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# Freedom of the City: Canadian Cities and the Quest for Governmental Status

Ron Levi

Mariana Valverde

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# Freedom of the City: Canadian Cities and the Quest for Governmental Status


## Abstract

Until recently, Canadian cities were limited to the legal powers explicitly prescribed by provinces (the U.S.-based Dillon's Rule). Despite much talk about a "new deal for cities," recent changes to municipal legislation do little to empower municipalities to define and govern local problems, although courts appear somewhat willing to expand the scope of cities' authority. Through two case studies involving the City of Toronto, we demonstrate that even after the overhaul of provincial municipal acts, cities still lack the necessary legal tools and the legal flexibility to respond to pressing urban needs.



## Keywords

Municipal government; Canada; Toronto



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# FREEDOM OF THE CITY: CANADIAN CITIES AND THE QUEST FOR GOVERNMENTAL STATUS©

RON LEVI* & MARIANA VALVERDE**

Until recently, Canadian cities were limited to the legal powers explicitly prescribed by provinces (the U.S.-based Dillon's Rule). Despite much talk about a "new deal for cities," recent changes to municipal legislation do little to empower municipalities to define and govern local problems, although courts appear somewhat willing to expand the scope of cities' authority. Through two case studies involving the City of Toronto, we demonstrate that even after the overhaul of provincial municipal acts, cities still lack the necessary legal tools and the legal flexibility to respond to pressing urban needs.

Jusque tout récemment, les villes canadiennes ne détenaient que les pouvoirs légaux que prescrivaient explicitement les provinces (la règle Dillon américaine). Malgré beaucoup de débats sur une nouvelle donne pour les villes, les récents changements de la législation municipale en font peu pour habiliter les municipalités à définir et à administrer les problèmes locaux, même si les tribunaux semblent quelque peu disposés à étendre l'envergure de l'autorité dont disposent les villes. Au travers de deux études de cas impliquant la ville de Toronto, nous démontrons que même après la refonte des lois sur les municipalités, il manque encore aux villes les outils juridiques nécessaires, ainsi que la souplesse juridique qui leur permettra de réagir aux besoins urbains pressants.

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* Assistant Professor of Criminology, University of Toronto.

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## I. INTRODUCTION

"City air," according to a medieval principle, "makes one free."[1] And, in the legal context of Western medieval cities, this was certainly the case: serfs who escaped to cities were deemed, by living within city walls for specified periods of time, to have acquired their freedom.[2] This link between cities and personal freedom continues to enjoy cultural currency and is at the core of Gerald Frug's celebrated analysis in *City Making*.[3] In a historical overview of city governance, from the medieval European town to nineteenth-century U.S. cities, Frug stresses the link between city autonomy and the communal interests and freedoms of residents.[4] But current legal governance affords U.S. cities limited

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[1] For more on this principle of *Stadtluft Macht Frei*, see generally "City" *Encyclopædia Britannica* 2006, online: Encyclopædia Britannica Online <http://0-www.search.eb.com.library.uor.edu:80/eb/article-61361>; Fritz Rörig, *The Medieval Town* (Berkeley: University of California Press, 1967) at 27; John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 Int'l Organization 139 at 155; and Max Weber, *The City*, ed. and trans. by Don Martindale & Gertrud Neuwirth (Glencoe, IL: Free Press, 1958).

[2] Weber, *ibid.* at 94, where Weber discusses the principle of "City air makes man free," in which "the lord of a slave or bondsman lost the right to subordinate him to his power."

[3] Gerald E. Frug, *City Making: Building Communities Without Building Walls* (Princeton: Princeton University Press, 1999).

[4] *Ibid.* at 26-53.

political power, a model that Frug laments, along with the lack of regional cooperation it fosters among cities and their residents.

In the Canadian context, struggles over the legal powers of cities are daily political issues. With Canadian cities enjoying even less freedom than the U.S. cities that Frug studies, it is not surprising that the scope of city authority is central to the domestic political agenda. What is surprising, however, is the dearth of close empirical examination of the current legal architecture of city governance. With ongoing disputes over the legal tools available to Canadian cities—and a potential "new deal for cities" that often emerges on the political horizon—such an investigation is particularly timely.

Rather than focus on normative questions of city autonomy and citizen freedom, we adopt a socio-legal approach, which documents the current political and legal configurations of municipal governance. We aim to investigate city freedom from a perspective that is often taken up in media reports, but generally ignored in academic research on municipal law—namely, the extent to which available legal tools allow Canadian cities to be responsive to current social problems. Whether or not city air makes us free, we investigate the contests over governmental autonomy that are waged in and through municipal law. We do so through an analysis of the legal inheritance of Canadian cities, the current legal regime, and the ongoing demands for legal change that are already being generated within the Canadian urban landscape.

This article proceeds in six parts. In Part II, we briefly outline the current political and legal context of Canadian municipal governance, and introduce the "new deal for cities," which has occupied the urban agenda over the past decade. In Parts III and IV, we closely analyze the doctrinal and statutory backdrop against which Canadian municipal law is set. We trace the status of Canadian cities as mere "creatures of the provinces" and discuss contemporary efforts by courts and legislatures to reconsider the scope of cities' authority in governing urban affairs. We then explore the tensions surrounding municipal autonomy through two case studies—the need for housing shelters to address homelessness, and the ambition of Canadian cities to compete with "global cities"—that reflect the array of political issues that test the legal powers of cities in everyday political and legal venues. Finally, we outline the potential benefits and pitfalls of current and proposed models for Canadian legal city governance. Rather than propose normative solutions based on models of individual or municipal autonomy, we adopt a genealogical stance in order to trace the debates

taking place and the legal architecture in which they are occurring.[5] This approach highlights the twists, turns, and contestations that are already determining the extent of city freedom in our time.

## II. THE SHORT-LIVED "NEW DEAL FOR CITIES": THE CURRENT CRISIS IN URBAN GOVERNANCE

For about ten years there has been significant political agitation around urban issues; for example, the forced merger of municipal governments in Toronto, Montreal, and Halifax has led to unprecedented public interest in urban governance.[6] By the 2004 federal election campaign, this interest led to the adoption of a "new deal for cities." The concerns underwriting this political agitation had been presaged in an earlier report to the Federation of Canadian Municipalities (FCM):

> The powers and resources of municipalities derive from the 1849 *Baldwin Act* of Canada and the distribution of powers under the *Constitution Act, 1867*. Municipal functions, responsibilities and duties have changed dramatically since 1849 and 1867. There are a number of trends which are giving rise to the need for more municipal autonomy, powers and resources. These trends include federal and provincial disengagement from services (described as decentralization, offloading, and abdication of responsibility); provincial grant reductions; rapid growth rates in some urban centres; the need for infrastructure upgrades; and demands and needs for new services that were not contemplated in the mid 1800s.[7]

When this report was written in 2001, the federal government had largely ignored the new urban poverty and associated governance problems by considering them as provincial issues or charity matters. By 2003, however, the political winds were changing, as demonstrated by a

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[5] On the insights that can be garnered through such an analysis, and the relationship of genealogical analyses of law to potential law reform efforts, see Mariana Valverde *et al.*, *Democracy in Governance: A Socio-Legal Framework* (Ottawa: Law Commission of Canada, 1999).

[6] Andrew Sancton, "Why Municipal Amalgamations? Halifax, Toronto, Montreal" (Paper prepared for a conference on "Municipal-Provincial-Federal Relations in Canada," Institute of Intergovernmental Relations, Queen's University, 9-10 May 2003), online: Institute of Intergovernmental Relations <http://www.iigr.ca/conferences/archive/pdfs4/Sancton.pdf>.

[7] Donald Lidstone, "Municipal Autonomy" (Report presented to the Communities in an Urban Century Symposium, 20 October 2001) [unpublished] as cited in Federation of Canadian Municipalities (FCM), "Communities in an Urban Century: Symposium Report" (January 2002) at 4 [FCM, "Urban Century"].

task force headed by Toronto MP Judy Sgro.[8] The task force's report was hailed as a belated recognition of the crises plaguing urban communities. These crises included a lack of affordable housing due to the cessation of federal housing programs, increases in homelessness and other manifestations of poverty due to stringent welfare rules and cuts in welfare rates, and automobile congestion and transit problems caused by provincial cutbacks and downloading. Fundamentally, the Sgro report recognized that cities lacked the necessary tools to address these crises.[9]

While it became clear that cities could soon expect increased funding, it was equally evident that they would only obtain lukewarm support for their parallel campaign to be recognized as a level of government. John Godfrey, as the "Parliamentary Secretary to the Prime Minister with a special emphasis on cities," gave a speech to the big city mayors in which he compared the federal government's decision to take up the slogan "a new deal for cities" to Franklin Delano Roosevelt's New Deal. (Godfrey promised the bank presidents in the room that he would not imitate Roosevelt in closing the banks.)[10] Godfrey's only concrete offering, however, was a new cities secretariat within the Privy Council Office. In trying to persuade the mayors that Prime Minister Paul Martin supported the cities agenda, all Godfrey could muster was a rather slippery quote in which Martin had stated that "the cities agenda, the municipal agenda—both large and small—is at the heart of the federal government's priorities."[11]

Martin's substitution of "municipalities" for "cities" would presage further dilution of the cities agenda. Fiscal reform ensued, including an announcement that GST would no longer be charged on

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[8] Liberal Party of Canada, Prime Minister's Caucus Task Force on Urban Issues, *Canada's Urban Strategy: A Blueprint for Action* (Ottawa: Prime Minister's Task Force on Urban Issues, 2002) (Chair: Judy Sgro).

[9] See *e.g.* Canadian Institute of Planners, "Framework for an Urban Strategy for Canada" (Submission to the Prime Minister's Caucus Task Force on Urban Issues, 12 March 2002), online: Manitoba Professional Planners Institute <http://www.mppi.mb.ca/documents/CIP_urbantaskforce/framework.pdf#search=%22%22Framework%20for%20an%20Urban%20Strategy%20for%20Canada%22%22>; Denis Wong, *Cities at the Crossroads: Addressing Intergovernmental Structures for Western Canada's Cities* (Calgary: Canada West Foundation, 2002).

[10] John Godfrey, "A New Deal for Canadian Cities" (Speech presented to Big City Mayors Meeting, Toronto, 22 January 2004) [unpublished], online: localgovernment.ca <http://www.localgovernment.ca/show_libary.cfm?id=111>.

[11] *Ibid.*

municipal goods and services.[12] But the slow political progress was evident when it was announced that federal gas tax funds would be transferred to municipalities—despite being designed to fund mass transit in big cities, this reform was detached from the "city agenda."[13] In the federal government's new language, this was part of helping "communities," not cities as such. Canada's largest circulation daily newspaper responded that "cities need to see a truly 'new deal'":

> Martin has missed the point of a new deal for cities. He has adopted the language of new deal advocates but applies it to policies designed to benefit every community, no matter how small. True, villages and hamlets across the country, native reserves, and Prince Edward Island farmers have serious needs ... . Clearly they deserve federal funding to help themselves rebuild, but not under the auspices of a new deal for cities.[14]

This shift from "a new deal for cities" to "a new deal for communities" (also exemplified in the new title then given to John Godfrey, Minister of State for Infrastructure and Communities[15]) is regarded as unfortunate by urban activists.[16]

It is important to note that the federal reluctance to recognize the distinct problems of cities may, in turn, precipitate further political and legal difficulties for Canadian cities. At one level, these federal manoeuvres may lend new force to the long-standing reluctance of provinces to recognize the distinct situation of cities, a reluctance that is already resented in Ontario and other provinces.[17] But this federal shift away from the cities agenda may also encourage increased competition *amongst* Canadian cities. A notable example is the City of Toronto, which, as we discuss in Part III, below, is presently pursuing more flexible and powerful legal powers independently through the *City of*

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[12] *Debates of the Senate of Canada (Hansard)*, No. 141 (2 February 2004) (Rt. Hon. Adrienne Clarkson), online: Debates of the Senate (Hansard) <http://www.parl.gc.ca/37/3/parlbus/chambus/senate/deb-e/001db_2004-02-02-E.htm?Language=E&Parl=37&Ses=3>.

[13] *Ibid.*

[14] "Cities need to see a truly 'new deal'," Editorial, *Toronto Star* (4 January 2005) A14.

[15] P.C. 2004-844, C. Gaz. 2004.II.1182.

[16] See John Sewell, "Cities getting the rug pulled" *Eye Weekly* (1 April 2004), online: <http://www.eyeweekly.com/eye/issue/issue_04.01.0/city/citystate.php>; John Sewell, "Bulletin No. 45," (March 2004), online: localgovernment.ca <http://www.localgovernment.ca/show_bulletin.cfm?id=118>. Glen Murray argues that the federal plan will slow the decline of major centres, not end it. See Glen Murray, "How cities lost the 'New Deal'" *Toronto Star* (3 July 2005) A17.

[17] See *e.g.* Wong, *supra* note 9.

*Toronto Act*.[18] This independence may have unfortunate consequences for other Ontario cities that were hoping to derive legal and political benefits from a broad governmental initiative. In this way, the combined federal and provincial failure to recognize cities as legally, economically, and socially distinct from other municipalities may produce a handful of politically powerful cities who will receive a special legal deal from their provincial governments,[19] while others are consigned to the small-town category. In turn, municipalities as a group may find it increasingly difficult to press their case, either provincially or federally.[20]

## III. THE NEW MUNICIPAL LEGISLATION

### A. *Dillon's Rule and its Decline*

The "Dillon's Rule" doctrine of municipal government, which maintains that municipalities are merely the "creatures of the province,"[21] presents one of the most significant legal challenges for city reform. Although the origin of this rule is found in nineteenth-century U.S. law, it was most recently upheld by the 1993 decision of the Supreme Court of Canada in *R. v. Greenbaum*.[22] As we discuss in this Part, however, Dillon's Rule has been losing significant ground in Canadian courts ever since *Greenbaum*.

In *Greenbaum*, a Toronto sidewalk vendor successfully challenged a city bylaw that limited vending permits to businesses immediately abutting the sidewalk. Greenbaum argued that this bylaw

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[18] S.O. 1997, c. 2.

[19] Examples of this include Winnipeg and Vancouver. For more on the relationship between these cities and their provincial governments, see *e.g.* Chief Administrative Officer, City of Toronto, "The relationship of 5 Canadian cities and their provinces" (Report prepared by the Chief Administrative Officer, 5 September 2000, updated October 2001), online: Canada's Cities <http://www.canadascities.ca/caoreport_092000.htm>. For more on Winnipeg's "new deal" in particular, see John Sewell, "Bulletin No. 40," (October 2003), online: localgovernment.ca <http://www.localgovernment.ca/show_bulletin.cfm?id=103>.

[20] This is particularly the case outside of British Columbia, which in recent years has provided some flexibility for city-specific legislation through the *Community Charter*, S.B.C. 2003, c. 26.

[21] Frug, *supra* note 3 at 26-53; *R. v. Greenbaum,* [1993] 1 S.C.R. 674 at 687-89 [*Greenbaum*]; Stanley Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983) at 115; and Warren Magnusson, "Are Municipalities Creatures of the Provinces?" (2005) 39 J. Can. Stud. 5 at 21-22.

[22] *Greenbaum, ibid.*

forced him to sell t-shirts without a permit.[23] And indeed, the Court determined that once the city decided to make sidewalk space available to vendors, such permits had to be generally available.[24] In reaching this conclusion—and in chastising Toronto for passing an illegal bylaw—Justice Iacobucci approvingly cited a passage from a planning law textbook[25] which indicated that Dillon's U.S.-based rule has been adopted in Canada. This rule established the doctrine of "prescribed powers": that municipalities are merely delegates of a proper (state or provincial) government, and thus able to act only if and when expressly authorized by statute. As Justice Iacobucci stated in *Greenbaum*:

> The courts, as a result of this inferior legal position [of municipalities], have traditionally interpreted narrowly statutes 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.[26]

In practice, this has meant that municipalities must run to the provincial legislatures for amendments to already long and complex general purpose municipal acts—and they must do so whenever a new issue emerges that requires either prohibition or regulation. As former

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[23] It is worth noting that Greenbaum was later appointed to the Toronto Licensing Tribunal, an unlikely fate for an unlicensed vendor who litigated against the city up to the Supreme Court.

[24] Other legal issues complicated the situation, such as whether sidewalk vending constituted a public nuisance. See *Greenbaum, supra* note 21 at 689-92.

[25] Makuch, *supra* note 21.

[26] *Greenbaum, supra* note 21 at 688-89. In addition, reference is sometimes made to *Attorney-General for Ontario v. Attorney-General of the Dominion*, [1896] A.C. 348 (P.C.), part of a line of cases on how the federal and provincial governments would divide the labour of restricting or banning alcohol sales. The Law Lords clarified that federal statutes take precedence in conflicts with provincial legislation; hence, localities that adopted the local-option provisions of the *Dominion Temperance Act* (S.C. 1864, c. 18) were not subject to similar provincial legislation. In addition, the Law Lords stated that provinces could only delegate to municipalities those powers specifically delineated as provincial in the *British North America Act* (now called the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act 1867*]). Nowhere, however, did this decision state that municipalities could not exercise their traditional powers to pass general regulatory bylaws (*e.g.* about public nuisances or disorderly taverns) in fields of provincial jurisdiction. Instead, the issue focused on whether liquor sales, importation, or manufacture could be altogether prohibited by a provincial legislature (and in turn, the authority enjoyed by municipal institutions, to whom provincial powers could be delegated. See *Attorney-General for Ontario v. Attorney-General of the Dominion*, Watson, L.J.).

Toronto mayor John Sewell indicates, explicit permission must be obtained from the province for every stoplight that municipal traffic authorities want to erect.[27] Similarly, cities cannot license new types of businesses—even if they present the same public order problems as existing licensed businesses—since their powers are restricted to long, but not particularly rational, lists of businesses traditionally requiring a licence.

As a result, the haphazard process by which lists of prescribed municipal powers are drawn up and changed results in absurd situations.[28] Interviews conducted by the authors with City of Toronto policy staff and urban policy experts reveal that the Ontario Ministry of Municipal Affairs and Housing has usually been willing to comply with simple requests for amendments facilitating changes in local bylaws.[29] Yet it is clear that city legal and policy staff and municipal politicians resent being unable to exercise their judgment even in minor matters.[30] And, in fact, municipal requests for legal changes are not always granted. For instance, in the field of environmental protection, Ontario is unwilling to allow municipalities to set higher environmental standards, thus blocking local moves to protect greenbelts and moraines.[31]

Even in Western Canada, where new municipal acts have been implemented, there continues to be wide dissatisfaction with provincial paternalism. As Denis Wong, a policy analyst for the Canada West Foundation, documents, a key frustration is that provinces consult municipalities only if and when they want to:

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[27] John Sewell, *A New City Agenda* (Toronto: Zephyr Press, 2004).

[28] For instance, more than five years after amalgamation, no unified licensing bylaw has been elaborated in the merged city of Ottawa. Business owners who wonder why doughnut shops or home businesses need a licence on one side of the road, but not on the other, are unlikely to obtain a rational answer.

[29] This is borne out by several interviews with municipal licensing and standards officials, conducted over 2004 and 2005, in which the respondents were promised confidentiality.

[30] To an outside observer, the paternalism evident in this area of Canadian law appears to have few parallels outside of the old colonial relations enshrined in the pre-1985 *Indian Act*, R.S.C. 1970, c. I-6.

[31] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 116 (21 November 2001) (Ms. Carol Seglins), online: <http://www.ontla.on.ca/french/hansard/committee_debates/37_parl/Session2/gengov/g016.htm#P675_229324>.

> The provincial government has full control over the types of revenues that cities can generate .... A second point of dissatisfaction with the provincial-municipal status quo is the lack of an adequate municipal voice in provincial urban policies and programs. Although many city respondents applaud existing consultations with their provincial government as a positive step ... they contend that the consultative process needs improvement. The fact that existing consultations are carried out on an ad hoc basis does not provide provincial governments and city authorities with sufficient time and opportunity to address core urban issues. The lack of systematic consultation also hinders any follow up on previous decisions. An additional problem city respondents identified is that "the cities' voices are not always heard."[32]

The doctrine of prescribed powers, then, is the main block standing in the way of municipal autonomy, and of modern and liberal provincial-municipal relations. Since Dillon's name is invoked to authorize the "prescribed powers" doctrine, as well as paternalistic and irrational processes more broadly (in Canada as in the United States),[33] it is worthwhile to consider Dillon's project.

John Dillon's *Commentaries on the Law of Municipal Corporations* first appeared in 1872,[34] at a time in U.S. history when there was a strong middle class backlash against city councils. At the time, councils were regarded as bodies too willing to spend money on questionable projects, in particular on railways. In this context, the jurist John Dillon became an ardent spokesperson for the cause of ratepayers, and especially business ratepayers. Dillon contemplated restricting aldermanic posts to the wealthy by reintroducing a property qualification for municipal office, but rejected this as unsuitable to a democracy.[35] His alternative solution to the problems of municipal corruption and largesse—problems that did not exist in all cities, but which his treatise regards as universal—was to bind cities more tightly to state governments. Claiming the authority of the renowned Justice Shaw of Massachusetts (though quoting a passage which does not actually set out the doctrine of prescribed powers),[36] and creating a sense of crisis by claiming, without authority, that municipal debts throughout the United

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[32] Wong, *supra* note 9 at 4.

[33] Frug, *supra* note 3.

[34] It was first published as *Treatise on the Law of Municipal Corporations* (Chicago: J. Cockcroft, 1872).

[35] John Dillon, *Commentaries on the Law of Municipal Corporations*, 3d ed. (Boston: Little, Brown, and Company, 1881) vol. 1 at 22-24.

[36] *Ibid.* at 116.

States amounted to a billion dollars,[37] Dillon claimed to "find" in existing American law support for his own argument about the need to restrain city councils.

On a close reading, one finds that Dillon's concerns were mainly fiscal, because he argued that municipal powers relating to investment should only be used with express permission from the legislature. (Dillon thought the legislature was less corrupt and more amenable to the interests of large ratepayers.) In contrast, Dillon continued to acknowledge the existence of another set of discretionary municipal public order powers, which are enjoyed by U.S. municipalities through statute and common law, and for which "all the inhabitants have an equal interest and should have an equal voice."[38] This is the "police power of the state,"[39] and, for Dillon, these discretionary and non-enumerated powers to obtain and preserve health, morality, and order remain firmly within the scope of municipalities (as long as no investment in infrastructure or in new ventures is involved),[40] despite their logic being the opposite of the "prescribed powers" doctrine for which he is famous. As a result, the local municipal power to regulate urban disorder is not questioned by Dillon. In the judicial review of municipal actions, he advocated that courts should construe the text of municipal powers strictly;[41] nowhere did he advocate narrowing the scope of permissible municipal action in this domain.

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[37] *Ibid.* at 24.

[38] *Ibid.* at 23.

[39] Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

[40] Without much comment, Dillon notes that state laws often empower municipalities "to make all by-laws that may be necessary to preserve the peace, good order and internal police" of communities (Dillon, *supra* note 33 at 364) or, variously, "health, good government and welfare" (*ibid.* at 374) or "peace and good order" (*ibid.* at 391, 402-03). These powers had existed for centuries, exercised in England by municipal corporations, statutory authorities, and local magistrates, both through their criminal court function and otherwise (*e.g.* licensing). In the United States this police power was, and continues to be, exercised by a variety of political and legal bodies, including municipalities and inter-municipal regulatory bodies such as port authorities. Our reading of Dillon leads us to conclude that for Dillon, the municipal exercise of these discretionary, un-enumerated police powers, even when exercised against businesses, is uncontroversial.

[41] Novak, *supra* note 39.

Given its political and legal heritage, Canada could certainly have avoided adopting Dillon's doctrine of prescribed powers.[42] But at least some Canadian officials in the nineteenth century appeared enamoured with the presumed urban similarities between U.S. and Canadian cities;[43] and when the U.S. railway craze (and its associated municipal indebtedness) hit Canada,[44] the Ontario Railway and Municipal Board—ancestor of today's OMB (Ontario Municipal Board)—was created in 1906 for the same reasons that motivated Dillon's recommendations.[45] During this time, Canadian provinces all continued to rely on versions of the 1849 *Baldwin Act* [46] as general-purpose municipal statutes.[47] And throughout, Dillon's doctrine—or rather, a second-hand version of some of his concerns—generally

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[42] Dillon's project was mainly to ensure that municipal councils did not make financial commitments binding property owners for years to come, as railway-crazy city councils were sometimes doing; and, secondarily, to ensure that municipal powers, especially in the area of taxes and licensing fees, would be narrowly construed by courts. See Dillon, *supra* note 35 at 20-21. This was relatively easy to do in the United States, where states are indeed the site of sovereignty. Canada, however, had both a stronger federal government and more direct links to the English tradition of local magistrate decision making and local autonomy exercised through special-purpose boards and commissions. For instance, the Webbs' history of local government emphasizes that through the industrialization process much regulatory work was done in England not by municipal corporations—which did not cover much of the country even after the 1835 *Municipal Corporations Act*—but by "special purpose authorities," the ancestors of today's Canadian "agencies, boards and commissions." These authorities often wielded tremendous powers, *e.g.* to levy fees and regulate transportation. Sidney Webb & Beatrice P. Webb, *The Manor and the Borough* (London: Frank Cass, 1963).

[43] See Engin F. Isin, "Rethinking the Origins of Canadian Municipal Government" (1995) 4 Can. J. Urb. Research 73 at 76. Isin notes that the Ontario commissioners charged in the 1880s with examining municipal governance and proposing legal reforms assumed that "the circumstances of the people of that country [United States] more nearly resemble our own in urban and rural districts, and we may reasonably conclude that whatever works satisfactorily amongst them is not wholly unsuited to us."

[44] In 1887-1888, Ontario appointed a Commission on Municipal Corporations, whose own historical research remains the best source on the subject. See Ontario, Legislative Assembly, "Second Report of the Municipal Commission" in *Sessional Papers*, No. 13 (1889).

[45] Warren Magnusson, "Toronto" in Warren Magnusson & Andrew Sancton, eds., *City Politics in Canada* (Toronto: University of Toronto Press, 1983) 94 at 106-07. Provinces also undertook other projects that undermined municipal business ambitions, especially in the utilities field. See Christopher Armstrong & H.V. Nelles, *Monopoly's Moment: The Organization and Regulation of Canadian Utilities, 1830-1930* (Philadelphia: Temple University Press, 1986).

[46] S.Prov.C. 1849, c. 81.

[47] See generally C. Andrew, "Provincial-Municipal Relations; or Hyper-Fractionalized Quasi-Subordination Revisited" in James Lightbody, ed., *Canadian Metropolitics: Governing Our Cities* (Toronto: Copp Clark, 1995) 137; C.R. Tindal & S. Nobes Tindal, *Local Government in Canada*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1984) at 11-33.

floated above Canadian law, ready to be invoked whenever cities tried to go beyond their traditional powers.[48]

A contemporary example of how ideas about Dillon's doctrine—that cities are no more than "creatures of the province"—are used to define the powers of Canadian cities can be found in the 1997 decision of the Ontario Superior Court in *East York v. Ontario (Attorney General)*.[49] For advocates of expansive city power, this decision enshrines a "most vicious" reliance on the argument that municipalities do not enjoy autonomous status.[50]

The case arose from a constitutional challenge to the *City of Toronto Act 1997*, which provided for the creation of Toronto's "megacity" in 1998.[51] Although indicating that it "may be that the government displayed megachutzpah" in its megacity pursuit[52]—particularly since there is no evidence of any reports, commissions, draft bills, position papers, or public hearings before the first reading of the legislative bill, and in referenda substantial numbers of people voted against this change[53]—the Superior Court concluded that this did not exceed the province's constitutional authority to make laws relating to municipal institutions in the province.[54] Drawing on early twentieth-century cases of the Supreme Court and Privy Council, the court determined that the power to restructure Toronto is within provincial authority under section 92(8), and laid out four general propositions regarding the constitutional status of Canadian cities:

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[48] See *e.g.* Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy* (Chicago: University of Chicago Press, 1985) at 118.

[49] (1997), 34 O.R. (3d) 789 (Gen. Div.) [*East York*], aff'd (1997), 36 O.R. (3d) 733 (C.A.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. vii [*East York* S.C.C.].

[50] Sewell, *supra* note 27 at 76.

[51] Constitutional challenges were brought under s. 92 of the *Constitution Act 1867* (that the province did not have the authority to restructure Toronto, or must consult with the municipality by constitutional convention), and under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The Court dismissed the *Charter* claims, noting that "there is nothing in the *Charter* which provides constitutional status to municipalities." *East York*, *supra* note 49 at 799.

[52] *East York*, *ibid.* at 804.

[53] *Ibid.* at 795-97.

[54] *Ibid.* at 798-99; *Constitution Act 1867*, *supra* note 26, s. 92(8).

> It is clear from the judicial and academic authorities referred to in the respondent's factum that there are four principles which apply to the constitutional status of municipal governments:
>
> (i) municipal institutions lack constitutional status;
>
> (ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides;
>
> (iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation;
>
> (iv) municipal institutions may exercise only those powers which are conferred upon them by statute.[55]

While some of the cases cited by the court have less to do with the constitutional status of cities and more to do with the limits on provincial legislatures to delegate,[56] earlier Canadian decisions do support the position that cities are without independent authority.[57] The decision of the Superior Court was upheld by the Ontario Court of Appeal's reading of section 92(8), and an application for leave to appeal to the Supreme Court of Canada was dismissed without reasons in April 1998.[58]

Despite this decision in the Toronto amalgamation case, a serious attack on the Canadian version of Dillon's doctrine was successfully launched starting in the mid-1990s. A campaign swept through Canadian legislatures which entailed an overhaul of the basic legislative structure for municipal government. The Alberta *Municipal Government Act* of 1994[59] was the first to be passed, and many of its provisions (including the granting of powers in a non-prescribed manner, through "spheres of jurisdiction" rather than specific objects of governance) were replicated throughout Canada. Yukon Territory, Nova Scotia, Saskatchewan, British Columbia, and Ontario all passed new municipal statutes between 1994 and 2001.[60]

The Alberta *Municipal Act* represented an effort by the provincial legislature to recognize that municipal government, especially

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[55] *East York*, *supra* note 49 at 797-98.

[56] *Ibid.* at 797.

[57] See *Smith v. London* (1909), 20 O.L.R. 133 at 143 (Div. Ct.), where Riddell J. determines that "[t]he municipality in Ontario is wholly a creature of the Legislature – it has no abstract rights ... ."

[58] *East York* S.C.C., *supra* note 49.

[59] R.S.A. 2000, c. M-26 [Alberta *Municipal Act*].

[60] Donald Lidstone, "A Comparison of New and Proposed Municipal Acts of the Provinces: Revenues, Financial Powers and Resources" (Paper presented to the FCM Annual Meeting, Banff, 25 May 2001) [unpublished].

in cities, had finally "grown up" (a metaphor endlessly repeated in these debates), and was thus deserving of adult and perhaps even governmental status. The new "purposes" section of the Alberta *Municipal Act* is worth quoting, since similar clauses were inserted into municipal acts in other provinces, with the exception of Ontario:

> s. 3 The purposes of a municipality are:
> (a) to provide good government;
> (b) to provide services, facilities or other things, that in the opinion of the council, are necessary or desirable for all or part of the municipality; and
> (c) to develop safe and viable communities.[61]

This apple-pie phrasing would not by itself grant municipalities increased autonomy, of course, but the political discourse surrounding the new act, in Alberta as elsewhere, indicates that the legislature intended to grant municipalities more flexible and arguably more powerful legal tools. As the Legislative Assembly Member introducing the act commented, "Flexibility and innovation are key. Alberta Municipal Affairs becomes a facilitator, not a regulator."[62]

In keeping with these winds of change, the Supreme Court of Canada has gone on to undermine the old theory that municipalities are mere creatures of the province. Most central has been the decision in *Spraytech v. Hudson*,[63] in which the Court allowed the town of Hudson, Quebec, to ban the use of aesthetic pesticides, even if these were considered non-toxic by provincial and federal regulators. Although banning pesticide use altogether would be *ultra vires*,[64] towns can severely curtail their use even with little evidence of toxicity. Reliance on the broad "precautionary principle" (invoked in such matters as the regulation of nuclear power plants) to pass municipal bylaws restricting the use of legal materials—in such a way as to cause serious economic damage to a series of legal business operations—would, in the United States, have invoked the police power of the state. And indeed, the Court went on to conclude that Quebec law grants municipalities

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[61] Alberta *Municipal Act*, *supra* note 59.

[62] Alberta, Legislative Assembly, *Hansard*, No. 2 (9 May 1994) at 1775 (Mrs. Gordon).

[63] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [*Spraytech*]. See also the difference between the majority and dissenting opinions in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 [*Shell*].

[64] *Spraytech*, *ibid.* at 279.

"general welfare" (*salus populi*) powers[65]—in other words, a police power.

In stating that Quebec municipalities' power to protect the general welfare indeed covers such actions as banning aesthetic pesticide use, the Court relied on Ian M. Rogers' treatise,[66] a key text in Canadian municipal law, quoting that "the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures ... . Undoubtedly the inclusion of 'general welfare' provisions was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* ... ."[67] Further, the Court held that "[r]ecent commentary suggests an emerging consensus that Courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens ... ."[68]

If the Court had left the matter there, much of the impact of the new doctrine would have been confined to judicial review of municipal bylaws and policies, without necessarily affecting the political core of provincial-municipal relations. However, Justice L'Heureux-Dubé added a comment destined to be quoted constantly by advocates of municipal autonomy. Rather than the police power legacy, she invoked the European Union's principle of "subsidiarity."[69] This principle, which European Union sources stress is not a justiciable legal doctrine but rather a political principle,[70] is invoked to elaborate the basic political character of municipalities, with the Court addressing something much larger than the traditional questions of *ultra vires* and the standard of review: "[L]awmaking and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local

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[65] *Ibid.* at 258-60.

[66] Ian M. Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., looseleaf (Toronto: Carswell, 1971).

[67] *Ibid.* updated 2001, cumulative supp. to vol. 1 at 367; quoted in *Spraytech, supra* note 63 at 258-59.

[68] *Spraytech, supra* note 63 at 262.

[69] *Ibid.* at 249.

[70] European Union, "EU decision-making procedures: the subsidiarity principle and the role of national parliaments," online: <http://europa.eu.int/scadplus/constitution/subsidiarity_en.htm>.

distinctiveness and population diversity."[71] This sets the (supreme) judicial cat among the provincial pigeons, since, read literally, it would overturn the whole idea that municipalities are nothing but creatures of the province.

The implications of this passage are uncertain. For one thing, the doctrine of subsidiarity in Europe does not usually refer to municipalities; it was devised to address national anxieties about the creeping powers of a pan-European government.[72] This calls into question subsequent claims about the Canadian Supreme Court having adopted the doctrine of subsidiarity to justify giving more powers to municipalities.[73] It is perhaps symptomatic of this ambiguity that the City of Calgary, in its appeal to the Court of a case which we discuss in Part III, section B, below, cannot even spell the European word correctly:

> In interpreting the scope of municipal powers, the Supreme Court of Canada affirmed in *114957 Canada Ltee. v. Town of Hudson* (*Hudson*) that the Courts must adopt a deferential approach to municipal governments and apply a liberal and benevolent interpretation of their powers. The principle of subsidiary [sic] accepted by the Court affirms that lawmaking and implementation are often best achieved at the local level where municipal governments are closest to the citizens affected, most responsive to their needs, to local distinctiveness and to population diversity.[74]

The misspelling is no doubt due to automatic spell checkers, but it illustrates the perils of importing a European Union legal-political neologism without a proper discussion of how it is being used and its relation to the basic architecture of the *Constitution Act 1867*. The taking up of subsidiarity and of Justice L'Heureux-Dubé's remarks demonstrates the continued legal and political contestations over the fundamental principles of Canadian municipal governance. The question that remains, however, is whether this change in judicial perspective will be sufficient to satisfy the present claims and needs of

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[71] *Spraytech*, *supra* note 63 at 249.

[72] European Union, *supra* note 70.

[73] The Canadian Institute of Planners' (2002) submission to the Sgro task force, for example, lays out seven principles for federal participation in urban policy-making, including "subsidiarity." See *supra* note 8 at 13.

[74] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary* (*City*) (1998), 217 A.R. 1 (Q.B.) [*United Taxi* Q.B.], rev'd (2002), 303 A.R. 249 (C.A.) [*United Taxi* C.A.], rev'd [2004] 1 S.C.R. 485 [*United Taxi* S.C.C.]. See City of Calgary's application for leave to appeal to the S.C.C., online: localgovernment.ca <http://www.localgovernment.ca/show_libary.cfm?id=76> at para. 25.

Canadian cities. This leads us to consider how a key a provincial statute within this recent spate of acts, the 1994 Alberta *Municipal Government Act*, has been interpreted by the courts.

### B. *The Supreme Court Interprets the New Municipal Acts*

The City of Calgary had been involved in disputes with a sector of the taxi industry since before the passing of the 1994 Alberta *Municipal Act*. After its enactment, the protracted dispute took on new life. Because of the act's broad "spheres of jurisdiction" approach, taxi licensing is no longer specifically mentioned. This meant that the taxi companies in question, which had long been trying to break the quasi oligopoly created by the city's decision to freeze the number of taxi plates and to make the scant number of existing plates available only to established companies, now had to up the legal ante. They had to obtain an authoritative ruling not only on the meaning and validity of the city's system for taxi plates, but also on the interpretation of this new act.

In the 1998 Queen's Bench decision on this challenge,[75] Justice Rooke upheld the bylaw as *intra vires*, and questioned not only the substance of the taxi companies' case but the quality of legal advice they received. His decision, not surprisingly, was appealed.[76] The appeal was complicated because a new act had since been passed—and because the taxi companies' legal counsel threw every possible argument at the court, however dubious, including a challenge that "outsiders" (newer taxi companies) were discriminated against contrary to section 15 of the *Charter*.[77]

The *Charter* challenge was unsuccessful. Yet, to the surprise of knowledgeable observers, the Alberta Court of Appeal ruled in a 2-1 decision that the taxi plate bylaw was now *ultra vires* because no specific mention of taxi plates, or any other specific business entity, existed in the new act. Absent such specific mention, the majority argued, the city could still develop a licensing system through its general business licensing powers (section 8), but it could not create a quasi monopoly by

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[75] *United Taxi* Q.B., *ibid.*.

[76] *United Taxi* C.A., *supra* note 74.

[77] *Ibid.* at 280-81; *United Taxi* S.C.C, *supra* note 74 at 496.

freezing the number of plates since this essentially amounted to a prohibition affecting everyone who was not already in the business.[78]

The Court of Appeal judgment, which appears to be motivated by a Dillon-like concern for the economic rights of business people, was accompanied by a dissenting opinion by Justice O'Leary.[79] Justice O'Leary agreed with the trial judge that the non-enumerated regulatory powers granted to municipalities by the 1994 *Municipal Government Act*, under the "spheres of jurisdiction" approach, are broad enough to accommodate not only the licensing of taxis but the specifics of the bylaw regarding plates. Relying on the Supreme Court's evolving jurisprudence on municipal powers in cases such as *Spraytech*,[80] Justice O'Leary placed the Calgary dispute firmly in the political context of the "new deal for cities." He determined that the intent of the Alberta legislature in passing the new *Municipal Government Act* was not to put an end to traditional regulatory practices (such as controlling the issuing of taxi plates), but instead to *enhance* the ability of city councils to respond to issues within their municipalities without being bound by the prescribed powers doctrine.[81] Justice O'Leary also noted that other provinces had interpreted the Alberta act as granting municipalities more powers, or at least more flexibility, to develop solutions to complex problems within their jurisdiction.[82] Though Justice O'Leary concluded that the bylaw should be upheld, he indicated that the particular policy devised by the city—a lottery for taxi plates which could not be accessed by new taxi owners—was problematic.

The Supreme Court of Canada, which decided the case twelve years after it was launched, fully supported Justice O'Leary's interpretation of the act.[83] The Court's relatively brief judgment extended beyond the act's business licensing powers (section 8), and

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[78] *United Taxi* C.A., *ibid.* at 272-75.

[79] *Ibid.* at 272-303.

[80] This included *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, *Shell*, *supra* note 63, as well as *Spraytech*, *supra* note 63.

[81] *United Taxi* C.A., *supra* note 74 at 298.

[82] *Ibid.* at 298-299.

[83] At the Supreme Court, the city of Edmonton, the province of Alberta, and the province of Nova Scotia intervened to support Calgary, arguing that a broad interpretation of the new *Municipal Government Act* was essential for other Alberta municipalities and across the country. Politically, this provincial support is particularly notable, reflecting a city-province alliance that elsewhere seems highly elusive.

provided a short but trenchant review of the act's interpretive guidelines. These interpretive guidelines, at section 9 of the act, reflect the political context of a "new deal for cities." The provision states, as follows:

> Under the heading "Guides to interpreting power to pass bylaws" we read:
> 9. The power to pass bylaws under this Division is stated in general terms to:
> (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and
> (b) enhance the ability of councils to respond to present and future issues in their municipalities.[84]

This statutory language allowed the Court to decide that "there is no indication in the Act that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. To the contrary, section 9(b) indicates that the legislature did not intend to curtail the powers exercised by municipalities but rather sought to enhance those powers ... ."[85]

The decision in *United Taxi* has proved important outside of the Alberta context. In *Croplife*,[86] the City of Toronto successfully defended its new pesticide bylaw before the Ontario Court of Appeal. In deciding the case, the Court of Appeal relied heavily on the "broad and purposive" approach developed in *United Taxi* as a new model for interpreting municipal statutes, regardless of whether or not a municipality is governed by an Alberta-like statute with flexible powers.[87]

Taken together, this series of cases, including *Spraytech*, *United Taxi*, and *Croplife*, indicates a change in judicial position that adds important support to the political and legislative turn to a "new deal for cities." Keeping this in mind, we now turn to Ontario, where the 2001

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[84] Alberta *Municipal Act*, *supra* note 59.

[85] *United Taxi* S.C.C., *supra* note 74 at 494-495.

[86] *Croplife Canada v. Toronto (City)* (2003), 68 O.R. (3d) 521 (Sup. Ct.), aff'd (2005), 75 O.R. (3d) 357 (C.A.) [*Croplife* C.A.], leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 329 (QL).

[87] An application for leave to appeal from this decision has since been dismissed, without reasons, by the Supreme Court of Canada (*ibid.*).

*Municipal Act*,[88] which claims to be part of this new deal, appears in some ways to be worse for municipalities than its predecessor.

## IV. ONTARIO

### A. *The 2001 Ontario Municipal Act: Responsibility Without Freedom of Choice*

In this part, we provide a descriptive and broad-strokes analysis of the basic logic of the Ontario *Municipal Act*—gleaned from the act itself and from legislative debates and public hearings—and some of the key differences between it and acts passed in other provinces.[89]

When the act was introduced (and indeed, when its predecessor, drafted in 1998 but not passed, was introduced[90]), two main innovations were highlighted in the accompanying documents and speeches. One was the replacement of Dillon's "prescribed powers" approach (often called the "laundry list" approach) by "spheres of jurisdiction." As we elaborate in this part, this was regarded as more rational and more empowering for municipalities.

The second change was the introduction of a new clause giving municipalities "natural person" powers.[91] This has not yet been judicially interpreted and has not given rise to significant policy activity. But there seems to be general agreement that natural person powers are not meant to make municipalities exactly like private corporations (for example, their annual budgets cannot show a deficit) but are intended to facilitate private-public partnerships, such as business improvement

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[88] S.O. 2001, c. 25 [Ontario *Municipal Act*].

[89] In our discussion, we focus on the field of licensing because this area has come to the attention of the Supreme Court (in *United Taxi*), and also because one of the present authors is undertaking an empirical study of business licensing in Toronto. A more exhaustive analysis of the act would be premature: the Ontario *Municipal Act* will soon be subject to a full five-year review, probably by a (Liberal) government unsympathetic to the Tory government that passed the act. In addition, the *Act* is currently being modified in non-public consultations with the Association of Municipalities of Ontario on the one hand, and the City of Toronto on the other hand.

[90] Ontario, Ministry of Municipal Affairs and Housing, "Proposed Legislation New Municipal Act: Consultation Draft" in *A Proposed New Municipal Act: Draft Legislation, Including Explanatory Notes, Consultation Document* (Toronto: Queen's Printer for Ontario, 1998) ["Proposed Legislation"].

[91] Ontario *Municipal Act, supra* note 88, s. 8.

areas.[92] Yet even these natural person powers are eroded by highly detailed restrictions micromanaging the municipal procurement process. This erosion has led the Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO) to question with some dismay: "If municipalities have 'natural person powers,' why should the proposed legislation prescribe the contents of municipal procurement policies in such detail? In fact, why should it even be necessary to prescribe that municipalities adopt a procurement policy?"[93]

The precise extent of these natural person powers is best left to municipal financing experts. Instead, we will analyze a few aspects of the new act, beginning with the "purposes"—or lack of them—ascribed to municipalities. There, much turns on the invocation of terms such as "accountability and responsibility,"[94] through which a series of financially and administratively burdensome requirements are imposed, and which are likely to be experienced as continued provincial paternalism. We then briefly turn to two additional parts of the act: the "spheres of jurisdiction" approach mentioned above and the act's business licensing provisions.

1. Municipalities are created...

When articulating the purposes of municipalities, the Alberta *Municipal Act* begins by outlining that these are "(a) to provide good government; (b) to provide services, facilities or other things that, in the opinion of the council, are necessary or desirable for all or part of the

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[92] Business improvement areas presently exist as ad hoc legal entities. On municipal budgets and deficits, see *ibid.*, s. 289.

[93] Association of Municipal Managers, Clerks and Treasurers of Ontario, "The AMCTO's Response to Bill 111, 'The *Municipal Act, 2001*'" (Paper presented to the Standing Committee on General Government, 21 November 2001), online: <http://www.amcto.com/db/newsinfo.asp?itemtype=728&it=728&itemid= 4226> at 3. This twenty-page analysis of the act, submitted to the provincial government, shows that before these restrictive regulations were issued, the provincial government was already taking away with a less visible hand what they had given publicly by the other hand.

[94] Pat O'Malley, "Risk and Responsibility" in Andrew Barry, Thomas Osborne & Nikolas S. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 189 [O'Malley, "Risk and Responsibility"]; Pat O'Malley, *Risk, Uncertainty, and Government* (London: Cavendish/Glasshouse, 2004); and Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997).

municipality; and (c) to develop and maintain safe and viable communities."[95]

In Ontario, by contrast, council's opinion about the community's needs is not mentioned. Citizenship as a practice of freedom does not exist, even in a form like the mild Alberta wording of developing "safe and viable communities." In keeping with the logic of holding political and legal institutions responsible,[96] the Ontario *Municipal Act* instead presents the "purposes" of municipalities merely as being to serve as repositories of responsibilities:

> Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for purposes which include:
> (a) providing the services and other things that the municipality considers are necessary or desirable for the municipality;
> (b) managing and preserving the public assets of the municipality;
> (c) fostering the current and future economic, social and environmental well-being of the municipality; and
> (d) delivering and participating in provincial programs and initiatives.[97]

Particularly when compared with other provinces, the Ontario act is unusual because it begins by reiterating the old Dillon fear of cities spending property taxpayers' money on infrastructure and other projects (subsection (b)).[98] But most striking is the first sentence. Instead of recognizing that citizens and communities over time develop a desire for self-governance—in keeping with the somewhat mythical but powerful narrative about cities as the site of civic education, virtue, and freedom—section 2 informs Ontarians that the province has created municipalities, like God creating light, and that these entities are created to be "responsible and accountable."

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[95] Alberta *Municipal Act, supra* note 59, s. 3.

[96] "Responsibilization" and accountability are two great bywords of neo-liberal politics: see O'Malley, "Risk and Responsibility," *supra* note 94; and Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

[97] Ontario *Municipal Act, supra* note 88, s. 2.

[98] This is all the more surprising given the restrictions on borrowing and taxing within municipal acts generally.

2. "Responsibilization" and Accountability

Under these rubrics of accountability and transparency, the Ontario *Municipal Act* imposes on municipalities an onerous series of new procedural requirements.[99] These include detailed public notice requirements regarding municipal budgets, thereby highlighting the province's Dillon-like fears of municipal wastefulness:

> Section 291 of the new Act requires that the City give public notice of its intention to adopt or amend a budget at a council meeting specified in the notice. The new Act does not provide a definition of budget amendment, for purposes of section 291 ... . The intent of section 291 is to provide for accountable and transparent decision-making regarding municipal budgets—and likely speaks to the legislative practices of other Ontario municipalities, which do not have the open government traditions of the City of Toronto. If even the minimum notice requirements of the recommended bylaw were applied to every budget amendment, the result would be a virtually impossible standard for Council to meet and would result in unnecessary, ineffective, and expensive notice for routine items regarding budget adjustments by Council and staff.[100]

Budgetary matters are not the only ones with new process requirements. One seemingly small requirement that appears to flow from this "responsible and accountable" language is that the city must now provide details of how business licence fees are calculated for each type of business.[101] To compound municipal difficulties, section 150 states: "The total amount of fees to be charged for licensing a class of business shall not exceed the costs directly related to the administration and enforcement of the by-law or portion of the by-law."[102]

The two sections set up a standard that may be impossible to meet. Provincial cabinet ministers probably do not know that most cities

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[99] On the financial and non-financial dimensions of this quest for accountability, see Power, *supra* note 94.

[100] Chief Administrative Officer, City of Toronto, "Municipal Act, 2001 Implementation" (Staff Report to Policy and Finance Committee, 23 October 2002) at 4, 5, online: <http://www.city.toronto.on.ca/legdocs/2002/agendas/committees/hl/hl021118/it005.pdf>.

[101] Ontario *Municipal Act*, *supra* note 88, s. 158. The Ontario Chamber of Commerce, appearing at the hearings on Bill 111, expressed fears that "the new legislation would give municipalities greater access to user and licensing fees," while the Toronto Board of Trade expressed similar fears but acknowledged that the government had responded to business concerns in the final version of the act: "[W]e support the guarantee under the legislation that licensing fees would not be permitted to exceed the costs of administration and enforcement ..." (*supra* note 29). On their part, representatives from the hotel and trucking industries expressed gratefulness to the Conservative government for their continued exemption from municipal licensing (*ibid.*).

[102] Ontario *Municipal Act*, *supra* note 88, s. 150(9).

work mainly with "generalist" licensing and standards officers. The activities of these officers are complaint driven and rarely engage in proactive inspections. As a result, any figures that are attached to particular types of business licence are a form of guesswork, which may aggravate municipal frustrations.

In addition, the Ontario *Municipal Act* departs from the standard doctrine that acknowledges the ability of municipal councils and other municipally based bodies to charge licence fees as a form of tax, for revenue purposes, without having to limit the fee to enforcement costs.[103] The Alberta *Municipal Act*, for example, allows licensing fees on certain businesses as "a reasonable tax for the activity authorized or for the purpose of raising revenue."[104] Even the overturned judgment of the Alberta Court of Appeal in *United Taxi*, which took a narrow view of municipal powers, remarks that alongside municipal powers to target disorder, "sometimes termed 'the police power' because it enables local authorities to regulate and control trades and businesses," there exists a licensing power that is merely a form of "revenue raising."[105]

The examples listed here—public notice provisions, new rules restricting small financial decisions, delays caused by the need to comply with consultation requirements, and new rules governing business licensing fees—are but a few areas of municipal governance likely to be hampered by the new Ontario *Municipal Act*. Simply put, the act creates responsibilities without providing the resources or the powers to manage them, and then compounds this by continuing to micromanage process as well as content.

### 3. Spheres of jurisdiction and prescribed powers

The 1998 draft legislation of a new version of the Ontario *Municipal Act* set out thirteen "spheres of jurisdiction" for municipal powers.[106] This meant that a large number of sections and regulations

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[103] Subsection 92(9) of the *Constitution Act 1867* allows provinces to make laws about "shop, saloon, tavern, auctioneer and other licences in order to raise revenue for provincial, local, or municipal purposes" (*supra* note 26). These powers had been exercised by municipalities in the years before the *Constitution Act 1867*, and continued to be exercised, now as delegated by provincial governments, afterwards.

[104] Alberta *Municipal Act*, *supra* note 59, s. 8(c)(i).

[105] *United Taxi* C.A., *supra* note 74 at 267-268.

[106] "Proposed Legislation," *supra* note 88, s. 11(1).

from the previous act[107] were no longer required because they were now covered by more general "spheres."

But the province did not intend to cede its power to prohibit municipalities from undertaking new regulatory initiatives. As a result, while the act gave municipalities broader "spheres of jurisdiction," the province wrote a series of restrictions and exceptions into the act.[108] A provincial document issued to explain how the draft 1998 legislation was amended before its passage in 2001 is unwittingly revealing: "By removing a few key 'spheres' where the potential for overlap with provincial jurisdiction is greatest, the need to impose restrictions and limits is greatly reduced."[109] The spheres of jurisdiction that were eliminated in this way were health, safety, and the protection and well-being of people; nuisances; and the natural environment.

It should be noted at the outset that health, safety, and "*salus populi*" were not eliminated altogether; they remain in the *Municipal Act*, but no longer as a sphere of jurisdiction. One vestige of "health, safety and well-being" is found in one of the three rationales or rubrics under which municipalities are allowed to levy business licence fees.[110] The concept makes a second appearance at section 130, which confers residual powers to make bylaws promoting the "health, safety and well-being" of citizens. Just what this might cover is disputable, since the highly prescriptive nature of the rest of the act does not support a broad interpretation of section 130 as restoring the *salus populi* jurisdiction. For example, the section that immediately follows is "Wrecking and salvaging of automobiles,"[111] and other sections allow municipalities to

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[107] *Municipal Act*, R.S.O. 1990, c. M-45, as repealed by Ontario *Municipal Act*, *supra* note 88, s. 484.

[108] In the context of Toronto, this was heightened by a more historically specific small-town Tory dislike for the City of Toronto council and its bureaucracy.

[109] Ontario, Ministry of Municipal Affairs and Housing, *New Directions: A New Municipal Act for Ontario* (Toronto: Queen's Printer for Ontario, 2001) at 6. This document candidly admits that the province decided to hear business interests rather than municipal voices in its revision of the 1998 draft legislation, stating that the limits on municipal powers were denounced by municipalities, but "on the other hand, *provincial ministries and business groups* felt that these limits were necessary" (*ibid.* at 8) [emphasis added].

[110] Ontario *Municipal Act*, *supra* note 88, s. 150(1).

[111] *Ibid.*, s. 131.

undertake such specific safety measures as compelling residents to clear snow and ice from the abutting sidewalk.[112]

Yet section 130 has been judicially interpreted broadly, as exemplified by the decision in *Croplife*. Pursuant to section 130, and motivated by *Spraytech*, the City of Toronto passed a bylaw, which is very much like the one in Hudson, restricting the use of pesticides for aesthetic purposes. This was challenged by gardening and pesticide companies.

The city's case was weakened because the introductory section of the Toronto bylaw makes reference to "environmental protection"—a sphere which had been removed from the provincial bill before it became law in 2001. But on the motion challenging the bylaw, Justice Somers concluded that the main purpose of the bylaw was *not* to regulate the environment (thereby declaring irrelevant the voluminous conflicting expert evidence about whether pesticides in use in gardens and golf courses are toxic). Despite the legally incautious inclusion of the word "environmental," Justice Somers found that the bylaw's purpose is to promote the health, safety, and well-being of Torontonians. As an environmental bylaw, it would have been *ultra vires* the city, but a reliance on more general, non-scientific notions of "health, safety and well-being" that have for centuries been used to allow cities to govern all kinds of moral and physical dangers and risks, was sufficient to render the pesticide bylaw *intra vires*.

In dismissing an appeal from the *Croplife* decision, the Ontario Court of Appeal emphasized the Supreme Court's elaboration, over the 1990s, of a "broad and purposive" approach to municipal powers. Maintaining the motion judge's decision that the bylaw emphasizes "health, safety and well-being," the court further agreed that section 130 was not to be read narrowly. In so doing, the Court of Appeal determined that support from the legislative history for a narrow reading of section 130 was itself equivocal, so that the mere fact that section 130 identifies a *specific* power in the act—there being no express legislative direction to interpret it narrowly—"does not exempt it from the modern interpretive rules."[113] Six months later, an application for leave to appeal was dismissed, without reasons, by the Supreme Court.

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[112] *Ibid.*, s. 122.

[113] *Croplife* C.A., *supra* note 86.

a. The public welfare and business licensing

The civic poverty of the Ontario act could not be more strikingly demonstrated than in the text of the "purposes" section of the general licensing section, which states that municipalities can "only" license and regulate businesses under three headings: "1. Health and safety"; "2. Nuisance control"; and "3. Consumer protection."[114] This is indeed a case of "cities without citizens."[115] Citizens no longer exist, nor do communities: there are only property owners, ratepayers, and, fleetingly, the public, which is transformed by this legislation into a more specifically neo-liberal identity of consumers.[116]

We now turn to a point about business licensing, namely the persistence of Dillon fears about cities putting their hands into the pockets of businesses. While the regulation of businesses for the protection of consumers is said to be the key goal and the justification of licensing schemes, municipalities remain deprived of a common regulatory tool: fines. Provincial and federal regulatory agencies can use the threat of fines to achieve compliance, yet municipalities can only impose fines in certain areas (most notably parking). Businesses such as restaurants or pawn shops that are found to breach the conditions of their licences can only have them revoked altogether, and that decision can be appealed to the Licensing Tribunal. In contrast to Canadian courts' increased willingness to expand the scope of municipal authority, the limited legislative availability of intermediate sanctions is a glaring limit on cities' ability to carry out regulatory functions and to produce the kind of orderly civic space that citizens want and expect.

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[114] Ontario *Municipal Act*, *supra* note 88, s. 150(2).

[115] Engin F. Isin, *Cities Without Citizens: Modernity of the City as a Corporation* (Montreal: Black Rose Books, 1992).

[116] Municipal law practitioners point out that the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1, which received little public airing (and was never cited in the "new deal for cities" political documents), gave municipalities greater licensing powers by removing the laundry list of businesses subject to licensing in favour of a general provision. See *e.g.* Theresa Leitch, "Licensing Powers Under the Ontario Municipal Acts" *The Lawyers Edge* (20 March 2003) Tab 5, online: The Lawyers Edge <http://www.softconference.com/oba/publication.aspx?userID=70554751306389461 17200684447&code=03MUN0320C>. This was then curtailed in 2001 through the "consumer protection" et cetera clauses. It is unclear why this happened; however, given the tenor of business comments on the Ontario *Municipal Act*, one suspects that businesses applied pressure on the Conservative government.

b. The public welfare and nuisances

Before the introduction of zoning law and environmental regulations, nuisances constituted the bread and butter of municipal regulation.[117] And most recently, in a nuisance case out of Montreal, the Supreme Court of Canada upheld the city's power to regulate noise through municipal bylaw.[118] Whereas the Quebec Court of Appeal had developed a narrower framework for determining the scope of municipal powers to regulate nuisances,[119] a majority of the Supreme Court found that this did not "show the City the deference it is owed with respect to the exercise of its powers."[120] The Court took a broad view, which noted, for instance, that "noise affects city dwellers in their everyday lives and was one of the earliest concerns of municipal governments," and that "the City has had the authority to regulate nuisances since before Confederation."[121] In so doing, the Court determined that even though the City of Montreal's noise bylaw infringed on section 2(b), the right to free expression in the *Charter of Rights and Freedoms,*[122] it was a reasonable limit on this right—justified, in large part, by the city's goal of producing a healthy and peaceful urban environment.

While this decision supports a broad reading of the nuisance sections of the Ontario *Municipal Act*, note a curious contradiction in the Ontario legislation. Subsection 128(1) reads: "A local municipality may prohibit and regulate with respect to public nuisances, including matters that, in the opinion of the council, are or could become or cause public nuisances." The overinclusive language of the section would suggest that any routine urban activity could become or cause a public nuisance, if carried out in the wrong time or in the wrong manner. The scope of section 128(1) is accompanied by a privative clause, which

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[117] Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991); Novak, *supra* note 39.

[118] *Montréal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141 [*Montréal*].

[119] *Montréal (Ville) c. 2952-1366 Québec inc.*, [2002] R.J.Q. 2986 (C.A.).

[120] *Montréal, supra* note 118 at 161.

[121] *Ibid.* at 154.

[122] *Charter, supra* note 51.

states that "[t]he opinion of the council under this section, if arrived at in good faith, is not subject to review by any court."[123]

The broad and unreviewable powers granted by section 128 are somewhat undermined, however, by the highly prescriptive tone and content of section 129. One example will give the flavour of its prescriptiveness: "A by-law under subsection (1) [of section 129] shall not require light fixtures used in conjunction with commercial, industrial, institutional, agricultural or recreational uses to be turned off at any time the use is actually being conducted."[124] Two other subsections limiting municipalities' powers to regulate outdoor illumination follow in paragraphs (b) and (c). Perhaps commercial illumination requires specific mention because it is not a traditional target of nuisance powers, but noise, odour, and dust are well within, and indeed at the core of, the common law of public nuisance.[125] Mentioning them specifically in section 129(1) only undermines the "spheres of jurisdiction" approach.

To complicate this further, as mentioned above, the general licensing section also mentions "nuisance control."[126] This time, however, nuisance control is not a separate bylaw-making power, but one of three rationales under which licensing powers can be exercised. The relation between the different occurrences of nuisance is murky. How a municipality is supposed to determine which nuisances are to be preventively governed by means of licensing and inspections, and which are to be regulated or prohibited by other means (for example, by a specific bylaw declaring something to be a nuisance or to be at risk of becoming a nuisance, as per section 128), is not obvious. And interpreting or using either of these sections to pass new bylaws is further complicated by specific bylaws, which regulate some of what has traditionally been covered by the public nuisance category. The noise bylaw, for example, is used by police and bylaw enforcement officers on a routine basis, and is also used to govern disorder proactively by way of prevention. Yet how it relates to any occurrence of "public nuisance" in the 2001 act is unclear.

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[123] Ontario *Municipal Act*, *supra* note 88, s. 128(1), (2).

[124] *Ibid.*, s. 129(2).

[125] Bilson, *supra* note 117.

[126] Ontario *Municipal Act*, *supra* note 88, s. 150(2).

The general point is that the 2001 Ontario *Municipal Act* does not effect a shift away from a laundry list of prescribed powers toward a more empowering spheres of jurisdiction approach. Instead, the act presents a confusing mix of legal logics, with some powers which are granted in a general form coexisting with other powers (even over the same regulatory targets) which take a micromanagerial-specified form. At the time of this writing, the Toronto pesticide bylaw challenge is the only reported case in which courts have interpreted the relation between those sections written in the "police powers-like" language of generality and unreviewability, and those written in the traditional laundry list of prescribed powers manner. The indication is that perhaps despite the increased judicial willingness to interpret municipal authority broadly, Ontario cities may have gained little by way of new powers or by way of greater flexibility in exercising old powers through their legislation.

Even for areas in which a reading of the act suggests that greater or more flexible powers have been granted, these are sometimes undermined by the regulations. For instance, a Toronto proposal to use the more flexible powers of the new act to require large apartment buildings to obtain an operating licence (with a basic audit as a prerequisite), despite meeting all of the act's requirements, will first require the agreement of the province to repeal a particular regulation.[127] It is most remarkable that a senior provincial Ministry of Municipal Affairs and Housing official, interviewed by us in 2004, opined that this apartment licensing bylaw seemed eminently sensible because it fell squarely within the "consumer protection" subsection of the licensing section. The official did not know that the proposal could not proceed unless the provincial government struck out a regulation.

## V. CASE STUDY 1: THE LIMITS OF CITIES' FREEDOM TO ADDRESS THE HOUSING CRISIS

It is widely acknowledged that a specific problem faced by cities, and not by most other municipalities, is the crisis created by rising house prices, higher rents, and a marked slowdown (or even a halt) to the

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[127] O.Reg. 243/02. See also the discussion in Commissioner, Urban Development Services, "A Framework Strategy to Ensure that Privately-owned, Multi-Unit Residential Buildings are maintained in accordance with the Provisions of the Toronto Municipal Code" (Staff Report to the Planning and Transportation Committee, 10 December 2003).

provision of affordable housing and public housing. The sudden and rapid increase in the visibility of homelessness over the 1990s, especially in Vancouver and Toronto, is the visible tip of a larger iceberg—an iceberg that includes overcrowded and substandard housing (municipal policies having failed to enforce building codes and rental housing rules for fear of causing more homelessness), pressures on municipal budgets caused by the provision of (expensive) family shelters or municipally financed motels, and women and children living with abusive men because of a lack of alternatives.[128] Although federal and provincial governments have helped to create this urban housing crisis, it is largely the cities that are left to solve the problem.

In addressing the larger systemic problem that gives rise to homelessness and other less visible crises, cities are limited not only by finances but also by inadequate legal tools. The need for the province to amend the regulations associated with the 2001 *Municipal Act* before Toronto can develop an apartment building licensing scheme, reflects the paternalism in city-province relations: a recent initiative to address homelessness—the 2003 municipal shelter bylaw[129]—is a case in point, which reveals that some of the difficulties and disutilities are created by the lack of appropriate legal tools.

After no less than seven staff reports on how the recommendations of the Toronto Mayor's Homelessness Action Task Force[130] might be carried out, Toronto city council considered several options to facilitate new emergency shelters. Chief among these was a zoning bylaw amendment, which was necessitated by the existing bylaw that hampered efforts to create new shelters.

After several years of often heated debate—many councillors wanted a higher number of restrictions on the provision of shelter beds, in their own wards at any rate—council passed a uniform city-wide zoning bylaw in 2003, which outlines a consistent set of zoning permissions. These permissions were not for shelters in general, but for

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[128] An important document was Toronto (Ont.), Mayor's Homelessness Action Task Force, *Taking responsibility for homelessness: an action plan for Toronto: Report of the Mayor's Homelessness Action Task Force* (Toronto: The Task Force, 1999) [*Taking Responsibility*]. In addition to a large scholarly literature documenting the housing crisis, in Toronto the United Way has undertaken important research on increased levels of urban poverty.

[129] City of Toronto, By-law No. 138-2003, *Municipal Shelter By-Law* (11 February 2003).

[130] *Taking Responsibility, supra* note 128.

a much narrower category of municipally run emergency shelters for homeless persons. In itself, this was an achievement. The mechanisms of zoning law make it difficult for Canadian municipalities to promote anything like the "inclusionary zoning" policies currently in force in a variety of jurisdictions, particularly in the United States.[131] Apart from the middle class backlash against "undesirables," there are specific, provincially created obstacles to inclusionary zoning. For instance, in keeping with the "responsibilization" and transparency logics discussed in Part IV, above, provincial law requires cities contemplating zoning changes to hold public meetings and consultations in often complicated and expensive ways. This obligation gives a platform to those who oppose inclusionary measures; they are generally more educated and better equipped to participate in meetings, petitions, and phone calls to councillors than those who are the potential beneficiaries of inclusionary zoning measures. In Toronto, predictably, most of the "untold number of community meetings"[132] around the new bylaw degenerated into angry shouting matches dominated by NIMBY-style middle class homeowners panicking about the possibility of homeless shelters near their properties.[133] Given the proliferation of these provincially mandated platforms, where worried middle class homeowners pressure their local councillors, it is remarkable that city council was able to pass the compromise bylaw of 2003.[134]

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[131] A useful source on inclusionary zoning policies and bylaws throughout the United States is the "NIMBY report" originally produced by the American Friends Service Committee and now by the National Low Income Housing Coalition. See *The* NIMBY *Report: On the Continuing Struggle for Inclusive Communities*, online: <http://www.nlihc.org/nimby/index.htm>. The Toronto process summarized here has many parallels in American municipalities.

[132] *Toronto (City) Zoning By-law No. 138-2003 (Re)* [2004] O.M.B.D. No. 280 (QL) at para. 29 [*Zoning By-law*].

[133] This summary is based on a study of city council minutes, the extensive coverage given by the *Toronto Star*, and the reports produced by city staff. The authors thank to Prashan Ranansinghe for his thorough research on the background to the bylaw and his summaries of relevant articles, minutes, and documents. See *e.g. Zoning By-law*, *ibid.* at 10-11; Terry Gillespie, "Both sides oppose shelter bylaw; Too restrictive, tenant group says But ratepayers want more limits" *Toronto Star* (14 October 2003) B1; Kerry Gillespie, Bruce Demara & Paul Moloney, "Shelter bylaw forums raise a tempest; "Residents fear homeless influx into neighbourhoods" *Toronto Star* (18 September 2002) B1; and Jack Lakey, "Shelter bylaw raises strong reaction" *Toronto Star* (15 April 2002) B5.

[134] Going against the grain of zoning law, the 2001 proposed bylaw would have abolished separation requirements and limits on the sort of street on which city shelters could be placed.

The main effect of this bylaw is that it applied to the whole city, which made it possible to distribute homeless shelters more widely. The shelters, however, were by no means allowed to mushroom. The struggle around the bylaw was, in broad terms, a struggle between the logic of zoning law—which has always been a logic of differentiation, class separation, and exclusive enclave creation—and the logic of social welfare, which is inclusive and rights oriented. The 2003 bylaw, which is similar to many other city measures, created a pragmatic compromise between the exclusionary, property-driven logic of zoning/planning[135] and a social-welfarist logic. Thus, while shelters could be located anywhere in the city, their provision would be strictly limited because the new bylaw, in contrast to the inclusionary 2001 proposed bylaw, set a separation of 250 metres between municipal shelters.[136] It also limited shelters to locations along an "arterial road or minor arterial road."[137]

The ratepayers' associations would challenge this bylaw and take the city to the OMB. Given that other zoning bylaws were inconsistent across the post-amalgamation megacity, the new bylaw governing municipal shelters was seen as a pilot project to impose the more "progressive" standards for regulating housing which had been current in the old city of Toronto on the whole, merged city.[138] Thus, ratepayers' associations who worried about institutional uses other than shelters—especially associations located in what had been independent suburbs, Scarborough in particular—had grounds to see the shelter bylaw as a dangerous precedent. But perhaps less predictably, the compromise bylaw was challenged from the opposite side of the political fence, by the Advocacy Centre for Tenants Ontario (ACTO).[139] This poor people's

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[135] Apart from the legal literature on zoning and planning, historical and socio-legal studies demonstrate how zoning law allows and encourages segregation on the basis of class, race, and family structure. See Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford Press, 2003).

[136] Of course, zoning variances and recognitions of legal non-conforming uses are regularly granted, especially to established social service providers in the downtown core, because this is where residents are habituated to such types of housing and less likely to complain even at the more accessible Committee of Adjustment, never mind the more legalistic OMB. It is not the case that most shelters and similar institutional uses in Toronto are 250 metres apart from each other.

[137] *Supra* note 129, s. 2(ii).

[138] Many of the city council debates about the zoning bylaw for shelters included discussions of policies around "second suites," and city staff reports on the shelter bylaw question often included recommendations about standardizing the rooming-house licensing bylaw.

[139] *Zoning By-law, supra* note 132.

advocacy group argued that the 250-metre rule and the restriction of shelters to arterial roads greatly limited the city's ability to provide shelter at low cost and encouraged the continuing use of large institutional buildings which the target population disliked. The group also tried to mount a *Charter* challenge by claiming that the homeless constitute a discrete group analogous to those named in section 15 of the *Charter*, a claim that, if successful, would have resulted in the invalidation of zoning bylaws which distinguish homeless shelters from other types of group housing.[140]

In other provinces such a bylaw could have been contested in court, but in Ontario, zoning disputes are appealed to the OMB. The formally democratic process governing new zoning bylaws and bylaw amendments, itself imposed on municipalities by provincial legislation (public meetings, delays, notice to neighbours, et cetera), is thus always subject to being trumped by a provincial body, and an appointed one at that.

The Confederation of Residents and Ratepayers' Associations withdrew from the lawsuit due to lack of funding, but the OMB panel that heard the challenge considered the ratepayers' initial written submissions. The OMB decision[141] describes in some detail the lengthy consultation process undertaken by the city and the protracted debates within city council committees and at council itself. The OMB concludes that the bylaw was not perfect, but was a reasonable compromise, and had been subject to a lengthy consultation process which gave it legitimacy. The Board found the bylaw on the whole valid while also expanding its scope by stating that municipal shelters could be placed not only on arterial roads but also in bits of residential streets near arterial roads ("arterial road corridors").[142]

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[140] In the United States there have been similar efforts to use rights statutes to trump exclusionary zoning measures, thus using the existence of contradictory logics in different areas of law to pursue progressive policy goals. However, a recent decision of the U.S. Supreme Court finding that the *Fair Housing Act* does not apply to and hence does not invalidate municipal NIMBY-style referendums garnering public (white) support for excluding land uses associated with blacks and poor people (public housing, mainly) does not bode well for such campaigns to play existing law against itself. See *Cuyahoga Falls (City of), Ohio et al. v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003).

[141] *Zoning By-law, supra* note 132.

[142] *Ibid.* at paras. 181-85.

On the conflict between the inclusionary logic of social welfare and the openly exclusionary, discriminatory logic of zoning, the OMB expressed its dismay at the tenants' group's attempt to use the Board to bring about a major change in constitutional law (that is, the recognition of homeless people as a group deserving of section 15 protection). While chastising the ACTO in unusually strong terms, it is curious that the OMB proceeded to opine on the constitutional matter, stating that if it had had jurisdiction to hear the constitutional case (which it more or less heard, however unwillingly), it would have concluded that the zoning bylaw did not breach section 15 of the *Charter*.[143] The Board panel bristled at the suggestion—apparently made by ACTO—that both the bylaw and the OMB discriminated against a vulnerable discrete minority, namely the homeless. In response, the OMB stated that "the Board does not make decisions based on any assessment of the character or type of people who will access the use."[144] Equally reflected in earlier case law,[145] the central fiction of zoning law is that one can govern "uses" without having an impact on social relations between identifiable groups of people. As the OMB said:

> There is no distinction based on personal characteristics of a group or individual, nor any distinction of any kind apparent, implied, or as a result of this by-law. Any person may access the facilities if they find themselves homeless and there is capacity at the shelter.[146]

With regard to the metaphysical question of whether shelters are or are not housing, despite the obvious fact that people use them as housing, the OMB's finding is consistent with its views about the homeless. If anyone can become homeless, it follows that shelters are not "housing," as this would imply a somewhat long-term use of the building by a distinct population. The OMB thereby insisted that shelters are "facilities," and not "housing."[147]

One could say more about the OMB's forays into constitutional law and social policy. For instance, our interviews indicate that perhaps

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[143] *Ibid.* at para. 20; see also paras. 168-197.

[144] *Ibid.* at para. 34.

[145] See *e.g. Alcoholism Foundation of Manitoba v. Winnipeg (City of)* (1990), 69 D.L.R. (4th) 697 (Man. C.A.).

[146] *Zoning By-law, supra* note 132 at para. 148.

[147] *Ibid.* at paras. 60-66.

in contrast to the OMB's often pro-developer stance,[148] in the area of supportive housing the OMB is regarded as a key actor that can promote the city's social policies.[149] But for our purposes, the OMB decision demonstrates some of the problems arising from cities' lack of legal tools to address current social challenges. Zoning bylaws and zoning variances—long important tools of municipalities across North America—are not suited to policy goals arising out of social and political problems such as severe poverty and homelessness. If municipalities, and especially large cities with visible concentrations of poverty, continue to be responsible for problems originating in the fraying of Canada's social safety net, they need to be provided with legal tools suited to their social goals.

## VI. CASE STUDY 2

### A. *The Quest for a City Charter: Acquiring the Tools of Global Cities*

> What if we took onto the international stage? Wouldn't it be wonderful if our next meeting was in London, England, because it has a city charter? Imagine the international press! Unable to get the attention of our provinces, unable to get the attention of our Canadian government, we have gone to London, England to discuss and find out how that city charter works.[150]

Such comments highlight the heated debates over municipal autonomy that gained attention over the last decade. At their core is an argument that, to compete internationally, Canada's largest cities (especially Toronto) cannot be governed through standard municipal acts that treat all cities the same way. Instead, Toronto requires a "charter" to provide it with wide-ranging powers to raise revenue and govern its own affairs independent of provincial control and permissions.

While the idea of a charter remains vague and largely undefined—and as a legal matter, a charter provides no greater

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[148] John G. Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002).

[149] This is borne out by interviews with supportive housing providers, conducted in 2005 by Mariana Valverde, in which the respondents were promised confidentiality.

[150] "C5: Historic first meeting of Canadian mayors with Jane Jacobs" (2001) 2:1 Ideas That Matter 3 at 20-21 (quoting Dale Stanway, CEO of the City of Calgary).

autonomy than would a more generous municipal act—the city charter debate is rife with symbolic politics over the need for Toronto to be competitive in a global economy, and for regulators to recognize the new historical context in which Canada's largest cities operate.[151] The context in which the above statement was made provides some insight into what is being sought, namely, urban advocates Jane Jacobs and Alan Broadbent, and the mayors of Vancouver, Calgary, Toronto, Montreal, and Winnipeg, presenting their views on the needs of Canadian cities. Perhaps not surprisingly, four of these mayors focused on their respective cities' economic needs, from the need for increased revenue to the need to improve public transit, sewer systems, crime control, poverty, air pollution, and so on. Speaking on behalf of the City of Toronto, however, Mayor Mel Lastman made it clear that while money was key, a core problem was in Toronto's lack of legal tools: "We can't make a move without the provincial government saying, yes, it's okay."[152]

This concern about the dependency of cities on provincial governments, and the need for new legal tools for Canadian cities to succeed, is premised on a set of claims about cities that are invoked throughout the political debates over municipal autonomy. While we return to these in more detail in Part VI, section B, below, here we highlight the basic structure that these claims take through the comments of Jane Jacobs at this 2001 meeting of mayors. What we distill from her comments are four interconnected logics that broadly echo those on which the city charter movement rests its claims.

First, the legal governance of Canadian cities keeps them infantilized. Cities must "grow up" and no longer resort to begging from the provincial and federal governments. "Too many Canadian cities," Jacobs suggests, "remain forever in adolescence"; even for those cities that have "grown up," she claims that

> [t]he reliance on provincial grants and federal largesse is very crippling. It demeans city governments, putting them in the demoralizing position of being considered incompetent to manage their own internal affairs. It makes beggars out of them as they have to plead and wheedle to get some of the money ... .[153]

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[151] But see Andrew, *supra* note 47 at 147-48.

[152] *Supra* note 150 at 10.

[153] *Ibid.* at 6.

Second, dependency is not merely a problem of resources. Instead, dependency is normatively unsatisfactory for cities regardless of the financial consequences. As Jacobs illustrates, "dependency is not to be cultivated":

> [I]t is debilitating, demoralizing, wasteful, and not a good condition in general, whether it applies to people or to institutions. If dependency is bad for everything else, why the notion that it's good for cities? It isn't. It absolutely isn't. You can see how it infantilizes cities, making them childish in many ways, to the disgust of their own citizens.[154]

Third, the model governing Canadian cities does not recognize cities' new challenges and functions. Jacobs argues that

> [a]s wards of the province, cities were allowed only to levy property taxes. This was not a bad idea when their capabilities in most cases were limited to maintaining roads, fighting fires, providing water and sewers, keeping drunks in hand and, in general, directly servicing properties. Times have changed beyond recognition. Canadian municipalities are no longer country bumpkin villages – they have wide ranges of abilities and human capital. Yet the old arrangements have remained ... .[155]

Fourth, Canadian cities are improperly governed through "one size fits all" models, which ignores their diverse roles and needs. For Jacobs, this is closely tied in with the other three logics:

> [Provincial and federal] grants, permissions, and largesse can't help but reflect the priorities of those other levels of government. They absolutely don't reflect what different cities have or their differing needs and opportunities at any given time. In reality, municipalities do not march in step with each other. In Canada, they are forced to act like groups of puppets that are fastened to the same sets of controlling strings.[156]

While municipal finances remain central, the political emphasis on the need for improved (or at least new) tools for city governance should be emphasized. Although the call for new tools may often, as Mayor Lastman's comments at the same meeting indicate, come down to a need for financing options, we believe that the choice to articulate the problem in this way is itself significant. Perhaps Jacobs' comment above, that Canadian cities are subject to a uniform set of controlling strings, is instructive. The comment echoes a 1976 report by the Canadian Federation of Mayors and Municipalities, entitled *Puppets on a Shoestring: The Effects on Municipal Government of Canada's*

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[154] *Ibid.* at 13-14.

[155] *Ibid.* at 6.

[156] *Ibid.*

*System of Public Finance*.[157] The report, while discussing the issue of tools, emphasized the fiscal crisis facing Canadian municipalities. The recent movement of the metaphor away from finances toward the centrality of legal tools was at the core of the city charter debate.

### B. *A Key Concern: Tools for Global Competitiveness*

As articulated within this debate, the need for legal tools stems from Canadian cities' need to become (and remain) globally competitive, and to compete with major U.S. cities.[158] Similarly, Keil and Young's analysis of the Toronto campaign highlights the "globalization" concerns that animate the city charter movement.[159] As they indicate, the politics of municipal autonomy are underwritten by a latent anxiety over Toronto's colonial origins and its ability to face the challenges of a global economy. They write, as follows:

> There [is] a shared sense that the restructuring of the municipal governance regime in Toronto, be it through a charter or otherwise, is a necessary reaction to the pressures brought on by globalization ... . The current legal and political framework – born in a colonial and mostly rural Canada – was deemed insufficient or even detrimental to the needs that Toronto would encounter through globalization.[160]

The situation is particularly dire: as suggested at a symposium of the Federation of Canadian Municipalities, Canada is the only G7 country without an "Alpha World City," making it less likely that the country as a whole will be heard globally.[161]

This emphasis on "the global" (echoing Saskia Sassen's influential research on the expanding list of global cities[162]) remains a core element of arguments in favour of a Toronto city charter, which would link Canada's prosperity to the ability of its largest cities to

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[157] Canadian Federation of Mayors and Municipalities, *Puppets on a Shoestring: The Effects on Municipal Government of Canada's System of Public Finance* (Ottawa: Canadian Federation of Mayors and Municipalities, 1976).

[158] *Supra* note 150 at 11.

[159] Roger Keil & Douglas Young, "A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto" (2003) 39 Urb. Affairs Rev. 87 [Keil & Young, "Charter"].

[160] *Ibid.* at 95-96.

[161] FCM, "Urban Century," *supra* note 7 at 4.

[162] Saskia Sassen, *The Global City: New York, London, Tokyo*, 2d ed. (Princeton: Princeton University Press, 2001).

"compete on the nation's behalf in the global marketplace."[163] Toronto, as Keil suggests, "appears as an almost denationalized throughput node of a global economy."[164] This emphasis on global competitiveness is, of course, part of a much broader governmental array of urban neo-liberalism, in which lean, accountable, and local government is combined with the policing of marginal populations, thereby drawing together left and right politics in an effort to promote a "competitive city."[165]

But if the need for global competitiveness is a key focus of newspaper reports and political statements, the solution is often said not to require additional revenue for municipalities precisely because of the neo-liberal nature of this discourse. What is instead imagined is that Toronto's competitiveness can be ensured, not through additional taxation (imagined as potentially wasteful), but through new legal tools to manage its own affairs. For instance, the Toronto Board of Trade makes it clear that in addition to enhanced resources and immediate investment in infrastructure, what is first required is a new governance plan that emphasizes local accountability, transparency, and "good decision-making,"[166] and in that respect Toronto must learn from other "competitor cities" worldwide. Similarly, for the city's chief administrative and financial officers, not only will "the right tools ... make a difference," but "the right tools are making a difference

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[163] Mayors' Summit Communiqué, "Canada Needs Competitive Hub Cities" (23 January 2004) at 1, online: <http://www.canadascities.ca/pdf/mayorsummit_com_012304.pdf>; Chief Administrative Officer, City of Toronto, "Towards a New Relationship with Ontario and Canada" (Staff Report to Policy and Finance Committee, 6 June 2000) at 1, online: <http://www.city.toronto.on.ca/ourcity/newrelation.pdf> [CAO, "Towards a New Relationship"]; FCM, "Urban Century," *supra* note 7; James Milway & Jen Nelles, "Opportunities for Improving Municipal Governance in Ontario: A Discussion Paper" (June 2003), online: Institute for Competitiveness and Prosperity <http://www.competeprosper.ca/research/ReportOnMunicipal Government_190603.pdf>.

[164] Roger Keil, "'Common Sense' Neoliberalism: Progressive Conservative Urbanism in Toronto, Canada" (2002) 34 Antipode 578 at 592 [Keil, "'Common Sense' Neoliberalism"]. See also Roger Keil, *Los Angeles: Globalization, Urbanization, and Social Struggles* (Chichester, NY: J. Wiley, 1998).

[165] Keil, "'Common Sense' Neoliberalism," *ibid.* at 595-96; Keil & Young, "Charter," *supra* note 159 at 88.

[166] Toronto Board of Trade, *Strong City, Strong Nation: Securing Toronto's Contribution to Canada* (June 2002) at 21, online: Toronto Board of Trade <http://www.bot.com/assets/StaticAssets/Documents/PDF/StrongCityRpt.pdf>.

elsewhere."[167] And as the city's background report states, options like "Home Rule" in some U.S. cities (which grants some discretionary authority independent of state legislatures), the constitutional recognition of cities as a level of government in many European countries, and the principle of subsidiarity in the European Union's Treaty of Maastricht, give evidence that "[a] city's legislative toolkit helps or hinders the city's flexibility, creativity and nimbleness in solving problems in a rapidly changing environment."[168]

### C. *Toronto and the City Charter Debate*

On 7 July 2000, the *Toronto Star* reported that on the previous day, city council voted 52-1 "to demand special charter status and put an end to what it sees as provincial government interference in its affairs."[169] There was debate over whether to place a question about seeking charter status on the civic election ballot, even if such a question would violate a newly passed provincial regulation. And during the course of the debate, Mayor Lastman—who less than a year earlier publicly suggested that Toronto perhaps should become a province[170]—emphasized that as part of a city charter, Toronto would also hope to enjoy part of the provincial gas and sales taxes.

Controversy over the idea of a city charter is, at one level, surprising. As John Barber pointed out in *The Globe and Mail*, a city charter in and of itself provides no greater municipal autonomy than any other act.[171] But the controversy is rife with symbolism. As Barber

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[167] Chief Administrative Officer and Chief Financial Officer, City of Toronto, "The time is right for new relationships with Ontario and Canada" in *Towards a New Relationship with Ontario and Canada: Background Reports* (Chief Administrator's Office, June 2000) at 6, online: <http://www.toronto.ca/ourcity/citycharterrep1.pdf>.

[168] Chief Administrative Officer, City of Toronto, "Comparison of Powers and Revenue Sources of Selected Cities" in *Towards a New Relationship*, *ibid.* at 1-2. See also Federation of Canadian Municipalities, "Early Warning: Will Canadian Cities Compete? A Comparative Overview of Municipal Government in Canada, the United States and Europe" (Report prepared for the National Round Table on the Environment and the Economy, May 2001) at 5-10, online: <http://www.fcm.ca/english/documents/compete.pdf>, and see also FCM, "Urban Century," *supra* note 7 at 8.

[169] P. Moloney, "Council demands new status for city; charter depends on approval by province" *Toronto Star* (7 July 2000) B1.

[170] Keil & Young, "Charter," *supra* note 159 at 91.

[171] J. Barber, "Giving city charter status won't provide power it craves" *The Globe and Mail* (22 November 2000) A24.

suggests, "the charter campaign becomes purely symbolic – a defiant dream for the political class, a sharpened stick that Mel [Lastman] can use to poke Mike [Harris] at opportune moments."[172]

If the city charter campaign is part of a broader symbolic politics, where did it originate and what are its goals? A pivotal moment occurred in 1999 when Toronto Mayor Mel Lastman suggested to reporters that Toronto should become its own province, thereby putting the question of municipal autonomy, and city state status, on the radar.[173] As Keil and Young argue,[174] this campaign needs to be understood within the broader debates over globalization, municipal restructuring, and urban neo-liberalism discussed above. In their excellent overview of the specific history of Toronto's city charter campaign, they suggest that its roots can be traced to the city's 1970s civic reform movement,[175] and that in recent years it is the amalgamation of Toronto, with the resulting political and financial fallouts that was the proximate cause, and spur, of this campaign.

These politics were evident when a possible city charter was raised in a May 2000 Toronto city council meeting. Focusing mainly on the downloading of costs by the Ontario government as a result of amalgamation—and briefly noting that global trends encourage the development of city states—city councillors sought to have staff prepare a report on a possible referendum for Toronto to separate from Ontario.[176] And it is in this city-provincial context that an amendment to the motion was passed, according to which city staff were also to examine "the issue of 'Charter Cities' and any other alternative deemed appropriate to halt the provincial download."[177]

The staff report prepared in June 2000 recommended that city council endorse a new relationship with the federal and provincial government, including the request to become a charter city, and that a

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[172] *Ibid.*

[173] Keil & Young, "Charter," *supra* note 159.

[174] *Ibid.* at 88-89.

[175] By creating a Minister of State for Urban Affairs, the federal government in the 1970s sought to create direct links with municipalities, but was unsuccessful for want of provincial support. See City Solicitor, City of Toronto, "Powers of Canadian cities – the legal framework" (June 2000, updated October 2001) at 10, n. 3.

[176] Toronto City Council, *Minutes of the Council of the City of Toronto* (9-11 May 2000) at 87-88.

[177] *Ibid.* at 91-92.

"Team Toronto" be created.[178] It is most interesting that this report, though focusing on the new challenges faced by Toronto and its need to compete with other North American cities in the twenty-first century, notes that city charters are also an older Canadian technology for governing cities, beginning with the charter for Saint John, New Brunswick, in 1785, Montreal, and continuing more recently, with Vancouver.[179] But this report called for a "custom built" charter that would provide "recognition of Toronto as an 'order of government' with the right to be consulted in advance on any provincial legislation, policy, program or other action that would impact the City"; either a U.S.-style Home Rule arrangement, by which the city would enjoy similar powers to those granted to the provinces by the *Constitution Act 1867*, or provincially defined "spheres of power," within which Toronto has "natural person powers to act independently"; confirmation that the city charter cannot be changed by mere provincial regulation; the ability to raise money through public-private partnerships, tax incentives, financing agreements, and the like; and, the ability for Toronto to negotiate directly with the federal government.[180]

The report reiterated that much of what it sought could already be found in other jurisdictions: if the idea of a charter had deep historical roots in Canada, many of the powers it sought could be found in the United States or other Canadian cities. And in advocating the pursuit of charter status, the report recommended against deeper constitutional change; if Toronto could become "a responsible and accountable order of government with rights and responsibilities," this "would not require secession or elevation to provincial status, both of which would entail insurmountable constitutional hurdles."[181] Toronto's secession from Ontario—or from Canada—would invariably require provincial approval.[182]

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[178] CAO, "Towards a New Relationship," *supra* note 163 at 1-2.

[179] See *e.g.* P. Kenward, "The British Columbia Community Charter: What is going on and what does it mean for you? Part 3" *McCarthy Tétrault LLP Legal Update*, June 2003, online: McCarthy Tétrault LLP <http://www.mccarthy.ca/pubs/publication.asp?pub_code=1350#>.

[180] CAO, "Towards a New Relationship," *supra* note 163 at 4-5.

[181] *Ibid.* at 6.

[182] City Solicitor, *supra* note 175 at 8-9.

The very idea of becoming an "order of government" that is not constitutionally enshrined is, of course, murky.[183] Perhaps, as the Federation of Canadian Municipalities suggests, the point was that a charter "might require the Province to relate to the City as if it were an autonomous, accountable order of government."[184] As one councillor suggested: "Wouldn't that be a wonderful way to kick off a charter campaign? I would reinforce this campaign by doing road repairs around Queen's Park. Cut off their toilets. Repair the sewers. Let them find out what real war is."[185]

This emphasis on *tools* and *powers*, then, allows the charter proposal to gain currency from a wide range of supporters, whether on economic, infrastructural, or political grounds.[186] The charter movement, with Toronto at its core (and buttressed by the fact that Vancouver was recently granted a charter, with some fanfare but perhaps less political strife), prompted the Federation of Canadian Municipalities to endorse a template for writing charters generally.[187]

This has spurred a wide range of proposals for what a Toronto charter would include. The most publicized is the "Greater Toronto Charter,"[188] underwritten by urban advocate Alan Broadbent, which emphasizes principles of democratic governance, as defined by subsidiarity (as we document in Part III, above, a principle that has a

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[183] Keil and Young note that in Canada, greater municipal autonomy could be achieved by a constitutional amendment rendering municipalities a third order of government, with other options including broadly written municipal acts or city charters that can provide autonomy and symbolic value: Roger Keil & D. Young, "Municipal Autonomy? A Sketch of Local State Rescaling in Canada at the Beginning of the 21st Century" (2003) [unpublished].

[184] Federation of Canadian Municipalities, *Model Framework for a City Charter* (2002) at 3 [emphasis added], online: Federation of Canadian Municipalities <http://www.canadascities.ca/pdf/model_framework.pdf>.

[185] Moloney, *supra* note 169, quoting Councillor Howard Moscoe (North York Spadina).

[186] See Keil & Young, "Charter," *supra* note 159 at 91.

[187] Toronto, City Clerk, "Establishing a New Relationship with the Federal and Provincial Governments – Progress Report on Toronto's Initiatives" (Clause embodied in Report No. 12 of the Policy and Finance Committee, adopted by City of Toronto Council 30 July-1 August 2002) [Toronto City Clerk, "Progress Report"]. This endorsement of Charter autonomy was met by others, including the Association of Municipalities of Ontario, the Mayors of Canada's five largest cities (C5) and the Toronto Board of Trade, with calls for urban reform coming from the United Way of Greater Toronto, TD Bank, and others (*ibid.*).

[188] "The Greater Toronto Charter (2001)" in Ideas That Matter, *Towards a New City of Toronto Act Greater Toronto Charter* (Toronto: Zephyr Press, 2005) 40, online: <http://www.ideasthatmatter.com/cities/CityOfTorontoActJune2005.pdf>.

precarious status, at best, in Canadian law) and fiscal accountability. A populist and neo-liberal approach to governance underwrites this model charter, which emphasizes Toronto as "an order of government that is a full partner of the Federal and Provincial Governments of Canada"[189] and accountable to local citizens. Reflecting the arguments presented by Jane Jacobs earlier in this part, this model charter identifies global urbanization as a key issue and emphasizes the need for Canadian cities to compete with others internationally. And, among other benefits, it notes the "symbolic value [of a charter] as an identifier of the uniqueness metropolitan cities bring to a nation state,"[190] underscoring the view that economic globalization has rendered cities the key site of both democracy and prosperity.

Within the City of Toronto it is clear that, at least at a rhetorical and normative level, attaining a charter is not purely an issue of resources. As the City of Toronto's charter strategy suggests:

> The case for change is best advanced by the merits of the argument for modern powers and resources to equip a modern city with appropriate and necessary tools to carry out twenty-first century urban government responsibilities ... . [A]ccess to sustainable, appropriate and adequate financial resources is an urgent and critical issue, but the case for a new relationship is not only about money. It is just as much about having the agility and flexibility to make decisions in a complex and rapidly changing urban environment.[191]

And yet, history shows that charters, while perhaps symbolically mobilized in current political struggles, can be as much a tool of royal control as an instrument of U.S.-style republican home rule. Even in the *Toronto Star*, which has tirelessly supported the campaign for greater autonomy for the city and for a city charter, a story in July 2000 noted that despite Toronto's fascination with the charter enjoyed by Saint John, New Brunswick, an interview with the Mayor of Saint John suggested some caution: "I don't know that it does all that much for us today," she said in a frank telephone interview. "I've heard Toronto is interested in this, but I don't think you're going to get anything (from a

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[189] *Ibid.*, art. 1.

[190] Avana Capital Corporation, *Towards a Greater Toronto Charter* (2000) at 2, online: Ideas That Matter <http://www.ideasthatmatter.com/cities/TwdsCharter.pdf>.

[191] Toronto City Clerk, "Progress Report," *supra* note 187 at 4.

charter) that the province can't override ... . Our lawyers tell us that (regardless of the charter) the province can do what it wants ... ."[192]

Regardless of whether a charter would, in fact, provide additional tools that could not be had through a more expansive municipal act, achieving charter status was for a few years the brass ring for Toronto to grasp. As a perceptive story in Toronto's *Eye Weekly* points out, this is so whatever it might mean—whether it be John Nunziata suggesting that "constitutional status" is needed, Tom Jakobek arguing that "[i]t's a dollars-and-cents thing," Barbara Hall stating that "I don't want to get hung up on terms like 'charter'," or Mayor David Miller concluding that: We need a charter. We need the province to review the Municipal Act so we have natural person powers."[193] And perhaps the passion it garners is equally understandable—as Markham Mayor Dan Cousens concluded about a potential Toronto charter, "I love it."[194]

### D. *A Charter by Stealth?*

I am optimistic Dalton McGuinty will understand this. He's from a big city.
—Mayor David Miller[196]

With the election of the provincial Liberal government and a new city mayor, the municipal autonomy movement appears to be re-energized. A joint task force between the city and the province has been set up to "Review the *City of Toronto Act, 1997* and other Private (Special) Legislation pertaining to Toronto."[197] On 17 September 2004, Premier Dalton McGuinty delivered a speech to the Big City Mayors Summit, pledging to introduce a modernized *City of Toronto Act* by the end of 2005, and to consider giving Toronto the "tools it needs in the

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[192] T. Walkom, "City charter could be a curse" *Toronto Star* (18 July 2000) A17.

[193] W. Norvell, "Charter, anyone? Securing the designation other large cities have could cure our ills" *Eye Weekly* (16 October 2003).

[194] D. Stein, "Show of muscle by urban Toronto" *Toronto Star* (17 August 2000) A27.

[196] Norvell, *supra* note 193, quoting Mayor David Miller.

[197] Ministry of Municipal Affairs and Housing, "Final Terms of Reference: Joint Ontario-City of Toronto Task Force" (23 September 2004), online: Ministry of Municipal Affairs and Housing <http://www.mah.gov.on.ca/userfiles/HTML/nts_1_21835_1.html>.

global economy" to establish a new relationship with the federal government, and to make the city more sustainable, autonomous, and accountable.[198] Premier McGuinty has publicly supported the types of arguments made by Toronto chartists by stating that Toronto is governed by a "legislative and fiscal straitjacket that would baffle Houdini,"[199] and echoing Margaret Thatcher's famous claim that there is "no such thing as society" through his following suggestion: "You don't live and work and raise your family in a province; you do so in a city, and as a subset of that, you do so in a neighbourhood."[200]

But if the municipal autonomy movement is revitalized, a Toronto charter, and its symbolic cachet, may have been abandoned. The city is no longer focusing on a charter but is instead seeking special powers to be incorporated into the *City of Toronto Act*. The irony is that this act was the mechanism for creating the Toronto megacity, and the spur for the charter itself—an irony surely not lost on either the city or the province. And in the interim, Toronto has left the Association of Municipalities of Ontario—an organization that is now conducting independent talks with the Ministry of Municipal Affairs and Housing—to seek additional powers within the Ontario *Municipal Act*. Any amendments achieved by the AMO would likely be ones that Toronto would equally seek to incorporate in a revised *City of Toronto Act*.

As with so many successful social movements, Toronto's city charter movement may be a short-lived campaign with long-lasting effects. Having energized citizens and municipal officials, municipal autonomy is now being pursued through conventional paths, which may reflect a process of growing up for the city and the province alike.

## VII. CONCLUDING REMARKS

Is there a new deal for Canadian cities with respect to legal tools? The variability of municipal law across Canada (and even within a single province) makes it difficult to generalize. About the only thing that is clear, and unlikely to change in the short term, is that talk about

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[198] Dalton McGuinty, "Address to the Big City Mayors summit" (17 September 2004), online: Government of Ontario <http://www.premier.gov.on.ca/news/Product.asp?ProductID=303>.

[199] J. Honderich, "Let's not drop ball on Toronto Act" *Toronto Star* (18 November 2004) A28.

[200] Royson James, "McGuinty vows to help T.O." *Toronto Star* (28 December 2002) A19.

the new deal that pervades political rhetoric and government and municipal reports has not resulted in major legal, and especially statutory, differences. This is further evident in the recent report of the Joint Ontario-City of Toronto Task Force.[201] Despite the report's prosaic title, "Building a 21st Century City," and recommendations of broad powers for Toronto, the city's ability to pass bylaws remains closely regulated. According to the taskforce's proposals, if "a city by-law were to run counter to provincial interests," the province would have "the ability to temporarily suspend it pending a legislative review."[202] This raises doubt as to the broad and permissive municipal powers being proposed.

And yet rhetoric and largely symbolic initiatives often end up having real effects, especially politically. If enough people believe, for instance, that when a city gets its own charter something important has happened, then the charter may well do more to increase the city's powers than a purely legal analysis would suggest. Like mechanical tools, legal tools have limitations, but a certain creativity and unpredictability is inherent in the complex process through which officials, courts, and citizens put the law's tools to various uses. One notable instance of this is found in Toronto's sudden abandonment of its campaign for charter status in favour of a less showy and legally more simplistic plan to have the province amend the amalgamation law, the *City of Toronto Act.*

Keeping in mind this caveat about politico-legal creativity, which forecloses any definitive predictions about the legal future, we now turn to some of the key developments that our research has documented.

The first is a third level of government. The campaign promoted by the Federation of Canadian Municipalities and others to have municipal government recognized as a third level of government is unlikely to succeed given the basic architecture of the Canadian constitution. The frequent citation in municipal reports and urban studies of the language of "subsidiarity" introduced into Canadian law in *Spraytech*, however, especially if connected to federal infrastructure and transportation grants given directly to cities, may lay a foundation

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[201] Joint Ontario-City of Toronto Task Force, *Building a 21st Century City - Final Staff Report* (November 2005), online: Ministry of Municipal Affairs and Housing <http://www.mah.gov.on.ca/userfiles/page_attachments/Library/1/3523728_toronto.pdf>.

[202] *Ibid.* at 3-4.

for a shift toward recognizing the municipal function as de facto governmental. What needs to be resolved is whether this principle of "subsidiarity" will become further institutionalized, and how courts will reconcile a principle of "local distinctiveness and population diversity" with Canada's political and constitutional structure.

Second is the end of prescribed powers. The "spheres of jurisdiction" approach used by numerous provincial governments to grant powers to municipalities with a more flexible form has not brought about the sudden death of the Dillon doctrine, especially in Ontario, where micromanagement of municipal decision making coexists with some new, flexible powers (used for example by the city of Toronto in its pesticide bylaw). Furthermore, while courts have recognized the general legislative intention to move away from the laundry list approach, there is no reason to expect that more flexible powers imply more power. The City of Calgary can now regulate taxi plates without the particular entity—plates, or taxis—being mentioned in the relevant statute, but the city has no greater powers to regulate the industry now than it exercised prior to 1994. Similarly, city charters can be a vehicle for autonomy and empowerment, but can also be prescriptive and limiting.

Third is the question of cities versus municipalities. What to urban studies specialists, economists, and sociologists seems like a serious (provincial) failure to develop legal tools that reflect basic socio-economic processes is compounded by the recent federal move away from the "new deal for cities." The amorphous concept of "community" used by the federal government, which is the political equivalent of the general concept of the municipal corporation, is likely to hamper those who are actively developing creative solutions to problems that are specific to cities, from policies favouring public transit to licensing large apartment buildings to building homeless shelters.

Fourth is accountability, but to whom? Neo-liberal and neo-conservative political movements claimed that governments in Canada, including municipal councils, needed to be reined in and made accountable. Accountability is not a neo-liberal invention, however; Dillon was a great promoter of municipal accountability and transparency, with large ratepayers featuring prominently in his model. Everyone can agree on the need for accountability. But there is less clarity and less consensus if one asks, accountability to whom? Our analysis of the Ontario *Municipal Act* shows that the envisioned accountability is often a matter of being accountable to the provincial government that "creates" municipalities (as the act puts it) more than

to citizens. Micromanagement of everyday municipal decision making coexists with the rhetoric of "empowerment" and flexible powers. And the mechanisms put in place in the name of accountability to citizens—not only in that act but also through the zoning and planning machinery controlled by the OMB—often favour middle class, educated property owners, putting real obstacles in the path of democratic municipal policies such as inclusive zoning.

Fifth is competition between cities, and the potential of star status for some. Whether in the context of the "new deal for cities" or city charter campaigns, Canadian cities are often finding themselves in competition with one another, with the largest cities arguing that they require unique status and powers. This raises the question of whether some cities will gain increased powers, while smaller cities will be left with less bargaining power in the process.

Cities and their citizens continue to face challenges, many of legal origin, as they seek to address the mounting socio-economic (and fiscal) crises of our post-welfare state. It is clear that neither new, more rational municipal acts nor popular tools such as city charters, will necessarily create a better legal field within which to develop creative solutions that suit specific cities. On the other hand, the legal changes of the past decade do contain some positive possibilities. The extent to which these possibilities become reality cannot be predicted. However, given that many municipalities managed to creatively find legal tools within the highly limiting context of the old, *Baldwin Act*-style municipal legislation, it is possible to feel at least somewhat confident that creative uses of legal technologies will be devised.