.

We can observe a pattern of little discussion of this issue, perhaps because there was a consensus among elite opinion (based on support for the progressive-reform model), and because there was always something perceived as more pressing on the political agenda. The major provincial issue in 1950 was the John McNair government's sales tax proposal. *The* issue in Campbellton in February through April 1950 was the planning, fund raising, and construction of a new indoor ice rink. The February 9 edition of the weekly *Campbellton Graphic* ("Town Clerk" 1) reports that the town clerk read the mayor's speech on the state of the town, and the published text indicates no mention of any change in the community's legal framework. It may only be a coincidence, but by January 1951 word reached the Fredericton *Daily Gleaner* that there was significant discontent over how the town of Campbellton was being run, and that the local property owners association was planning on running candidates in the upcoming election ("[Campbellton] Property owners"; "[Mayor] Defends Action Town Councillors").

Of course the legislation of nine months previous would make it hard for a new council to make senior staff changes, if that was the source of discontent.

It was with the passage of the updating and consolidation of provincial legislation relating to the city of Fredericton, known as the "Fredericton City Charter," that this new protection for municipal officers began to spread. In contrast, as late as 1946, the *Moncton Consolidation Act* repeats the language of an earlier era and establishes that council has the power "from time to time to remove or displace [municipal officers]...and appoint others in their stead" (*Moncton Consolidation Act* 383). The Fredericton City Charter, a long piece of legislation that ran 135 pages, provided the basic language that would later find its way into Equal Opportunity legislation of province-wide application. The charter's section 91(2) provided that clerks and treasurers "shall hold office until retirement or removal by death, resignation or a two-thirds vote of the Council for cause" ("Fredericton City Charter" 282). This new approach was not extended province-wide at this time. For example, the revised statutes in 1952 indicate the three primary statutes affecting counties, towns, and villages—respectively, chapters 44, 234, and 242—all retained the older provisions. Yet the new model did spread, albeit slowly.

Even before New Brunswick's *Municipalities Act* was proclaimed in 1966, the Fredericton model influenced other municipalities in the province. As late as 1965, the Bathurst City Charter was passed, which contained even more elaborate protections than Fredericton's, by making explicit the idea of "officials" as those who "carry into effect provisions of laws" and granting them all extraordinary employment protection ("Bathurst City Charter" 151). In the Fredericton case, there certainly seemed to be a reform-progressive mood surrounding and motivating the bill. Horace Hanson, solicitor for the city of Fredericton, told the Municipalities Committee in April 1951 that in drafting the charter the city had looked at the charters of sixteen Canadian cities. He continued that there were "provisions for control of expenditures and for no by-law to be passed at one sitting of the council except in an emergency" (New Brunswick, "Appendix—Report of Proceedings of Committees" 52). The extant media coverage mentions nothing about employment tenure, but in the reform tradition, the coverage does mention that the Municipalities Committee did amend the bill to give the city only "defined powers," and that "all council meetings be held at the city hall and all be open to the public" ("Fredericton Bill to be Introduced"). In addition, the Fredericton *Daily Gleaner* told its readers that an additional provision of the bill was that a "majority or minority of Council can ask for a provincial commission to be appointed on any issue, under authority of the [provincial] Inquiries Act" ("Fredericton Bill to be Introduced"). Interestingly, this power of investigation over municipal activities by an independent body, a classic reform-progressive principle (Griffith 47), still exists in New Brunswick, having been granted to the provincial ombudsman under the *Ombudsman Act.* The only public controversy regarding the bill was what role, if any, the city should have in controlling school board expenditures ("Control of School Board Expenditures"). Once again, municipal legislation was overshadowed by another larger, provincial issue. The most numerous, surviving correspondence received by the John McNair government in this period was related to a tax concession by the city of Saint John for the Irving pulp and paper mill in the city.

As we have said above, the new form of employment tenure for municipal officers was extended province-wide in 1967, with the implementation of the *Municipalities Act* of 1966. As has been discussed elsewhere (Young; Krueger; Stanley), the new Liberal government of Louis J. Robichaud faced many challenges after its election in 1960, and appointed a Royal Commission on Finance and Municipal Taxation, known as the Byrne Commission after its chair, Edward Byrne. While the ultimate public policy revolution of Robichaud is seen, like Robichaud himself, as liberal, progressive, modern,

and egalitarian, the Byrne Report itself was ambiguous. Fred Drummie was the director of the Office of Government Organization in the late Robichaud era, and he was responsible for the consideration and implementation of the Equal Opportunity program. As he wrote about the Byrne Report, after the fact: "If it was not revolutionary, it was indeed radical—there was an undertone of distrust of government, all voting was to remain with property tax payers....It was recommended that the institutions be changed but with reduced public involvement because, it appeared, the democratic institutions had failed at the local level and in some cases were not to be trusted at the provincial level" (Drummie 5).

The Byrne Report (Royal Commission) is now more often cited than read, and Drummie is correct in seeing what we would now call a technocratic approach to public policy. For example, while Byrne did advocate the modernizing and rationalizing of public services, he also argued that provincially provided services should be delivered by semi-autonomous "commissions" rather than by conventional ministries. He also defended the abolition of local self-government in rural areas (118); that municipalities should only have prescriptive powers (179); that there should be a property qualification to vote and run in elections (183), as well as a recall procedure (184); that ideally local elected officials should not be paid (185–86); that balanced budgets and debt ceilings for municipalities should be mandatory (264); and there should be a cap of $.50/$100 of assessment on the municipal tax rate (266). Without much attention to practical politics, he also advocated that all existing tax concessions be cancelled, even if in midstream. In the final chapter of the report, entitled "Public Apathy and the Control of Provincial Government Spending," the commissioners complained about weaknesses in the civil service, lack of collective cabinet responsibility, and a deplorable level of public apathy and resignation regarding government waste and corruption (316). One can see how Byrne's values may actually fit better into the progressive-reform rather than democratic-populist tradition.

While Belkhodja argues that opposition to Robichaud came from the political right (121–34), the foregoing discussion shows that there is some ambiguity in the Byrne Commission and the Equal Opportunity program itself. The new *Municipalities Act* should be understood in this context. The *Municipalities Act* arising from Byrne was first introduced in 1965 as Bill 116. Like most of the government's Equal Opportunity program legislation (excepting the *Assessment Act*), it was presented and later withdrawn because of the lack of time and the high level of opposition, particularly from municipal and county councils and their provincial organizations. This legislation satisfied many of the characteristics of the city manager version of the reform approach, including emphasis on the rule of law, weak powers for mayors and councils, the entrenchment of municipal staff, the separation of policy and administration, legally defined and limited policy jurisdiction, and the absence of civic parties. The Byrne Report claims that its recommendations simply shifted democratic debate to the provincial level, but from the perspective of the practitioners of local governance, this proposal was at the expense of local democracy and populism.

Interestingly, the Robichaud government did not accept all elements of the Byrne Report, and in particular they dropped some of the most elitist elements. The Robichaud government did not accept that provincial services should be provided by commissions rather than more accountable ministries, and they broadened the franchise beyond property owners (Stanley 143). There were also two differences in the 1966 *Act*, compared to the 1965 legislation, both of which were suggested by municipalities. First, the government decided to remove the tax rate cap, which had been unpopular with the municipal sector.

Second, and more important for our purposes, the government added the words "for cause" to the section on the job security for municipal officers. This protection was not in the 1965 bill, but it was

added to the 1966 legislation, Bill 21, at the request of some municipal councils, including Saint John and Fredericton. In justifying the first, unpassed *Municipalities Act* of 1965 (Bill 116), the minister of municipal affairs, Norbert Thériault (1062), noted the protections against dismissal are "found in some of our present legislation," though he showed no awareness of the absence of "cause" in Bill 116 and the fact that there were then numerous precedents for this greater protection. In its January 1966 submission on Bill 116 to the legislature's newly created Committee on Law Amendments, the city of Saint John argued that the proposed sections 77–89 did not adequately define appointment and termination processes. "Person [sic] appointed to hold public office under a municipal council should be afforded some means of protection with regard to arbitrary dismissal. In other words, there should be some provision for a hearing on the part of a person whose appointment as an officer is terminated for undeclared reasons" (13). In the same month, the city of Fredericton also commented on this issue, recommending that the words "for cause" be added after the word "dismissal," based on the wording in the Fredericton City Charter (10–11). In reporting to the legislature, the Committee on Law Amendments had little to say about the new section in Bill 21, except to raise an additional issue that "there was some objection to dismissal even by 2/3 majority" (90–91), implying that some thought the percentage vote should be higher. The Progressive Conservative (1006–7) opposition, which opposed the bill in both versions, focused chiefly on the elimination of elected self-government in rural New Brunswick, an issue that has become salient once again in the province. This protection against arbitrary dismissal is still intact in New Brunswick law.

One additional question to address is whether this extraordinary employment protection has a future in the province. To be sure, in some other provinces such as Nova Scotia, this protection has been eroded. Over the last twenty years there has been discussion of this issue in New Brunswick, under the guise of revision of the province's *Municipalities Act.* There is a body of opinion that opposes continuing this employment tenure, but the battle appears to have been won by those who support retaining it. In 1995, the Frank McKenna government promised a review of the province's Municipalities *Act*, and to that end the Municipalities Act Review Advisory Committee (MARC) was struck, representing provincial civil servants, the three municipal associations, and municipal staff. By 1997 they completed their work and made 234 recommendations. Among these was a section on suspension and dismissal of municipal officers (MARC 35–37). This nine-person committee advocated a weakening of the employment protection of municipal officers. They recommended (#80) that only the clerk, treasurer, and CAO (if applicable) have statutory protection; that council can dismiss for cause with a bare majority of votes (#81); that council can dismiss without cause (but offering notice or payment in lieu of notice) with a two-thirds majority (#82); that council can suspend with pay based on a majority vote (#83); that council can appoint an officer on a contract basis, and effectively avoid the tenure issue (#84); and that there be grandparent rights for those who currently hold the protections of the 1966 *Act.*

This was not the final word. The provincial government then created a review panel to look again at this issue, and in 2002 their work was reviewed by senior staff in the provincial Department of Environment and Local Government (ELG), as it was then called. Both the review panel and ELG staff opposed watering down this employment protection. They took the position that the full-time solicitor or director of the municipal legal department should have the same protection as the clerk, treasurer, and CAO. While they accepted that councils should be able to appoint people on a contract basis, they also argued that having "just cause" for dismissal should also be a requirement, as should a two-thirds voting requirement. They even advocated the two-thirds threshold for a council to fire second-tier officials, such as the engineer, building inspector, planner, etc. (although they did not consider that under the city

manager system, the CAO would be responsible for dismissing these officials), and that appropriate notice periods and compensation be written into the law (New Brunswick ELG 21–22). Given these more recent developments, municipal officer tenure protection is likely to be a fact of life in New Brunswick for some time to come.

How have the courts treated this employment protection? Conflict in the courts over the dismissal of municipal officers is not very common for numerous reasons. When a council finds itself in irreconcilable conflict with its CAO, clerk, or treasurer, for whatever reason, its most likely course of action is to offer the individual a "package" as an incentive for him or her to resign, to go quietly (Richard 1). Sometimes a dismissed individual will initiate a lawsuit and then settle with the municipality. Another possibility is that the official resigns, because they do not feel they can continue, or perhaps because of embarrassment over their substandard performance. The resignation in the year 2000 of Sandra Ryall, Quispamsis, NB, treasurer, provides an example of this ("Council in Turmoil"). The rarest outcome is the occasion in which the issue goes to a public civil trial, in which an official seeks reinstatement or compensation, such as pay in lieu of notice, in a case where none was offered. These cases rarely go to trial because of the difficulty of proving cause in dismissing a municipal officer. These cases are often messy, because if the mayor and council have any skeletons in their closets, the dismissed officer is likely to know about them.

In this section, I discuss a past example of a case of successful dismissal of a municipal officer, *Boisvenue v. St. Stephen (Town)*, in which the courts found that the dismissal was with cause. The Boisvenue cases provide good examples of the level of misconduct required to dismiss a municipal clerk or treasurer for cause. I say "cases" because the plaintiff, Roch Boisvenue, sued the town of St. Stephen twice after he was fired by the town. The facts of the case, in brief, are as follows. Mr. Boisvenue was hired to act as town manager in 1981 by the town of St. Stephen, NB. After the 1986 municipal election, issues came to the attention of the new council that led them to call the RCMP. After an investigation, the RCMP said that charges were not justified. The council, late in 1986, fired the manager, by a greater-than-two-thirds margin, claiming cause. All of the parties accepted that Boisvenue enjoyed the protection against wrongful dismissal under the *Municipalities Act.* The plaintiff then sued the town for reinstatement on the grounds that the council was biased against him, that he had not been given an adequate hearing, and that the principles of natural justice had been violated. In his decision on this first case (*Boisvenue v. St. Stephen (Town)* 78 287 ff), issued on 19 March 1987, Mr. Justice Jones found against the plaintiff. Boisvenue then sued again, seeking compensation for dismissal without cause. Mr. Justice Higgins upheld the dismissal decision in the second trial, accepting that the council did have cause (*Boisvenue v. St. Stephen (Town)* 88 320 ff).

And what was the case against Boisvenue? The court summed up the claims, described as dishonesty and misconduct, under eight headings. Specifically, Mr. Boisvenue was alleged to have (1) made an over-budget and untendered purchase of a telecommunications system; (2) directed that a town-owned toilet and sink be installed in his home by a municipal employee; (3) directed that a municipal employee stain wooden decking and strip the finish on furniture at his home; (4) sexually harassed his secretary; (5) engaged in sexual relations with a female town employee on town premises; (6) misused a municipal credit card; (7) had negative interactions with the merchants at a local shopping mall; and (8) reacted badly when questioned or criticized in private by the council (*Boisvenue v. St. Stephen (Town)* 88 330). The court also noted that some years previously, Mr. Boisvenue had asked an external auditor to look at the town books, and that he had also written to the provincial minister of municipal affairs asking for an inquiry into irregularities in the conduct of the municipal council. In general, the court

found to its satisfaction that these incidents had happened, and that the council was justified in having lost confidence in the manager. The court also found that the town had fulfilled its "duty of fairness" to its former employee.

In recent work on the subject, former municipal manager Eric Mourant argues that this promise of job security is deceptive because, to the best of anyone's knowledge, no protected municipal officer has even been restored to their job in New Brunswick through the courts. He notes there are many reported and unreported cases in which dismissed municipal officers primarily sought monetary compensation. He advocates for some non-judicial process under administrative law and within the provincial government, drawing on Nova Scotian and Quebecois precedents, that would restore municipal officials to their jobs at a lower cost to both the plaintiff and the municipal defendant. One can sympathize with Mourant's argument, because it appears that although the employer must have cause to dismiss, the necessary council super-majority appears to be permitted to judge whether they have cause.

However, it may be fear of a judicial order to return a municipal officer to their job that provides municipal councils with an incentive to offer more generous monetary compensation to protected than non-protected positions. Perhaps no clearly wronged municipal officer has been returned to their job because these plaintiffs have accepted generous settlements instead of pressing their claim for reinstatement right to the end of a legal process. A production worker wrongly dismissed and covered by a collective agreement can be returned to work and this does not create any great hardship for senior management. This is also true of provincial or federal judges, who work independently of the government hierarchy. However, once a mayor and council has lost trust in a CAO, clerk, or treasurer, even if for illegitimate reasons, monetary compensation may be the most practical step to resolve the incompatibility. We also live in a world in which the status of the municipal sector is being revived, and it is now referred to as one of the "three orders of government" in Canada, and of course no premier or prime minister is legally bound by a higher law to live with a deputy minister or permanent head of the civil service. The special status of municipal officers may grate upon the mayors and councils of municipal governments. Clearly, this employment protection is largely honoured in New Brunswick municipalities, and in those cases where incentives "to move on" are provided to clerks, treasurers, and CAOs, it is reasonable to believe that this protection does at least provide employees in protected positions with greater compensation than those in non-protected positions.

Conclusion

I have addressed the origins and rationale for the extraordinary employment protection for municipal officers in New Brunswick. This protection first appeared in the 1950s, and was implemented province-wide in 1966. It appears to have been motivated by progressive-reform views of municipal government, which hold an ambiguous view of both unrestrained public opinion and elected officials. I also argue that these protections help us to understand the role of the treasurer, and especially the clerk; these positions have a role and status that is enhanced beyond that of the senior civil servant in the federal or provincial order of government. Provincial law compels municipal corporations to appoint at least one individual to administer the municipality, and gives this person protection from easy dismissal. This officer can be regarded as the "protector of the constitution," who ensures that the municipal government conforms to relevant laws and best practices. While we would not go so far as to claim that these positions are quasi-judicial in nature, they do have roles and levels of protection that are unusual in contemporary civil services. These are roles that do not exist in the provincial or federal governments

outside the judiciary or besides those individuals who play an autonomous role under administrative law, such as officers of the legislature or members of independent agencies, boards, or commissions.

As a policy taker, there are many federal, provincial, and municipal statutes by which municipalities must abide. The nature of the clerk/treasurer indicates that there are some decisions that should be insulated from popular pressures, and therefore should not be within the purview of the elected council. The person fulfilling the role of clerk is mandated to work very closely with the council and to be fully informed of the council's activities. The provincial government is ultimately responsible for its "creatures," the municipalities, and the clerk and treasurer can be seen as officials who must consider best practices and the larger interests of both the provincial government and the municipal taxpayers and citizens. Unlike their opposite numbers in Ottawa and the provincial capitals, who may hire their own people into senior management roles, municipal elected officials must work *with* their clerk, treasurer, and CAO, rather than *around* or *behind* them.

Endnotes

[1] Martin's work on the COR Party of New Brunswick shows the difficulty of trying to apply democratic-populist values to provincial and federal politics.

[2] The author is grateful to an anonymous peer reviewer for raising this point.

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