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With Great(er) Power Comes Great(er) Responsibility: Indigenous Rights and Municipal Autonomy

ALEXANDRA FLYNN*

This article asks how the dialogue surrounding greater municipal autonomy intersects with Aboriginal rights and title, recognized under section 35 of the *Constitution Act, 1982* (*Constitution*), with a particular focus on Toronto.¹ The first part of this article sets out the ways in which Toronto sought empowerment following the *Better Local Government Act* or Bill 5, including judicial consideration of the constitutional role of Canadian municipalities, the legislative advances made by provincial governments, and the yet-implemented possibilities of protection through a little-used mechanism within the *Constitution*. Part II analyzes the obligations of municipalities in respect of Indigenous Peoples and communities with or without increased authority. I explain the ways in which municipal governments are introducing legal reforms to improve Indigenous-municipal relationships, the increasing expectations of municipal consultation with First Nations, and the direction of Canadian jurisprudence. In the final part of the article, I argue that any municipalities seeking protection or asserting a role as a democratic government within the Canadian federal landscape must understand their obligations to Indigenous communities.

IN AUGUST 2018, MID-WAY THROUGH THE CITY OF TORONTO'S democratic election, the Province of Ontario enacted the *Better Local Government Act* (Bill 5), legislation that drastically reduced the size of City Council.² The result was a slap in the face to the authority of Canada's largest city, just over a year after Toronto's City Council had changed the number of electoral districts following a multi-year ward boundary review process.³ The City of Toronto succeeded in challenging the newly enacted law at the lower court level. However, the decision was overturned one year later with a three-two split in favour of the province at the Court of Appeal.⁴ The lack of legal clarity has led to a pressing constitutional conundrum, if not crisis, and the Court of Appeal decision has been appealed to the Supreme Court of Canada (SCC), triggering a long overdue legal analysis of municipal authority.⁵ In the meantime, many advocacy groups and politicians have

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¹ This article uses the terms, "Indigenous Peoples" to refer to First Nations, Inuit, Métis, and other Indigenous Peoples; "Aboriginal Peoples" when referring to terminology used in the *Constitution*; "First Nations" to refer to Indigenous nations and government systems; and "bands" to described elected Indigenous councils as defined under the *Indian Act*. Where possible, I use the name of the Indigenous community. All errors are my own.

² SO 2018, c 11 [*Bill 5*].

³ Toronto City Council, *Follow-up Report on the Toronto Ward Boundary Review*, City Council Decision EX18.2 (Toronto: TCC, 8 November 2016).

⁴ *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 [*Toronto I*].

⁵ *City of Toronto v Attorney General of Ontario*, 2019 ONCA 732, leave to appeal to SCC granted, 38921 (26 March 2020) [*City of Toronto 2020*]; Toronto City Council, *Legal Challenge to Bill 5, the Better Local Government Act*, City Council Decision CC10.3 (Toronto: TCC, 2 October 2019) [*Toronto CC10.3*].

called for greater protection for municipalities through mechanisms such as a city charter.⁶ Other Canadian provinces, perhaps influenced by the undisciplined Ontario example, have used their constitutional power to cancel plans for expanded local autonomy.⁷

Bill 5 and the subsequent legal story have drawn attention to the precarious legal status of Canadian municipalities. However, within this tale, little mention has been made of the effects of municipal authority on Indigenous rights. The forgotten narrative of the Indigenous origin of Toronto and many other Canadian municipalities ignores the legal protections for Indigenous Peoples under Section 35 of the *Constitution, Act 1982 (Constitution)*.⁸ The *Constitution* states that “Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁹ Many First Nations have treaty and land interests such as reserves, urban reserves, and fee simple title at the urban scale, both within and adjacent to municipalities, and about half of all Indigenous Peoples live within cities across Canada.¹⁰ There are treaty relationships and Indigenous claims within and adjacent to cities, but localities often claim uncertainty in regard to the obligations they owe to First Nations.¹¹ As municipal authority changes, so too will Indigenous-municipal legal relationships, especially if local governments are constitutionally protected.¹²

This article raises urgent attention to Indigenous-municipal legal relationships across Canada, focusing squarely on Toronto, the target of Bill 5. With their important access to resources and transportation, most Canadian cities were Indigenous spaces first.¹³ Toronto sits on land that hosts a patchwork quilt of overlapping territories that include the Mississaugas of the New Credit, the Haudenosaunee Confederacy, Treaty 13 Nations, the Wendat, the Petun Nations, and other Indigenous communities.¹⁴ It is subject to the Dish With One Spoon Wampum Belt Covenant, a treaty agreement between the Haudenosaunee Confederacy and the Ojibwe and allied Nations to peaceably share and care for the resources around the Great Lakes. The displacement of Indigenous communities in cities like Toronto is a fundamental and omitted part of the lore of most cities. For example, the Mississauga tribe of the New Credit received ten shillings for the 250,880 acres of what became the City of Toronto, yet many history books omit any mention of the treaty or the sale of the territories, which has become the basis of a land claim.¹⁵ Instead, the City places its origin story at 1834, not the Treaty of Toronto signed in 1787, briefly revoked in 1794, and reasserted in 1805.¹⁶ The many Indigenous spaces and claims that span the geography of what we

⁶ “A Proposal to Empower and Protect Toronto,” *Charter City Toronto*, online: <chartercitytoronto.ca> [perma.cc/TYJ3-CL6Y] [*Charter City Toronto*].

⁷ Justin Giovannetti & Carrie Tait, “Mayors of Calgary, Edmonton criticize funding cuts to cities in Alberta budget,” *The Globe & Mail* (25 October 2019), online: <theglobeandmail.com/canada/alberta/article-alberta-premier-jason-kenneys-budget-cuts-hit-calgary-and-edmonton> [perma.cc/9SZ5-VGT5].

⁸ Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution*].

⁹ *Ibid*, s 35(1).

¹⁰ Mary Jane Norris, Stewart Clatworthy & Evelyn Peters, “The Urbanization of Aboriginal Populations in Canada: A Half Century in Review” in Evelyn Peters & Christopher Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 29.

¹¹ See e.g. Heather Dorries, *Rejecting the “False Choice”: Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (PhD Dissertation, University of Toronto, 2012) [unpublished].

¹² Felix Hoehn & Michael Stevens, “Local Governments and the Crown’s Duty to Consult” (2018) 55:4 *Alta L Rev* 971.

¹³ Victoria Jane Freeman, “*Toronto Has No History!*” *Indigeneity, Settler Colonialism and Historical Memory in Canada’s Largest City* (PhD Dissertation, University of Toronto, 2010) at 4–5 [unpublished].

¹⁴ See e.g. “Native Land,” *Native Land*, online: <native-land.ca> [perma.cc/TN8U-HTM7].

¹⁵ Freeman, *supra* note 13 at 72–73.

¹⁶ *Ibid* at 83–85.

call Toronto go well beyond the scope of this article, but are critical in considering the city's quest for autonomy.

This article focuses specifically on the implications of increased municipal protection on Indigenous rights and sovereignty. In this analysis, I draw particular attention to the City of Toronto, Canada's largest municipality and the fifth largest government in the country, which is currently engaged in efforts to assume greater autonomy.¹⁷ The first part of this article explains what we mean when we talk about the empowerment of cities. I set out the constitutional role of Canadian municipalities, exploring the legal nudges made by the SCC to recognize the democratic importance of local governments through the development of principles such as subsidiarity and cooperative federalism within the constraints of section 92(8) of the *Constitution*. The article explains how Bill 5 unleashed a series of arguments by applicants, respondents, and intervenors, and many advocacy efforts aimed at protecting local democracy related to the *Canadian Charter of Rights and Freedoms* (*Charter*) and unwritten constitutional principles.¹⁸ In the second part of the article, I outline the effects of a more expansive understanding of municipal authority on Indigenous Peoples and communities. I draw on the early promise of reimagined Indigenous-municipal relationships coupled with increasing local obligations to First Nations to argue that any changes to city power must be prefaced with a clear understanding of a city's responsibilities to Indigenous Peoples and communities. I conclude that local governments asserting claims for recognition and respect both within and outside the existing constitutional fabric must likewise recognize and uphold their own legal obligations to Indigenous Peoples and communities.

I. WHAT DOES THE EMPOWERMENT OF CITIES MEAN?

The legal story of municipal authority continues to evolve in Canada. In this story, the courts play a prominent but not decisive role. There are three ways to talk about city empowerment: through the courts, through legislation, and through a constitutional change.

A. THROUGH THE COURTS

Under section 92(8) of the *Constitution*, municipal status and jurisdiction appear unambiguous: "Municipal institutions" are within the province's exclusive authority and have no protection against changes to the design and power imposed on them by provinces.¹⁹ This constitutional brevity has led municipalities to be called "creatures of the province" with provincial governments empowered to set rules regarding what municipalities can and cannot do.²⁰ Based on existing case law, any constitutional understanding, review of municipal authority, or assessment of municipal decision-making thus means examining the specific acts undertaken by a municipality and whether

¹⁷ See e.g. *Charter City Toronto*, *supra* note 6.

¹⁸ *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 (factums filed at the Ontario Court of Appeal by the City of Toronto, the Attorney General of Ontario, the Canadian Constitution Foundation, the Canadian Taxpayers Federation, the David Asper Centre for Constitutional Rights, and the Federation of Canadian Municipalities).

¹⁹ Stanley Makuch, Neil Craik & Signe B Leisk, *Canadian Municipal and Planning Law*, 2nd ed (Toronto, ON: Thomas Carswell, 2004) at 81.

²⁰ Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 *Osgoode Hall LJ* at 409.

they are acting within their “defined jurisdictional sphere,” with a failure to do so resulting in “the courts quashing the municipal action as *ultra vires*, or beyond its legal competence.”²¹

Although cities are left out of the *Constitution* as a level of government,²² the interpretation by the courts of municipal power has evolved considerably over the last twenty years.²³ Cases concerning municipal authority mostly focus on reviews of municipal decision-making to ask whether specific acts undertaken by the municipality are *ultra vires* or within their “defined jurisdictional sphere.”²⁴ In asking whether decisions were within a locality’s powers, the SCC has recognized municipalities as representative governments. For example, in *Nanaimo (City) v Rascal Trucking Ltd* in 2000, the Court stated that “municipalities balance complex and divergent interests” in decision-making, thus “warrant[ing] that *intra vires* decisions of municipalities be reviewed upon a deferential standard.”²⁵ That same year, the Supreme Court decreed that “[m]unicipal governments are democratic institutions through which the people of a community embark upon and structure a life together.”²⁶ In *R v Guignard*, decided just two years later, the SCC affirmed that municipal powers “must be given a generous interpretation because their closeness to the members of the public who live or work on their territory make them more sensitive to the problems experienced by those individuals.”²⁷

A number of the SCC’s recent decisions also make room for the recognition of municipalities as a legitimate level of government in the federal structure. In 2007, the SCC firmly decided in *Canadian Western Bank v Alberta* that the *Constitution* must be interpreted through the lens of “cooperative federalism.”²⁸ Constitutional doctrines are used to balance the overlap of rules made by governments, reconcile diversity, and ensure sufficient predictability in the operation of powers.²⁹ The principle of cooperative federalism stands strongly against the previous interpretation of the federation’s respective jurisdictions as akin to “watertight compartments.”³⁰ It also incorporates the doctrine of subsidiarity, which serve as an important component in interpreting generously the scope of municipal action.³¹ Taken together, the pronouncements of the SCC regarding the proper interpretation to be given to Canadian federalism is consistent with an important role for municipalities as stewards of the local community.

Despite this seemingly progressive jurisprudence, judges have to date declared that they will not re-read the *Constitution* so as to include municipalities as a protected order of government.³² For example, in *East York v Ontario (Attorney General)*, several municipalities challenged the Province of Ontario’s decision to create the Toronto megacity in 1998 without the

²¹ Mukich, Craik & Leisk, *supra* note 19 at 81.

²² See e.g. Daniel Weinstock, “Federalism and Cities” in James E Sterling & Jacob T. Levy, eds, *Federalism and Subsidiarity* (New York; New York University Press, 2014) 259 at 259–87.

²³ *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136 at para 107.

²⁴ Mukich, Craik & Leisk, *supra* note 19 at 81.

²⁵ 1 SCR 342 at para 35.

²⁶ *Pacific National Investments Ltd. v Victoria (City)* 2000 SCC 64 at para 33.

²⁷ 2002 SCC 14 at para 17.

²⁸ 2007 SCC 22 at para 22–24 [*Canadian Western Bank*].

²⁹ *Ibid.*

³⁰ See e.g. *ibid.*; *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161; *Law Society of British Columbia v Mangat*, 2001 SCC 67; *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2.

³¹ *Canadian Western Bank*, *supra* note 287 at paras 42–43, 45 (the SCC held that a broad application of the doctrine of interjurisdictional immunity is incompatible with flexible federalism, which aligns more closely with the constitutional doctrines of pith and substance, double aspect, and paramountcy, and the principle of subsidiarity).

³² *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767 at para 85.

consent of the amalgamated six municipalities.³³ The Superior Court of Ontario concluded that the unilateral action did not exceed the province's constitutional authority to make laws relating to municipal institutions in the province. The Court set out four “clear” principles regarding the constitutional status of Canadian cities:³⁴ (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; and (iv) municipal institutions may exercise only those powers which are conferred upon them by statute. This decision was upheld by the Ontario Court of Appeal.³⁵ Likewise, Justice Louis LeBel in *114957 Canada Ltee (Spraytech, Société d'arrosage v Hudson (Town))* in 2001, cautioned that courts must assume municipal authority where none exists.³⁶ This means that the courts have not read section 92(8) or any other section of the *Constitution* as displacing provincial governments' authority over municipalities or protecting municipalities from provincial interference.

It is squarely within this legal terrain that Bill 5 was enacted. Toronto's nomination period for the statutorily scheduled municipal election began on 1 May 2018.³⁷ Thousands of candidates signed up in the first two months of the race, with a record number of candidates from historically marginalized communities vying for councillor positions.³⁸ On 7 June 2018, the Conservative party won a majority of seats in the provincial legislature and Doug Ford, a previous Toronto councillor, became the premier. Bill 5 passed into law on 14 August 2018 and, as promised, amended the *City of Toronto Act, 2006* (*City of Toronto Act*) by reducing the size of city council from forty-seven to twenty-five.³⁹ Several candidates for City Council, mainly women and people from other historically marginalized communities, challenged Bill 5, as did the City of Toronto once empowered to do so by City Council, following a tepid response by the city's mayor.⁴⁰

On 10 September 2018, Superior Court Justice Edward Belobaba found that Bill 5 “substantially interfered with both the candidates' and the voters' right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*” on two grounds and could not be saved under section 1.⁴¹ First, the change in the number of wards mid-way through the campaign period breached candidates' freedom of expression.⁴² Second, using section 3 to inform the interpretation of section 2(b), the large cut in the size of City Council and increase in the size of wards violated voters' freedom of expression rights by making them unable to “cast a vote that can result in effective representation.”⁴³ In a whirlwind decision, following the government's threat that they would invoke the notwithstanding clause to override Justice

³³ (1997), 34 OR (3d) 789 (ONSC) Borins J, aff'd by ONCA, (1997) 36 OR (3d) 733, leave to appeal to SCC refused (1998) 1 SCR vii.

³⁴ *Ibid* at 797–98.

³⁵ *Ibid*.

³⁶ SCC 40 at 49 [*Spraytech*].

³⁷ *Municipal Elections Act, 1996*, SO 1996, c 32, s 33(4) [*Municipal Elections Act*].

³⁸ *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 at para 31 [*City of Toronto et al*].

³⁹ SO 2006, c 11, Sched A, s 128(1).

⁴⁰ *City of Toronto et al*, *supra* note 39; Alexandra Flynn, “The legal case against Ford's assault on local democracy,” *Spacing Magazine* (30 July 2018), online: <spacing.ca/toronto/2018/07/30/the-legal-case-against-fords-assault-on-local-democracy>[perma.cc/DQ4Y-84PM]

⁴¹ *City of Toronto et al*, *supra* note 38 at para 10.

⁴² *Ibid* at para 31.

⁴³ *Ibid* at para 51. Section 3 of the *Charter* guarantees Canadian citizens the democratic right to vote in a general, federal, or provincial election, and the right to be eligible for membership in the House of Commons or of a provincial legislative assembly, subject to the requirements of Section 1 of the *Charter*.

Belobaba's decision, the Court of Appeal granted the Province of Ontario's request for a stay, with the result that the election moved forward under a twenty-five ward model.⁴⁴

Exactly one year later, the Court of Appeal decided in a three-two decision to overturn Justice Belobaba's decision on the grounds that the province was constitutionally empowered to design municipality authority in whatever manner it wished. The majority declared Bill 5 to be constitutional, with no violations of section 2(b) of the *Charter* or of unwritten constitutional principles. They stated that the affair was a "political matter," and that the Court had "no legitimate basis" to intervene.⁴⁵ The majority emphatically rejected combining *Charter* sections by using section 3 to inform section 2(b), stating that each *Charter* right must be unambiguous and "the content of one right cannot be subsumed by another, or used to inflate its content."⁴⁶ They also took offense to the use of unwritten constitutional or democratic principles to overturn Bill 5, stating that even if the Act did violate either such principle, "there would be no legitimate basis for the court to invalidate" the law.⁴⁷ The two dissenting judges resolutely disagreed, concluding that,

[T]he actions taken by Ontario to secure that result left a trail of devastation of basic democratic principles in its wake. By extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history.⁴⁸

The dissent rested its exposition on section 2(b), not unwritten constitutional principles, as the basis upon which Bill 5 should be invalidated.

The Court of Appeal's decision has been appealed to the SCC, with numerous grounds of appeal possible outside of section 2(b) of the *Charter*, including unwritten constitutional principles and the applicability of section 3 of the *Charter* to municipalities.⁴⁹ While the SCC could consider how the notion of municipalities as "creatures of the province" nests with the increasing amount of deference granted to local governments as democratic bodies, it is more likely that the Court will focus on the degree to which provinces are constrained from interfering with local elections or undermining candidates' and voters' expectations of freedom of expression during the voting period. However, even if the Court focuses on Bill 5's introduction during an election and the resulting impact on the expression rights of candidates and voters, the SCC is clear that municipalities are government actors within the Canadian federation. While they may have their powers limited by provinces, they are considered by courts to be public bodies that serve a democratic function.⁵⁰ Overturning Bill 5 on any grounds would only solidify this jurisprudence.

⁴⁴ *Toronto 1*, *supra* note 4.

⁴⁵ *Ibid* at para 6.

⁴⁶ *Ibid* at para 76.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at para 136.

⁴⁹ *Toronto CC10.3* and *City of Toronto 2020*, *supra* note 5. For a comprehensive discussion of the potential arguments on appeal to the SCC see the Introduction to this special volume.

⁵⁰ See *e.g. Pacific National Investment Ltd v Victoria (City)*, 2000 SCC 64 at para 33 ("Municipal governments are democratic institutions through which the people of a community embark upon and structure a life together. Even in this context, however, nobody can challenge the proposition that municipal governments are creatures of the legislature – a municipal government has only those powers granted to it by provincial legislation").

B. THROUGH PROVINCIAL LEGISLATION

Bill 5 was introduced through provincial legislation. The main question that arose in the legal case that challenged Bill 5 was whether the legislation was valid as a result of its introduction mid-way through an election. Only one intervenor challenged the legislation on the basis that section 92(8) should be read as prohibiting the provincial government from enacting Bill 5, noting among other arguments that, “[l]ocal democracy is older than Canada.”

Immediately after the Norman Conquest, William I granted a Charter to the City of London, and the City won the right to choose its own Mayor on 9 May 1215. A month later, the *Magna Carta* confirmed these rights and granted “that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.”⁵¹ The argument of the intervenor concludes that the “positive language of 92(8) confirms the place of the municipal council.”⁵² This argument had little traction in the Court of Appeal’s majority decision and dissent, consistently with previous decisions.⁵³ While protection for municipal elections under section 2(b) or section 3 of the *Charter* could limit an expansive understanding of provincial power in respect of municipalities and therefore continue to incrementally advance the recognition of municipal government in Canada’s federal model, such a decision would not displace the current interpretation of section 92(8) of the *Constitution*.

As such, Canada’s largest cities have sought greater autonomy through provincial legislation itself as a way to overcome provincial involvement in local affairs. Over the last two decades, and following extensive lobbying efforts, provinces across the country have given more expansive powers to large municipalities—including more options for raising revenue and greater oversight in matters such as infrastructure and housing.⁵⁴ For example, in 2016, the province of Québec introduced legislation that gave greater autonomy to Québec and Montréal, the latter also being granted special official status as a metropolis.⁵⁵ Among other new fiscal and regulatory powers, Montréal gained new authority in housing, heritage preservation, and homelessness and immigration policy.⁵⁶

The *City of Toronto Act* was meant to confer governmental status to Toronto via provincial legislation. Section 1 of the Act reads: “The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable.”⁵⁷ As a government, it has the power to “determine what is in the public interest for the City” and to “respond to the needs

⁵¹ *Toronto 1*, *supra* note 4; Stéphane Émond-Chabot, Mary Eberts & William B Henderson, “Factum of the Intervener, Federation of Canadian Municipalities in *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732,” (day/month/year of access) at 3, online:

<<http://www.ontariocourts.ca/coa/C65861/files/C65861.FOI.FederationofCanadianMunicipalities.pdf>> [perma.cc/T7KY-XNC3] (intervener factum).

⁵² *Ibid* at 4.

⁵³ *East York*, *supra* note 33.

⁵⁴ See e.g. *Municipal Affairs Act*, RSO 1990, c M46; *Charter of Ville de Montréal, Métropole du Québec*, CQLR c C-11.4.

⁵⁵ Raquel Fletcher, “Quebec signs new partnership with municipalities,” *Global News* (6 December 2016), online: <globalnews.ca/news/3110591/quebec-signs-new-partnership-with-municipalities/> [perma.cc/4XT6-SEBL].

⁵⁶ Staff writer, “Quebec proposes greater autonomy, grants metropolis status for Montreal,” *CBC News* (8 December 2016), online: <cbc.ca/news/canada/montreal/quebec-proposes-greater-autonomy-grants-metropolis-status-for-montreal-1.3888329> [perma.cc/F83M-SQDJ].

⁵⁷ *City of Toronto Act*, *supra* note 39, s 1(1).

of the City,” as well as a host of other seemingly expansive powers.⁵⁸ While initially lauded as evidence of a government-to-government relationship, the *City of Toronto Act* did not explicitly prevent the province from overriding Toronto’s final decision on its wards, nor from disrupting a democratic election.⁵⁹ Neither the majority nor the dissenting opinions of the Ontario Court of Appeal in *Toronto (City) v Ontario (Attorney General)* cited the enactment or specific section of the *City of Toronto Act* as a reason for overturning Bill 5.⁶⁰

Moreover, the powers of Canadian municipalities can still be restricted, even in a seemingly expansive act—for example, the province retained its power to override Toronto’s decisions—or may be limited by other pieces of provincial legislation.⁶¹ Even before Bill 5, numerous other pieces of legislation already limited the breadth of section 1 of the *City of Toronto Act* and the decision-making powers of local governments in Ontario, including the *Planning Act*,⁶² the *Ontario Municipal Board Act*,⁶³ the *Municipal Conflict of Interest Act*,⁶⁴ the *Municipal Elections Act, 1996*,⁶⁵ and the *Municipal Freedom of Information and Protection of Privacy Act*⁶⁶ to name a few.

At the end of the day, one needs to look at the full suite of legislation to which municipalities are subject to understand what they can and cannot do. While provincial governments could arguably constrain their own power by requiring a two-thirds vote or municipal agreement to make particular decisions, they remain the level of government in charge of decision-making when it comes to municipal authority. This is evidenced in Alberta, where the province introduced a charter for Calgary and Edmonton, its largest cities, in 2018 after years of negotiation.⁶⁷ Calgary’s new city charter contained forty-four new authorities, a new fiscal framework with cost-sharing and enhanced revenue tools, more requirements for community input, and a more mature government-to-government relationship between the city and the province.⁶⁸ After the election of a new provincial government in 2019, these powers were threatened.⁶⁹ Thus, even if an Act pertaining to municipal powers is called a “charter” it does not, on its own, acquire a special status that protects it from interference by subsequent provincial governments. It also means that provincial governments can delegate responsibilities to municipalities, such as the procedural duty to consult Indigenous Peoples before making decisions affecting their constitutional rights, as will be discussed later in this article.

C. THROUGH CONSTITUTIONAL AMENDMENT

⁵⁸ *Ibid*, ss 2(1), (2).

⁵⁹ Levi & Valverde, *supra* note 20 at 421.

⁶⁰ 2019 ONCA 732.

⁶¹ Levi & Valverde, *supra* note 20 at 454–55.

⁶² RSO 1990, c P13.

⁶³ RSO 1990, c O28.

⁶⁴ RSO 1990, c M50.

⁶⁵ *Municipal Elections Act*, *supra* note 37.

⁶⁶ RSO 1990, c M56.

⁶⁷ Scott Dippel, “Calgary finally has its city charter,” *CBC News* (6 April 2018), online: <[cbc.ca/news/canada/calgary/city-council-charter-1.4609322](https://www.cbc.ca/news/canada/calgary/city-council-charter-1.4609322)> [perma.cc/L82W-3RJX].

⁶⁸ Alta Reg 40/2018, online: <www.calgary.ca/cs/city-charter/the-city-charter.html?redirect=/citycharter>.

⁶⁹ Giovannetti & Tait, *supra* note 7.

A third way of entrenching city power would be by constitutional amendment, for example one recognizing city charters in the Constitution. This approach would operationalize section 43 of the *Constitution* which reads:

An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

- (a) any alteration to boundaries between provinces, and
- (b) any amendment to any provision that relates to the use of English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.⁷⁰

Canada's formula for amending the *Constitution* is very restrictive, requiring the consent of the federal government and the legislatures of seven provinces representing fifty per cent of Canada's population.⁷¹ However, a single-province amendment only requires the consent of that province's legislature and of the House of Commons pursuant to section 43. Such amendments have only been made a handful of times since the adoption of section 43 in 1982. In 1997, Newfoundland established a secular school system and Quebec established a language-based school system. In 1993, New Brunswick added section 16.1 to the *Charter*, which guarantees equality rights to the province's English and French-speaking communities.⁷²

Scholars suggest a great deal of potential for section 43 in providing constitutional protection to account for local diversity.⁷³ Toronto's size relative to other Canadian municipalities arguably provides a basis for a different constitutional status. For example, the United States has a handful of "home rule" cities; London has special status as the Greater London Authority; and Mexico City has its own constitution and power akin to a state.⁷⁴ As Kathy Brock notes,

The internal logic of section 43 provides guidance in that it recognizes two essential facts about the Canadian constitution and the Canadian confederation compact. First, it acknowledges a commitment to local autonomy over local affairs ...; [t]he second principle recognized by section 43 is that the needs and aspirations of all the provinces may vary greatly, and these differences may not be understood by all other provinces.⁷⁵

⁷⁰ *Constitution*, *supra* note 8, s 43.

⁷¹ *Ibid*, s 38.

⁷² Dwight Newman, "The Bilateral Amending Formula as a Mechanism for the Entrenchment of Property Rights" (2013) 21:2 Const Forum 17 at 18.

⁷³ See e.g. *ibid* at 18; Benoît Pelletier, "Les Modalités de la Modification de la Constitution du Canada" (1999) 33:1 RJT 1 online: <ssl.editionsthemis.com/uploaded/revue/article/rjtv0133num1/pelletier.pdf> [perma.cc/A99X-AQWU]; Kathy Brock, "Diversity Within Unity: Constitutional Amendments Under Section 43" (1997) 20:1 Canadian Parliamentary Review 23 at 24, online: <revparl.ca/english/issue.asp?param=62&art=49> [perma.cc/G8S2-ET8G].

⁷⁴ Valverde & Levi, *supra* note 20; Harriet Bulkeley et al, "Enhancing Urban Autonomy: Towards a New Political Project for Cities" (2018) 55:4 Urban Studies 702; Alejandra Reyes, "The Evolution of Local Governance in Mexico City: Pursuing Autonomy in a Growing Region" *IMFG Perspectives Paper* (2019), online: <munkschool.utoronto.ca/imfg/research/doc/?doc_id=514> [perma.cc/6WU9-UJ7T].

⁷⁵ Brock, *supra* note 73.

Several prominent political actors at the local, provincial, and federal levels have already expressed support for the idea of a constitutionally protected City of Toronto. In 2018, former Mayor John Sewell and journalist Doug Earl began a campaign to introduce a constitutionally protected charter in Toronto.⁷⁶ They argued that,

A more equitable relationship, with clearly separated authority, exclusive jurisdictions for the city, and clear rules on shared jurisdiction, will reduce inter-governmental friction, streamline decision-making, eliminate duplication, produce tax savings and clear the decks for partnership and cooperation between Toronto and Ontario on matters that are truly of mutual interest.⁷⁷

The charter would be enshrined in the *Constitution* and would require both federal and provincial amendment going forward.⁷⁸ The proposal has been endorsed by a candidate running for a leadership position with the provincial Liberal party, a city councillor, local media, and a Toronto-area Minister of Parliament.⁷⁹ Thousands of people have expressed support by attending rallies.⁸⁰ While the initiative faces hefty political hurdles, if successful, a city charter would remove the unilateral power of the province to determine the City of Toronto's authority, and would elevate the City as a constitutionally protected government.

As cities seek and gain autonomy and power through any of these three means, there are possibilities of greater protection from provincial interference and more decision-making autonomy. The initiatives taken over the last two decades, whether through the courts, provinces, or campaigns for constitutional protection under section 43, demonstrate a steady upward trajectory in recognizing a distinct legal order for cities. This upward trajectory, I argue, carries implications and obligations in respect of Indigenous Peoples and communities, as the next section explains.

II. MUNICIPAL LEGAL OBLIGATIONS TO INDIGENOUS PEOPLES AND COMMUNITIES

As Bill 5 weaves its way through the courts and as advocates clamor for enhanced city power, there is little discussion of the implications for Indigenous Peoples and communities. Local governments ought not neglect these implications for two main reasons: first, demands for municipal empowerment, whether through courts, legislation, or the *Constitution*, only magnify the existing legal obligations that local governments have to First Nations; second, the omission undermines recent local efforts to reimagine municipal-Indigenous relationships.

⁷⁶ "Charter City Toronto In the Media," *Charter City Toronto*, online: <chartercitytoronto.ca/in-the-media.html> [perma.cc/6QSZ-W9F5] (link to CCTO on Spacing Radio for discussion between John Sewell and Doug Earl about Charter Cities).

⁷⁷ *Ibid.*

⁷⁸ "Proposal Overview," *Charter City Toronto*, online: <chartercitytoronto.ca/proposal-overview.html> [perma.cc/R4ZR-MRUY].

⁷⁹ *Charter City Toronto*, *supra* note 6.

⁸⁰ *Ibid.*; "Capacity Crowd for Charter Cities," *Charter City Toronto*, online: <chartercitytoronto.ca/charter-city-meeting.html>.

A. INCREASING MUNICIPAL LEGAL OBLIGATIONS TO FIRST NATIONS

Aboriginal and treaty rights of First Nations are recognized and affirmed under section 35(1) of the *Constitution* and have been given additional meaning through the courts with the duty to consult and accommodate.⁸¹ Although the *Constitution* recognizes and affirms Aboriginal rights, barriers to meaningfully exercising those rights is an urgent issue.⁸² Courts have been a crucial venue for asserting and advancing Indigenous rights, including by specifying how governments must engage with First Nations.⁸³

Despite Canada's nation-to-nation relationship with Indigenous Peoples—as evidenced by the very fact that it concluded treaties with them—Canadian history is replete with examples of what then-Chief Justice Beverley McLachlin of the SCC would eventually call the national government's "cultural genocide" towards Indigenous Peoples through the creation of reserves and residential schools, as well as the erosion of hunting and other rights.⁸⁴ The Dominion, then the federal government, has a long history of systematic erosion of Indigenous rights through the inability of Indigenous peoples to bring lawsuits concerning their rights, and the loss of status of Indigenous women who married non-Indigenous men, to name just a few examples.⁸⁵ Moreover, both the federal and provincial governments have often refused to engage in discussions with Indigenous communities over treaty violations and Indigenous claims, such that legal actions have been required to bring them to the negotiating table.⁸⁶ Until recently, Canada was even among a small handful of states that refused to bind themselves to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which, among other things, advances Indigenous rights to the protection of their ancestral territories and mandates informed consent from Indigenous communities for developments on their lands.⁸⁷

One concrete way that Indigenous rights are undermined is through imposed jurisdictional knotting. John Borrows writes that jurisdictional fracturing is rampant, meaning that federal and provincial governments impose and apply laws that muddy their respective obligations to First Nations.⁸⁸ Scholar Kaitlin Ritchie cautions that the expectation of municipal negotiations with First Nations may further water down the nation-to-nation relationship that exists between the federal government and First Nations, further compromising treaty and other relationships.⁸⁹ The

⁸¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

⁸² Fraser McLeod et al, "Finding Common Ground: A Critical Review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations" (2015) 6:1 International Indigenous Policy Journal 3; Clara M Fraser & Leela Viswanathan, "The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project" (2013) 22:1 Canadian Journal of Urban Research 1.

⁸³ *Haida*, *supra* note 81 at paras 16, 19-20, 47 (referencing *R v Badger*, [1996] 1 SCR 771 at para 41; *R v Marshall*, [1999] 3 SCR 456).

⁸⁴ Rhoda Howard-Hassmann, "Cultural Genocide of Canada's Aboriginal People," (13 July 2015), *Centre for International Governance Innovation*, online: <cigionline.org/articles/cultural-genocide-canadas-aboriginal-people> [perma.cc/8KCX-CSL9].

⁸⁵ Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (Winnipeg: TRCC, 2015) at 25.

⁸⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

⁸⁷ GA A/Res/61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007); see e.g. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

⁸⁸ John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17.

⁸⁹ Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation." (2013) 46:2 UBC L Rev 397 at 397–438.

conundrum that Ritchie describes plays out in deliberations as to whether municipalities in Ontario have a duty to consult and accommodate. This duty arises when the Crown has knowledge (real or constructive) of the existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.⁹⁰ The Crown is understood by the courts to be the federal and/or provincial governments.⁹¹ It holds a non-delegable legal duty to consult and accommodate Indigenous Peoples in such cases, although it may delegate procedural aspects of consultation to third parties.⁹²

The courts have stated that the goal of the duty to consult and accommodate is to achieve “reconciliation.”⁹³ However, the term has not been given any specific legal meaning.⁹⁴ To many Indigenous Peoples, the vagueness of the aspiration it represents fails to acknowledge the colonialism that underpins our legal system. Mariana Valverde and Adriel Weaver write that reconciliation involves a “reconciliation of Canadian (Crown) sovereignty with some collective rights for [A]boriginal peoples, rights which are sometimes substantive ... and sometimes merely procedural.”⁹⁵ They state that reconciliation is “purged of its potential to challenge colonial violence” and is instead “a statement whose logical corollary, apparently, is that the Crown must act decently not because of international human rights norms but because of its internal, self-imposed honour.”⁹⁶ As such, the judicial understanding of reconciliation is measured by the Crown itself rather than in accordance with specific principles, such as those contained in UNDRIP, making it limited.

The issues of jurisdictional muddling and of what it concretely means to move towards reconciliation become pronounced in considering the relationships between Indigenous local communities and settler municipal governments. There are no SCC cases extending the duty to consult to municipalities.⁹⁷ The leading appeal court decision, *Neskonlith Indian Band v Salmon Arm (City)*, states that municipalities have no independent constitutional duty to consult First Nations whose treaty and other interests may be affected by municipal decision-making.⁹⁸ In this case, the Neskonlith were unsuccessful in challenging a decision made by the City of Salmon Arm, which allowed a permit for development to be issued in a flood plain area located right beside their reserve. Even though the City of Salmon Arm took steps to consult and accommodate the Neskonlith, the Court held that the municipality did not owe them a duty to consult, partly on the basis that municipalities do not have the capacity to properly do so.⁹⁹ A handful of other lower court decisions have come to the same conclusion.¹⁰⁰

⁹⁰ *Halfway River First Nation v British Columbia (Ministry of Forests)*, [1997] 4 CNLR 45 at 71.

⁹¹ When beneficial ownership was transferred to Ontario, Ontario took the place of Canada as the level of government with the capacity to take up lands, subject to the rights guaranteed by the treaty; see also *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158.

⁹² *Haida Nation*, supra note 81. See also *Clyde River (Hamlet) v Petroleum Geoservices Inc.*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 [*Chippewas*].

⁹³ *Chippewas*, *ibid.*

⁹⁴ *R v Van der Peet*, [1996] 2 SCR 507.

⁹⁵ Mariana Valverde & Adriel Weaver, “‘The Crown Wears Many Hats’: The Black-boxing of Sovereignty in Canadian Aboriginal Law” in Kyle McGee, ed, *Latour and the Passage of Law* (Edinburgh: Edinburgh University Press, 2015) 93 at 108.

⁹⁶ *Ibid.*

⁹⁷ Shin Imai & Ashley Stacey, “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v. Salmon Arm (City)*,” online (2014) 47:1 UBC L Rev 293 at 293–312.

⁹⁸ 2012 BCCA 379; *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Also see *Morgan v Sun Peaks Resort Corporation*, 2013 BCSC 1668; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991; *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456.

In 2017, however, two decisions of the SCC increased the likelihood that the duty to consult would be extended to municipalities. First, in *Clyde River*, the SCC decided that the procedural aspects of the duty could be delegated to third parties.¹⁰¹ It held that the Crown may rely on administrative bodies (in this case, the National Energy Board) to satisfy the duty to consult.¹⁰² The Court added that the Crown must supplement consultation processes where necessary to ensure that the duty to consult is adequately discharged.¹⁰³ An administrative agency may also assess the adequacy of its consultation process unless their authority to do so is explicitly removed by statute.¹⁰⁴ In such cases, the agency is understood as representing the Crown in regard to consultation. Felix Hoehn and Michael Stevens advance that—based on *Clyde River*, on the evolution of municipal autonomy, and on the fact that third parties have been put into positions where they are in effect, an arm of the Crown—municipalities should be deemed to hold a duty to consult and accommodate.¹⁰⁵ In any case, across the country, municipalities are expected to consult, at least procedurally, on matters that affect First Nations. Municipalities already represent the provincial Crown in municipal planning processes, for example, and provinces effectively rely on municipalities to discharge this duty.¹⁰⁶

Empowered local governments beg the question of a municipal duty to consult and accommodate specifically, and other obligations more broadly, that cities owe to Indigenous Peoples and communities.¹⁰⁷ Municipalities have a curious place as administrative bodies and sort-of governments under Canadian law based on their empowerment under section 92(8) of the *Constitution*.¹⁰⁸ In *Godbout c Longueuil (Ville)*, questioning whether the *Charter* applies to municipalities, Justice Gérard La Forest (with McLachlin CJ and Justice Claire l'Heureux-Dubé concurring) stated in a concurrent opinion that municipalities can only be described as “governmental” entities in that, like Parliament and provincial legislatures,

[m]unicipal councils are democratically elected by members of the general public and accountable to their constituents ... possess a general taxing power ... [and] are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. Finally, and most significantly, they derive their existence and authority from the provinces. Since the *Charter* clearly applies to provincial legislatures and governments, it must apply to entities upon which they confer governmental powers. Otherwise, provinces could simply avoid the application of the *Charter* by devolving powers on municipal bodies. The *Charter* therefore applies to municipalities.¹⁰⁹

¹⁰¹ *Clyde River*, *supra* note 92.

¹⁰² *Ibid.*.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Hoehn & Stevens, *supra* note 12.

¹⁰⁶ *Ibid.*; Imai & Stacey, *supra* note 97.

¹⁰⁷ One question triggered by local demands for municipal empowerment is whether a city that is protected by section 43 of the *Constitution* would be considered a Crown, or whether some or all of the city's powers would still be bound by the province because of section 92(8) of the *Constitution*. Presumably, a charter city would have the same obligations as federal and provincial governments.

¹⁰⁸ *Spraytech*, *supra* note 36.

¹⁰⁹ [1997] 3 SCR 844 at paras 50–51 [*Godbout*].

As administrative bodies, municipal governments are tasked with delivering public services.¹¹⁰ Local governments are reviewable based on administrative law principles like any other public body, meaning that a court can assess whether the entity's decisions meet fairness standards, and whether it exceeded its powers. The law determining whether an entity is a public body reviewable by the courts was summarized in *McDonald v Anishinabek Police Service*.¹¹¹ The Ontario Superior Court held that a court can review an entity's decision "if the body in question is exercising public law functions, or if the exercise of its functions have public law consequences."¹¹² The Court also cited *Masters v Ontario*, stating that if a body fulfills a governmental function, "then the body is part of the machinery of government and is subject to public law."¹¹³ The *Charter* applies to all aspects of government, including the legislative, executive, and administrative branches, as well as municipalities and municipal by-laws.¹¹⁴

In short, since local governments exercise public powers delegated by the province, they are governmental bodies. Whether or not they are considered part of the Crown in particular instances, municipalities can and should take their obligations to Indigenous Peoples and communities seriously. In seeking greater legal and constitutional protection—as it currently does through its challenge of Bill 5—Toronto should identify how disentangling itself from provincial oversight would fit alongside section 35 protections, especially given its own stated commitments to UNDRIP and reconciliation. In favour of increased authority through legal action or constitutional reform, a city must address its legal obligations to Indigenous Peoples and communities, described next.

B. CHANGING GOVERNANCE PRACTICES AT THE LOCAL SCALE

Indigenous and municipal governments across Canada have been reimagining their relationships for years, even without a court-recognized duty to consult. Angela D'Elia Decembrini and Shin Imai pragmatically voice that First Nations and municipalities have a long-standing history of entering into agreements and generating legislative requirements for municipalities to consult and accommodate.¹¹⁵ In cities across Canada, there are examples of urban Indigenous agency cooperation and coordination established to provide better service delivery. In some cities, Indigenous-led organizations have statutory mandates in areas such as child welfare and education.¹¹⁶

On 21 August 2018 Ontario Regional Chief Rose Anne Archibald told municipal leaders that, "[a]cross Canada, municipal governments and neighbouring First Nations are developing stronger relationships."¹¹⁷ These relationships, aimed at "long-term prosperity and peace" are built

¹¹⁰ S M Makuch, "Bora Laskin and Municipal and Planning Law" (1985) 35:4 UTLJ 469.

¹¹¹ (2006), 83 OR (3d) 132 (ON SCDC) [*McDonald*].

¹¹² *Ibid* at para 71.

¹¹³ *Ibid* at para 73; also see *Masters v Ontario*, (1993) 16 OR (3d) 439 (Ont Ct J).

¹¹⁴ *Godbout*, *supra* note 109.

¹¹⁵ Angela D'Elia Decembrini & Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put *Neskonlith* to Rest" (2019) 56:3 Alta L Rev 935.

¹¹⁶ Yale D Belanger, "Breaching Reserve Boundaries: *Canada v Misquadis* and the Legal Creation of the Urban Aboriginal Community" in Evelyn Peters & Christopher Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 69.

¹¹⁷ RoseAnne Archibald, Address (Delivered at the AMO Conference, Ottawa, 21 August 2018), online: *Chiefs of Ontario* <chiefs-of-ontario.org/news_item/orc-roseanne-archibald-speaking-points-at-amc-conference-in-ottawa/> [perma.cc/7LTL-BSM5] [unpublished].

through “lasting friendships, relationships and partnerships on the principles of truth and reconciliation.”¹¹⁸ She stated, “[m]unicipalities, although not original partners to the treaties, are considered from a First Nations perspective, to be current and valuable partners and certainly benefactors of the Treaty process.”¹¹⁹

While far from perfect, Toronto has introduced a number of initiatives focused on relationship-building. For example, over the last ten years, the City of Toronto has increasingly included Indigenous perspectives in its governance model and started to build relationships with Indigenous communities.¹²⁰ There is a broad and diverse range of Indigenous Peoples in Toronto, many of whom may not have connections to First Nations on whose territories the city was established and continues to develop. This calls for a different approach from the reserve-based models most often associated with First Nations governments. The 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP) proposed two possible models of urban Indigenous governance: greater local political participation through Indigenous representation on political bodies at the municipal level, and co-managing urban programs and services.¹²¹ RCAP also proposed a “community of interest” model through the establishment of a city-wide politically representative body. Indigenous communities in Toronto are moving towards both approaches, according to the report of the Toronto Aboriginal Research Project.¹²² Indigenous community agencies are participating formally in local government through their representation on the City’s Indigenous Affairs Committee, which is presently working towards the development of a larger urban Indigenous framework.

In 2010, the City affirmed recognition and respect for the unique status and cultural diversity of Indigenous communities in Toronto, including recognition of their inherent rights under the *Constitution*.¹²³ In 2014, Toronto’s City Council endorsed the *94 Calls to Action* from the TRC Report and requested the development of concrete actions by staff to fully implement the calls to action explicitly relating to the role of municipal governments.¹²⁴ These measures included the adoption of cultural competency training for the Toronto civil service, a ten-year capital project to incorporate Indigenous place-making in Toronto parks, and a roadmap and report card regarding the implementation of plaques to commemorate Indigenous places. In addition, City Council has

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Toronto City Council, *Development of an Urban Aboriginal Strategy for Toronto*, City Council Decision EX33.5 (Toronto: TCC, 5 August 2009).

¹²¹ Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship (1996), online: <<http://data2.archives.ca/e/e448/e011188230-02.pdf>> [perma.cc/J4JP-NTL8] at 439–41.

¹²² Don McCaskill, Kevin FitzMaurice & Jaime Cidro, “Toronto Aboriginal Research Project: Final Report” (2011), *Toronto Aboriginal Support Services Council*, online: <toronto.ca/wp-content/uploads/2019/04/8f73-tarp-final-report2011.pdf> [perma.cc/3J6L-ALGU]. With a sample of over 1,400 individuals, fourteen topics studied and seven methodologies utilized, the TARP study provides an extensive picture of the current situation, successes, aspirations, and challenges facing Aboriginal people in the Greater Toronto Area (GTA). The TARP study is also unique in that it is a community-based research initiative that has been overseen from start to finish by the Toronto Aboriginal Support Services Council in collaboration with the TARP Research Steering Committee.

¹²³ City Council, *Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes* (May 27, 2010).

¹²⁴ See e.g. Peter Wallace, “Fulfilling Calls to Action from Truth and Reconciliation Commission Report” *Toronto City Council* (1 April 2016), online: <toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91816.pdf> [perma.cc/US5T-35UR]; Toronto City Council, *Implementing Indigenous Cultural Competency Training in the Toronto Public Service*, City Council Decision MM29.6 (Toronto: TCC, 24 May 2017) [Toronto MM29.6].

adopted an ongoing ceremony at its meetings and approved a public campaign to educate residents on the Year of Truth and Reconciliation Proclamation.¹²⁵

The City of Toronto made important strides by adopting UNDRIP in 2013.¹²⁶ UNDRIP is widely seen by Indigenous activists, scholars, and lawyers as a best practice in considering Indigenous-settler relationships.¹²⁷ Toronto's UNDRIP-related actions are noteworthy for two reasons. First, UNDRIP's recognition of Indigenous rights goes well beyond the threshold established in Canadian law regarding the duty to consult. The standard it sets concerning free, prior, and informed consent (FPIC) entails not merely an Indigenous right to be consulted with regard to project proposals, but the right to effectively veto projects that cannot be reconciled with Indigenous values or interests. While the City of Toronto has not specifically set out how and when FPIC applies to project assessments, the adoption of UNDRIP still signals the City's desire to build respectful and reciprocal relationships with Indigenous communities. Second, following the release of the TRC report, the City of Toronto acknowledged Article 11 of UNDRIP.¹²⁸ Importantly, the City noted "staff's legal duty to consult," particularly in relation to environmental assessments and heritage.¹²⁹ The City has taken an important step by imposing this obligation on itself.

Toronto, like a number of other municipalities in Ontario and elsewhere, has created an Indigenous Affairs Office meant to oversee place-based relationship building with Indigenous communities.¹³⁰ The Indigenous Affairs Office will help guide the municipal government in its relationships with Indigenous Peoples, including urban Indigenous communities, neighbouring First Nations and Métis Nations in Ontario, and Indigenous organizations.¹³¹ This starts to build a corporate knowledge and awareness of the important relationships that are to be cared for by the City. As the city deepens its self-awareness, it will begin to polish the links of its relationships with Indigenous Peoples and will be able to work better with Indigenous Peoples, organizations, and nations in order to implement the principles of UNDRIP and FPIC.

The early promise of reimagined Indigenous-municipal relationships coupled with developments in jurisprudence mean that any changes to city power must be prefaced with a clear understanding of the effects on Indigenous Peoples and communities. Campaigns for greater legal protection for local governments must recognize Aboriginal and treaty rights. Cities must

¹²⁵ Toronto City Council, *Aboriginal Year of Truth and Reconciliation and Establishment of Aboriginal Office*, City Council Decision EX39.10 (Toronto: TCC, 19 March 2014).

¹²⁶ Wallace, *supra* note 124 at 4.

¹²⁷ See e.g. Aimee Craft et al, "UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws" *Centre for International Governance Innovation* (2018), online: <cigionline.org/publications/undrip-implementation-more-reflections-braiding-international-domestic-and-indigenous> [perma.cc/3JCS-C7SK].

¹²⁸ Wallace, *supra* note 124 at 4; Article 11 of UNDRIP, *supra* note 87 at 11–12 states that: "(1) Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

¹²⁹ Wallace, *supra* note 125 at 4.

¹³⁰ See e.g. Elder Advisory Council, "Vision: Maamawe – All Together," *City of Thunder Bay*, online: <thunderbay.ca/en/city-hall/maamawe---all-together.aspx> [perma.cc/354H-ZBSQ].

¹³¹ Toronto MM29.6, *supra* note 124; Toronto City Council, *Proposed Aboriginal Office for the City of Toronto*, City Council Decision EX26.25 (Toronto: TCC, 3 November 2017).

acknowledge how their quests for greater power nests with their responsibilities to First Nations and Indigenous Peoples.

III. CONCLUSION: NO CITY POWER WITHOUT RESPONSIBILITY

This article queried how the dialogue surrounding greater municipal autonomy intersects with Indigenous rights, with a particular focus on Toronto. The first part of the article set out the ways in which Toronto sought empowerment following Bill 5. This included a discussion of the constitutional role of Canadian municipalities, the advances made by courts and provincial governments, and the yet-to-be implemented possibilities of protection through a little-used mechanism of the *Constitution*. The following section analyzed the obligations of municipalities in respect of Indigenous Peoples and communities with or without increased authority. I explained the ways in which municipal governments are introducing legal reforms to improve Indigenous-municipal relationships, the increasing expectations of municipal consultation with First Nations, and the direction of Canadian jurisprudence. Overall, this reflection drives toward the conclusion that municipalities seeking protection or asserting their roles as democratic governments within the Canadian federal landscape must understand their obligations to Indigenous Peoples and communities. In seeking greater power, cities must acknowledge their responsibilities.