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Municipal Accountability and Transparency In The Wake Of Bill 8

Over the past decade the discourse around accountability and transparency has come to dominate many discussions about politics and public policy in Canada. For Ontario's municipal sector this discourse crystallized in 2014 into a piece of legislation now commonly referred to as 'Bill 8.' Passed into law in December of 2014, Bill 8 (the *Public Sector and MPP Accountability and Transparency Act*) is a wide-ranging piece of legislation impacting hundreds of organizations in the broader public sector.

Bill 8 expanded the jurisdiction of the Ontario Ombudsman to include municipalities, universities, school boards, and hospitals (commonly referred to as the MUSH sector).¹ As it was gradually implemented in late 2015 and early 2016, more than 500 public sector organizations came under the jurisdiction of the Ombudsman's Office for the first time, significantly altering the makeup of public sector oversight. Prior to its enactment, the Ombudsman's oversight (as delineated in the *Ombudsman Act, 1975*) was limited to provincial ministries, agencies, boards, corporations, commissioners and tribunals (Gilmour et al., 2016, 4).

For municipalities Bill 8 created broad provincial oversight over matters that previously were strictly within the realm of municipal affairs (Mascarin and Dean, 2015, 8). It is the latest in a growing accountability and transparency regime that already includes provincial oversight, reporting, and statutory requirements covering everything from financial management to conflict of interest, and local elections (Cote and Fenn, 2014, 5). Local governments in Ontario greeted the bill with a mix of interest and suspicion. While some municipal politicians and public servants were keen to build upon the strong reputation for accountability and transparency that already existed in many local communities, others were concerned the bill was not appropriately

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designed to meet its objectives.

The full bill contains 11 schedules, though only numbers 6 and 9 apply to municipalities. Schedule 6 act amended MFIPPA to increase the level of responsibility that heads of municipal organizations bear for ensuring the retention of records. Crucially, schedule 9 gave the Ontario Ombudsman the authority to investigate complaints about Ontario's municipalities, including municipal councils, local boards, and municipally-controlled corporations (with some limited exceptions). The Ombudsman became the default ombudsman in municipalities without their own, and gained final oversight authority over all complaints, even those made in communities with a local ombudsman. The Ombudsman's office also gained the authority to conduct "systemic" investigations, similar to those that already happen at the provincial level.

This policy brief explores how policymakers and public servants in Ontario's municipal sector are reacting to Bill 8, relying on data from a survey of municipal CAOs and City Managers.² It offers a brief glimpse of the measures local governments are taking several months into the implementation of this new regime for accountability and transparency, and outlines some of their concerns.

The first section will briefly outline the context in which Bill 8 was proposed, passed, and proclaimed. It will argue that while Bill 8 significantly expanded provincial oversight of the municipal sector, it was not the first time the province imposed new requirements for municipal accountability in response to a high-profile scandal. Prior to Bill 8, the province amended the *Municipal Act* to require municipalities to introduce a variety of mandatory and voluntary policies and procedures designed to increase accountability and transparency. Similarly, these measures were largely the result of perceptions of abuse, rather than an evidence-based assessment of the state of municipal accountability.

The second section will explore the operational and policy decisions municipalities have made since the proclamation of Bill 8. Several months into its implementation the data indicates that the municipal response to Bill 8 is both fragmented and evolving. While some municipalities implemented new policies or procedures, a majority are still determining the best approach for their community.

When Bill 130 was passed there was a general feeling that some of the mandatory provisions were redundant, and that the bill itself was an overreaction to high-profile wrongdoing that only implicated a few “bad apples.”

Limitations

The survey results used for this analysis include responses from a broad representation of Ontario municipalities, including small, medium and large municipalities, single, upper and lower tier, and those located in all regions of the province. However, the results should be handled with caution and care as responses were received from only 143 municipalities. While the findings in this policy brief speak to the situation in many of the province’s municipalities, the survey results may not reflect the experiences of every local government in Ontario.

Municipal Accountability And Transparency Before Bill 8

Bill 8 was not the first time that the province of Ontario used its broad legislative authority to impose new requirements for municipal accountability and transparency. In 2006, the government introduced Bill 130, which amended the *Municipal Act*, requiring municipalities to pass accountability and transparency regimes with a mix of mandatory and voluntary elements. Bill 130 was motivated by several high-profile scandals in the early 2000s and a perception that local governments in Ontario were unaccountable (Alcantara et al., 2012, 113 & 118). Under Bill 130, Ontario municipalities were required to create or update formal policies to ensure that they met provincial standards, and to create a process for investigating closed (in-camera) sessions of council. Municipalities were also given the option to introduce new accountability and transparency measures and officers, including codes of conduct and integrity commissioners, auditors-general, or lobbyist registrars (Alcantara et al., 2012, 113).

While it is not possible to gain a complete or comprehensive understanding of compliance with Bill 130, Alcantara et al. conducted a study in 2012 of how 12 municipal governments in Ontario responded to both the mandatory and voluntary legislative requirements outlined in the act. When Bill 130 was passed there was a general feeling that some of the mandatory provisions were redundant, and that the bill itself was an overreaction to high-profile wrongdoing that only implicated a few “bad apples” (Alcantara et al., 2012, 126-7). The study found that most, but not all municipalities chose to meet the minimum requirements outlined in the legislation, while the optional measures were adopted unevenly (Alcantara et al., 2012, 114). Some municipalities introduced new codes of conduct, while others hired integrity commissioners (Alcantara et al., 2012, 125-6).

Municipalities are responsible for a substantial range of public services, but will never become responsive, modern, fiscally sustainable agents of good governance if they are motivated solely by compliance and rote functionality.

Most of the municipalities included in Alcantara's et al.'s study appointed a closed meeting investigator, using two dominant strategies. A large group chose to use the Ontario Ombudsman as their closed-meeting investigator, because they saw his office as having the resources and expertise to do the job well. Closed-meeting investigations by the Ombudsman were also free, and made sense for municipalities who rarely or never needed a meetings investigator, and were reluctant to pay for the service (Alcantara et al., 2012, 124).

The majority of municipalities that didn't use the Ontario Ombudsman chose to use AMO's Local Authority Services (LAS). LAS subcontracted the law firm Amberley Gavel Ltd. to serve as its closed-meeting investigator. These municipalities paid LAS a retainer of approximately \$300/year and an hourly fee of \$156.25 plus reasonable expenses in the case of an investigation. Municipalities chose LAS because it was popular within the sector, and viewed as competent, transparent, and relatively cost-effective. Many councils also liked LAS because of its connection to AMO and willingness to provide education and training for councilors and staff (Alcantara et al., 2012, 124-5).

Alcantara et al.'s study suggests that municipal governments tend to respond to mandatory policy change from the province by adopting the minimum requirements. In terms of Bill 130, while a number of municipal officials were interested in pursuing the optional voluntary measures, most felt that there wasn't sufficient public interest, or adequate resources to do so (Alcantara et al., 2012, 133).

This study also highlights a broader tension within the provincial-municipal relationship, inherent to every discussion of municipal accountability. The provincial view, articulated first in Bill 130 and then again in Bill 8, that municipalities are not sufficiently accountable has always been constructed within the context of the province's rigid regulatory framework. Yet there is a growing body of literature asserting the importance of autonomous local governments for creating prosperous, healthy, and vibrant communities. Despite this growing consensus, the political reaction in Ontario has always been to treat local governments as wards of the province. However, the province's prescriptive approach to local government policy disincentivizes local autonomy and creates an unnecessary and unhealthy dependence. Municipalities are responsible for a substantial range of public services, but will never become responsive, modern, fiscally sustainable agents of good governance if they are motivated solely by compliance and rote functionality. In order to become stronger, more accountable and autonomous actors within the federation, local governments need to be given greater leeway to make decisions, and a more flexible regulatory environment to operate in (Alcantara et al., 2012, 133).

Despite portrayals in the media, a reasonable case can be made that local governments are the most transparent and open level of government in Canada.

From Bill 130 to Bill 8

As with its predecessor, Bill 8 was precipitated by a perception that municipalities across the province are unaccountable and lacking transparency. However, as with Bill 130, this perception was the result of several high-profile scandals rather than any evidence demonstrating a systemic problem. Former Ontario Ombudsman, André Marin, was in many ways responsible for fomenting the perception of local governments as bastions of corruption, using prominent scandals to tar the entire sector as rotten. For instance, in 2014 a *Globe and Mail* article quoted Marin as saying “To me, some municipalities are like gangrenous limbs,” and that municipal mayors and councilors “make provincial politicians look like choirboys” (Bascaramurty, 2014). He also referenced “a putrefactive decay in democracy at the municipal government level,” where “hanky-panky continues to take place in the backrooms, and councils are continuing to cling to cloak-and-dagger old-school boardroom politics” (Brennan, 2013). The Ombudsman’s insistence on systemic municipal corruption (frequently presented without substantiating evidence), as well as the incendiary language he frequently used to express it—especially on social media—created discernable tension between his office and the municipal sector, and likely exacerbated municipal consternation around Bill 8.

Yet, despite portrayals in the media, a reasonable case can be made that local governments are the most transparent and open level of government in Canada. The *Municipal Act* requires municipal council meetings to be open to the public and only permits meetings held behind closed doors in limited circumstances. Unlike municipalities, parliament and provincial legislatures maintain their right to meet in secret and do so frequently (Sancton, 2015, 428). Most decisions made by provinces and the federal government happen in cabinet or caucus meetings, which are not open to the public. A municipality attempting to hold similar meetings could be found in contempt of the *Municipal Act*. This is not to suggest that unethical behavior does not take place in some municipalities. However, far too often provincial decisions about municipal governance are made in response to headlines instead of empirical evidence.

In many ways, the current thrust for strong accountability and transparency reflects a recent resurgence of populist politics and declining trust and confidence in government. In Canada, trust in government has fallen from approximately 60 percent in the early 1970s to 24 percent in 2013; according to research done by Canadian polling firm EKOS (Graves, 2014).⁴ Similar work done by the Organization for Economic Cooperation and Development

FIGURE 1:
Do you and your staff and council feel adequately prepared for your new Bill 8 requirements, or do you feel like you need further training?

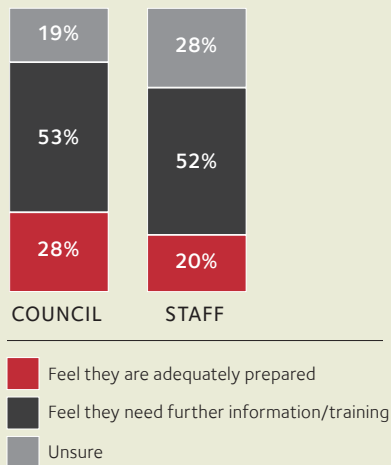
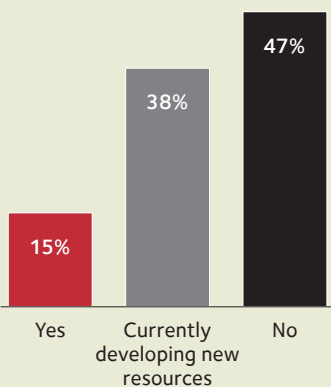


FIGURE 2:
Have you, or are you planning to create any new resources for citizens about Bill 8’s accountability requirements?



Source: AMCTO/AMO Bill 8 Survey, January 2016, n = 143

(OECD) found that between 2006-08 and 2011-12, confidence in government fell by at least six percentage points in 18 of 34 OECD member states (Silver, 2013). By 2012, an average of only four of every 10 people in OECD member countries expressed confidence in their government (OECD, 2012, 20). Populist politicians, in Canada and abroad, have capitalized on declining confidence in government to carve out new constituencies and build support, often relying on accusations of government corruption or ineptitude. If the role of watchdogs and accountability officers is to restore confidence in our institutions of governance, one can reasonably question how successful they have been. Certainly, the bombastic and scattershot rhetoric of the former Ontario Ombudsman has done more harm than good.

Municipal Accountability And Transparency After Bill 8

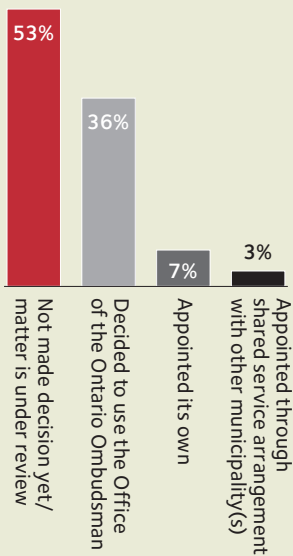
Data collected by AMCTO and AMO indicates that the municipal response to Bill 8 is both highly fragmented and in a state of transition. Following the passage of the bill, some municipalities implemented new policies or procedures. A majority, however, are still determining the best approach for their community. This section will explore the operation and policy decisions municipalities have made several months into the implementation of this legislation.

The Transition Period

From the outset, Bill 8 was the source of apprehension for municipal officials. Though the Ombudsman’s office recently acknowledged that it needs to be more proactive in reaching out to stakeholders, the transition period will likely continue to be defined by uncertainty (Gilmour et al., 2016, 7).

Bill 8 gives the Ombudsman broad authority and oversight over municipal governments. Prior to its implementation, some municipalities worried that the Ombudsman’s office would not have the ability or expertise to investigate the municipal sector. Bill 8 represented a significant expansion in the powers, responsibility and scope for the Ombudsman. His office gained responsibility for overseeing 547 new organizations that work on complicated issues, including education, social services, transit, public works, and housing (Gilmour et al., 2016, 7). To accommodate its new responsibility the Ombudsman’s Office added approximately 50 full-time equivalent (FTE) positions, received \$7.2 million in additional budget (QP Briefing, 2015), and indicated that it plans to invest significantly in new training. It is intentionally

FIGURE 3:
**Use of Municipal
 Ombudsman vs. Use of
 Ontario Ombudsman**



Source: AMCTO/AMO Bill 8 Survey, January 2016, n = 143

recruiting staff with expertise in its new areas of oversight, and engaging trainers with similar expertise (Gilmour et al., 2016, 7). However, some municipalities are still concerned that the office will struggle to overcome a lack of familiarity with the municipal operating environment, and especially the difference between parliamentary oversight and council governance, which is often misunderstood by senior orders of government.

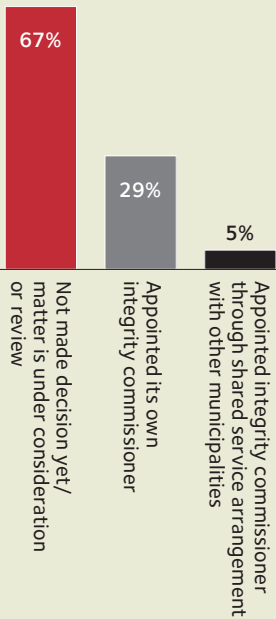
The municipal sector itself, is not prepared to comply with this new legislation. As seen in Figure 1, more than 50 percent of municipal public servants do not feel prepared for Bill 8, while 20 percent are unsure and only 28 percent feel that they are prepared. When asked whether their members of council feel prepared, respondents indicated even less confidence, suggesting that only 19 percent of their councils feel prepared, while 53 percent feel unprepared. Only 15 percent of municipalities have created new resources for their citizens (figure 2) to help educate them about how Bill 8 will change their municipality, though 38 percent say that they are planning to create some. Approximately 47 percent of municipalities have no plans to develop new resources.

Double Oversight

Double oversight is a frequently cited concern with Bill 8. In 2006 Bill 130 amended the *Municipal Act* to allow municipalities to appoint their own accountability officers, including ombudsmen, whose powers largely mirror those of the Ontario Ombudsman. As a result, the provisions of Bill 8 that set out the Ombudsman's authority are perceived by some as redundant. Some municipal officials are concerned that Bill 8 will diminish the importance or effectiveness of their local accountability officers (Gilmour et al., 2016, 7). AMO, for instance, argued during the debate on Bill 8 that the act could confuse the public, or lead to inefficiency, fragmentation, added costs, and even poor outcomes (AMO, 2014, 4).

As seen in Figures 3 and 4, 36 percent of municipalities plan to use the Ontario Ombudsman, while only seven percent have appointed their own, and three percent have appointed a municipal ombudsman through a shared service arrangement. Similarly, 29 percent of municipalities appointed their own integrity commissioner and 5 percent have appointed an integrity commissioner through a shared service arrangement with another municipality. However, as 53 percent of municipalities have not yet made a decision about an Ombudsman, and 67 percent have not made a decision about an Integrity Commissioner, it is still too early to determine whether or not double oversight will be a problem. Rather, the potential for duplication,

FIGURE 4:
Use of Integrity Commissioners



Source: AMCTO/AMO Bill 8 Survey,
January 2016, n = 143

confusion, and inefficiency will be tested in the coming months as more and more municipalities start appointing their own accountability officers and the Ontario Ombudsman's office begins discharging its new Bill 8 authority.

The Ombudsman's office says that its approach to Bill 8 will ensure that they are adding value and not simply replicating the work already done by municipalities. Specifically, they say that their investigations will be guided by the following four principles: (1) they will act as a last resort, referring people to local complaint and accountability mechanisms, where they exist; (2) they will work to resolve complaints about municipalities wherever possible; (3) their services will be efficient, confidential and free of charge, and; (4) they will track trends in complaints and conduct investigations into systemic issues across the sector (Ontario Ombudsman, 2015, 7).

Municipalities that appoint local accountability officers do so because they believe that they are better able to focus on and address issues within a local community. The process, from direction to council approval, can take months, with few precedents for officials to draw on for determining the necessary skill sets, performance standards, and operating procedures. It is difficult to determine how much to budget, how to educate staff and council, and communities that appoint joint accountability officers face the additional challenge of coordination. Nevertheless, municipal officials argue that local accountability officers are able to develop a better understanding of the local operating environment, and the context in which municipalities govern.

While the Ombudsman's office has been clear about its intended approach to working with municipalities, a successful and harmonious relationship will require proactive engagement with the municipal sector to ensure coordination and determine an appropriate division of labour. In particular, the Ombudsman will need to work closely with those municipalities who have or are appointing their own accountability officers to ensure that Bill 8 is leading to positive outcomes.

However, there is also broader concern about double oversight and duplication. The more that the lines of accountability become blurred, fragmented, or confused, the more difficult it will become to ensure that accountability officers themselves remain accountable. The role of an auditor general, integrity commissioner, or ombudsman is to serve as a check on the exercise of power, not to become an unaccountable centre of power in his or her own right. The lack of scrutiny that accountability officers face in the media, and the push for greater power and resources for these offices risks skewing this balance.

FIGURE 5:
Do you have a citizen complaint tracking process that permits the CAO (or City Manager) to monitor and help document staff actions to try to resolve a complaint?

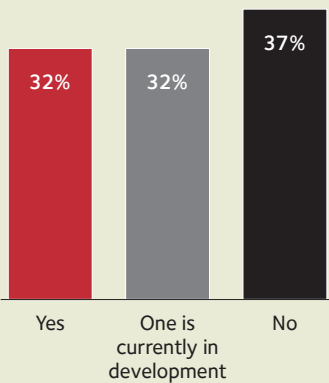
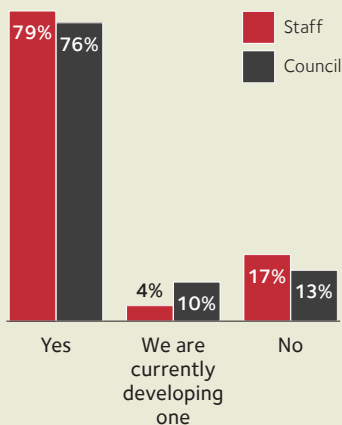


FIGURE 6:
Does your municipality have a Code of Conduct?



Source: AMCTO/AMO Bill 8 Survey, January 2016, n = 143

Vexatious Complaints

Many municipal stakeholders are also concerned that Bill 8 will give greater weight and credibility to frivolous or vexatious complaints. Typically, when a municipality receives a citizen complaint, that municipality reviews the grievance and determines if it was made with merit. If it was, the municipality is responsible for resolving the underlying issue, and making necessary changes to its processes and procedures to prevent a similar issue in the future. If it was not, the complaint is dismissed.

The concern around Bill 8 is that in this situation where a complaint is reviewed and deemed to be frivolous or vexatious, the complaint could then be taken to the Ontario Ombudsman and given new life. Dealing with such complaints can be a drain on time and resources. Politicians and public servants working in the municipal sector also worry that complaints with no foundation could be elevated beyond their merit, causing serious reputational harm to either the municipality or the individual.

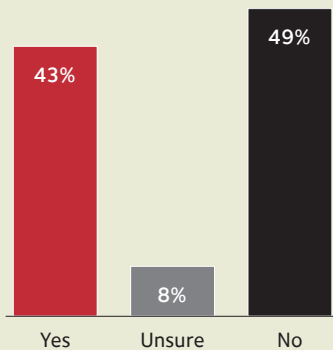
One way for municipalities to demonstrate that they are dealing with citizen complaints is to set-up a formal tracking process. Such processes are considered a best practice and recommended by the Ombudsman. According to AMCTO/AMO survey data, however, only 32 percent of municipalities use a formal system for tracking citizen complaints, while 37 percent do not. Some 32 percent of municipalities are currently in the process of developing one.

The Ombudsman’s office has attempted to dispel concerns about vexatious complaints. Since Bill 8 entered into force, the Ombudsman’s office has emphasized that their focus will be on common or systemic complaints, and that the *Ombudsman Act* gives them the discretion not to investigate complaints in certain circumstances (Gilmour et al., 2016, 7). Since his appointment the new Ombudsman Paul Dubé has been relatively transparent about how his office exercises its Bill 8 authority. Representatives from the Ombudsman’s office, as well as the Ombudsman himself, have travelled to local communities and municipal conferences, and every Friday the Ombudsman tweets information about the complaints he has received.

Codes of Conduct

An additional way of protecting municipal councilors and public servants from vexatious complaints is by implementing a code of conduct for councilors and staff. Codes of Conduct have been a central feature of municipal accountability for years. Codes address a broad range of issues, including how to handle gifts and benefits, proper use of municipal resources, proper conduct at council

FIGURE 7:
Are you planning to review your existing codes of conduct in 2016?



Source: AMCTO/AMO Bill 8 Survey, January 2016, n = 143

meetings and how to behave when acting on behalf of the municipality. Across the province, municipal codes range from general principles to prescriptive lists of rules and generally, each municipality develops a code(s) based on the unique needs of their community.

AMCTO's submission on the *Municipal Act* included a recommendation that codes of conduct become mandatory for all municipalities. Most municipalities already have codes in place, including 79 percent for staff and 76 percent for council, as seen in Figure 6. Just 17 percent of municipalities do not have a code for staff and 13 percent do not have a code of conduct for council. As seen in Figure 7, 43 percent of all municipalities who have codes of conduct are planning to review them in 2016. 49 percent of municipalities are not planning to review their existing codes in 2016, with many indicating that their code was recently updated or introduced within the past two years.

Open Meetings and Municipal Autonomy

Perhaps the biggest area of concern with Bill 8 is its potential impact on the autonomy of democratically elected municipal councils, and their ability to make decisions on behalf of their constituents. Proposals to bring open meeting legislation to Ontario began to appear in the early 2000s, when Ontario's Information and Privacy Commissioner released a paper entitled "Making Municipal Government More Accountable: The Need for an Open Meetings Law in Ontario" (Sancton, 2015, 435). All provinces have some provisions for open meetings, though practices vary across the country. Aside from Ontario, only New Brunswick, Nova Scotia, Manitoba and British Columbia have given their ombudsman oversight over municipalities, and only in BC does the ombudsman have jurisdiction over municipal meetings (Sancton, 2015, 427).

Closed meeting investigations have become a lightning rod in discussions of municipal transparency and accountability. At the heart of the issue is the ambiguity that surrounds the current open meeting provisions in the *Municipal Act*, and especially the definition of a meeting. Calls for a clearer definition of what constitutes a 'meeting' in the municipal context have grown within the past five years (For example, see Sancton, 2015). The Ontario Ombudsman's office, in particular, has taken an expansive view of what constitutes a meeting. In fact, much of the apprehension in the municipal sector is a result of the fact that most municipalities have had limited exposure to the Ombudsman's office, and their understanding was based largely on media accounts of high-profile investigations, which gave many a sense that these investigations would be adversarial in nature

The broader issue with closed-meeting investigations, however, is how they relate to municipal autonomy and the ability of a municipal council, which is duly elected to represent the view and values of its constituents, to govern.

(Gilmour et al., 2016, 7).

The broader issue with closed-meeting investigations, however, is how they relate to municipal autonomy and the ability of a municipal council, which is duly elected to represent the views and values of its constituents, to govern. When the *Municipal Act* passed in 2001, it was championed as a victory for the independence and autonomy of Ontario's municipalities. However, in the same way some interpreted Bill 8 as a "pronounced step backward" (Mascarin, 2015). Some viewed the provisions in Bill 8, especially the amendments to section 14 of the *Ombudsman's Act*, as potentially giving the Ombudsman (an appointed officer of the legislature) the power to "usurp" the role of a municipal appointed local accountability officer, who has been appointed by a democratically elected local council. During the legislature's review of the bill, AMO warned that the act might be interpreted as permitting the Ontario Ombudsman to investigate the legislative deliberations of a municipal council (AMO, 2014, 2).

Conclusion

In February of 2016 the Government of Ontario appointed a new Ombudsman. Despite the frenzied conversation about his office, the Ombudsman is still a virtual unknown in the municipal world. As the survey results also demonstrate, there remains a great deal of uncertainty and anxiety about Bill 8, and the role the Ombudsman will play in municipal government. As the new Ombudsman takes up his office there is an opportunity for him to reset the relationship between his office and the municipal sector. His predecessor's public-profile undermined and alienated municipalities, and fostered skepticism of his office. Moving forward the key to reinventing the relationship between the municipal sector and the Ontario Ombudsman will be to cultivate a constructive dialogue, and spirit of partnership. The first few months of his tenure have shown promising signs, and it appears that the Ombudsman's office has set a new tone with the departure of Mr. Marin. Nevertheless, repairing the Ombudsman's relationship with municipalities will be an uphill battle.

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NOTES

1. Though a new Patient Ombudsman will retain authority for investigating hospitals, the Ombudsman is empowered to investigate and resolve complaints about municipalities, universities and school boards. The office of the Provincial Advocate for Children and Youth was given expanded powers to investigate children's aid societies, and oversight of police services was not altered.
2. The survey, which AMCTO and the Association of Municipalities Ontario (AMO) jointly conducted in January of 2016, was sent to CAOs/City Managers in every Ontario municipality. Full survey results are available on the AMCTO website.
3. There are 444 municipalities in Ontario.
4. Ekos' most recent assessment of public trust in the federal government, conducting in April 2016, showed a spike in support. In the Ekos poll 44 percent of respondents said that they "almost always" or "most of the time" trust the new Trudeau government in Ottawa to do what is right, a marked increase from the 30 percent of respondents who felt that same way before the election (Connolly, 2016). However, this spike comes within the context of a consistent downward trend in support since the 1990s, so care should be taken in generalizing the findings. Until more time passes and more research is done to demonstrate a noticeable trend, this result can reasonably be interpreted as the result of an election that was fought along the lines of "change" and a new regime that has begun its tenure governing in a manner that appears dramatically different from its predecessor.



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AMCTO's Policy and Management Briefs are designed to fill a gap in the discussion of local government in Ontario, by fostering dialoguing and promoting rigorous analysis of important topics facing municipalities across the province.

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