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Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review

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Abstract

In 2013, under threat of a resident petition and, at worst, an Ontario Municipal Board (OMB) order that would unilaterally impose new electoral districts, the City of Toronto embarked on its first ward boundary review (WBR) since the enactment of the City of Toronto Act, 2006 (COTA). The WBR highlighted the scattered application of subsidiarity within Canada's federation. Under the notion of federalism enshrined in the Canadian Constitution, municipalities are granted only those powers that derive from provincial legislation. However, the Supreme Court of Canada has invoked the European principle of "subsidiarity" to reframe municipal authority over local issues. The aim of this principle is to guarantee a degree of independence for a local authority in relation to a higher body or central government, in order to ensure that powers are exercised as close to the citizen as possible. These two seemingly competing notions of municipal authority—federalism and subsidiarity—can and ought to be reconciled in the context of Canadian local governments. This article analyzes Toronto's WBR in light of the subsidiarity debate. Drawing principally on the work of Yishai Blank and Hoi Kong, this article asks how legal theory understands local decision-making, exploring in particular whether and how subsidiarity articulates federalism's claims. Through a detailed review of its WBR, the article suggests that Toronto's decisions are a manifestation of the city's view of its powers as operating within a federalist lens, leaving it reactionary to provincial decisions and quasi-judicial review. At the same time, provincial laws that set municipal authority in WBRs are framed within a contradictory framework that undermine the accountability of Toronto's WBR process. The article argues in favour of a re-imagination of municipal authority under the notion of "operative subsidiarity" nesting within a federalist framework.

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Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review

ALEXANDRA FLYNN*

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of the subsidiarity debate. Drawing principally on the work of Yishai Blank and Hoi Kong, this article asks how legal theory understands local decision-making, exploring in particular whether and how subsidiarity articulates federalism's claims. Through a detailed review of its WBR, the article suggests that Toronto's decisions are a manifestation of the city's view of its powers as operating within a federalist lens, leaving it reactionary to provincial decisions and quasi-judicial review. At the same time, provincial laws that set municipal authority in WBRs are framed within a contradictory framework that undermine the accountability of Toronto's WBR process. The article argues in favour of a re-imagination of municipal authority under the notion of "operative subsidiarity" nesting within a federalist framework.

IN 2017, JUSTIN TRUDEAU, Canada's optimistic and youthful Prime Minister, made unprecedented remarks in a room full of municipal leaders:

We know our country is only as strong as the towns and cities we're made of. We're only as strong as our rec centres and social housing, our wastewater and public transit. We heard you when you said you needed a strong partner in Ottawa.¹

These phrases suggest that municipalities have a direct government-to-government relationship with the federal government. But the remarks lie in stark contrast to the tattered 150-year-old pages of the *Constitution Act, 1867*,² where a city or town can do whatever the province empowers them to do, but not more.³ This article focuses on these contrasting messages of municipal authority, which I argue continue to be muddled in Canada. I reflect the potential of a particular legal principle—subsidiarity—to resolve these contrasting messages when it comes to the design of provincial legislation.

Until the 1990s, the judiciary endorsed unilateral provincial acts like amalgamations without requiring municipal consent and upheld a narrow interpretation of municipal action.⁴ Since then, the Supreme Court of Canada (SCC) has gradually invoked a broader interpretation of municipal action. One of the tools of interpretation adopted by the SCC was the principle of subsidiarity, a notion borrowed from the European Union, which advocates that decisions be made at the lowest level of government when appropriate and possible. The aim of this principle is to guarantee a degree of independence for a local authority in relation to a higher body or central government to ensure that powers are

1. Federation of Canadian Municipalities, News Release, "Prime Minister highlights nation-building partnership with Canada's local governments" (2 June 2017), online: *FCM Media* <www.fcm.ca/en/news-media/news-release/prime-minister-highlights-nation-building-partnership-canadas-local> [perma.cc/EJA9-9ENY].
2. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
3. See Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 *Osgoode Hall LJ* 409 at 416.
4. Stanley Makuch, Neil Craik & Signe B Leisk, *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Thomson Carswell, 2004) at 82.

exercised closest to citizens. In Canada, the courts are clear that the notion of subsidiarity cannot contradict the Constitution, meaning that municipal action must be read in light of the powers granted to municipalities by provinces.⁵ However, subsidiarity alerts us to another way of understanding municipal power: As a principle that understands the municipality as a government with broad authority to make decisions for their constituents.

This article analyzes what the principle of subsidiarity means for municipalities, arguing in favour of “operative subsidiarity” in the design of provincial legislation. First, I outline the meaning and origins of subsidiarity, including critiques in the potential of its application. Second, I discuss the judicial treatment of municipal authority in Canada over the last twenty years. I argue that municipal authority as interpreted by the SCC has increasingly made room for municipalities as governments deserving of deference, unless the action breaches fairness or human rights. However, despite this judicial evolution, provinces have not drafted legislation with the principle of subsidiarity in mind, leading to unintended consequences as a result of the interplay between laws. This means that while municipalities, especially cities, are asserting a stronger role in national debates, a complex reading of multiple laws mires their ability to act and ultimately complicates decisions once made.

To animate the state of municipal authority, I focus on Toronto’s ward boundary review (WBR), which began in 2013 by City Council resolution and concluded in early 2018 following quasi-judicial involvement. In 2018, the Province of Ontario introduced legislation to use the 25 federal and provincial electoral districts as the city’s wards. The WBR was the first electoral boundary review undertaken by the City of Toronto since the enactment of the *City of Toronto Act, 2006* (COTA), whereby Toronto was granted increased decision-making power, including the design of its electoral model and boundaries. Despite this purported independence, the city’s WBR was hampered by two “bookends” of provincial constraints: limits to its delegated powers under COTA and constraints imposed by Ontario Municipal Board (OMB) oversight, which was renamed in 2018 as the Local Planning Appeals Tribunal (LPAT). Even before the provincial government overturned the city’s chosen 47-ward model, Toronto’s WBR process was based on mixed legislative messages, with a contradictory framework that left the city reactionary to provincial decisions and quasi-judicial review. This section details the labourous provincial framework

5. *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 at para 72.

6. *City of Toronto Act, 2006*, SO 2006, c 11, Schedule A.

related to the drawing of ward boundaries and the eventual mid-election override of the city's decision.

The article concludes with an explanation of how operative subsidiarity can help in reconciling multiple pieces of provincial legislation that conflict and confuse the scale of municipal authority. I draw from the work of Yishai Blank, who argues that subsidiarity, although messy and fragmented, offers a place for cities of divergent sizes and powers to assume authority, but necessitates thoughtful decisions on where power should rest, and from Hoi Kong, who also seeks to operationalize the principle.⁷ When applied to *intra vires* decisions, operative subsidiarity provides a means of evaluating whether provinces have adequately devolved power to the municipal scale. In the case of the WBR, operative subsidiarity clarifies that the Province of Ontario's decision to reconfigure the city's wards mid-election was not a discrete action, but part of a larger legislative blackbox in relation to municipal decision-making and electoral districts. This article proposes that the principle of operative subsidiarity be applied to re-conceptualize municipal authority to comply with the expansive principles espoused by courts and enable a consistent approach to provincial legislative design concerning municipal authority.

I. THE PRINCIPLE OF SUBSIDIARITY AND ITS IMPLICATIONS FOR MUNICIPAL AUTHORITY

Nicholas Blomley remarks that, "Jurisdictions are conceived as technical devices, sorting mechanisms that can be used to allocate people and objects to particular categories."⁸ One of these sorting devices is the municipality.⁹ While early jurisprudence debated whether municipalities were to be considered governments or corporations under the law, it is now well established that municipal decisions

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7. In this article, "municipal" or "city" means the one or more statutes that give municipal corporations their powers. The term "city" is, in statutory terms in Ontario, undefined. The most recent set of municipal statutes removed references to titles like "city," "town," and "village." *Municipal Act*, 2001, SO 2001, c 25, s 457(1).
 8. Nicholas Blomley, "What Sort of a Legal Space is a City?" in Andrea Mubi Brighenti, ed, *Urban Interstices: The Aesthetics and the Politics of the In-Between* (Farnham: Ashgate, 2013) 1 at 5.
 9. While this article focuses on the municipal, provincial and federal scales, please note that the principle of subsidiarity has been invoked to argue that the neighbourhood should be granted legal power in decision-making. See *e.g.* Jerry Frug, "Decentering Decentralization" (1993) 60 U Chicago L Rev 253.

are subject to review per the *Charter of Rights and Freedoms*.¹⁰ Courts in particular have interpreted the provisions of provincial legislation as enabling municipalities to function as governments based on powers delegated from the provincial legislatures, and have held that municipalities must be able to govern based on the best interests of their residents and conceptions of the public good.¹¹

This recognition by the courts is echoed in the public domain. Cities and their mayors are increasingly important players within the country. In the case of Toronto, the country's largest municipality, this importance is reflected in decisions of the federal government to transfer billions of dollars and empowering the city to make final spending decisions;¹² political agency, whereby the provincial government refused to step in to remove Toronto's mayor;¹³ and oversight, where the City successfully argued that more expansive provincial ombudsman powers should not apply to Toronto's affairs.¹⁴ Scholars, including Ron Levi and Mariana Valverde, opined that this increasing recognition of municipal power by federal

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10. See generally Robert G. Doumani & Jane Matthews Glenn, "Property, Planning and the Charter" (1989) 34 McGill LJ 1036. Also note *Re McCutcheon and City of Toronto* (1983), 41 OR (2d) 652 at para 3 (ONSC), where Linden J stated, "[m]unicipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely 'creatures of the legislature,' with no existence independent of the legislature or government of each province. Hence, just as the provincial legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s 32(1), as actions of the provincial government, which gave them birth [emphasis added]". See Alexandra Flynn, "The legal case against Ford's assault on local democracy," Spacing Magazine (30 July 2018): online: <spacing.ca>. See also Yishai Blank, "Localism in the New Global Legal Order" (2006) 47:1 Harvard Intl LJ 263; and David J Barron, "A Localist Critique of the New Federalism" (2001) 51 Duke LJ 377.
 11. *Pacific National Investment Ltd v Victoria (City)*, 2000 SCC 64.
 12. See e.g. Government of Canada, "The Federal Gas Tax Fund: Permanent and Predictable Funding for Municipalities" (12 April 2017), online: <www.infrastructure.gc.ca/plan/grt-fte-eng.html> [perma.cc/SS2W-CCVJ]. The Federal Gas Tax Fund, a federal infrastructure funding program that gives funding directly to municipalities, including \$152 million per year to the City of Toronto.
 13. Adrian Morrow "Ontario Minister says stripping Ford of mayoralty powers was legal, appropriate," *The Globe and Mail* (19 November 2013), online: <www.theglobeandmail.com/news/toronto/municipal-affairs-minister-says-stripping-rob-ford-of-mayorality-powers-was-legal-appropriate/article15510564> [perma.cc/42V6-3H8K].
 14. See e.g. Adrian Morrow "Ontario set to strengthen Ombudsman's powers," *The Globe and Mail* (6 March 2014), online: <www.theglobeandmail.com/news/politics/ontario-set-to-strengthen-watchdogs-powers/article17339860> [perma.cc/R4VK-8TMV]; Ontario Ombudsman, "Who we oversee: Municipalities" (17 April 2017), online: <www.ombudsman.on.ca/About-Us/Who-We-Oversee/Municipalities.aspx>. In 2014, the Ontario Ombudsman proposed an expansion of their scope of powers to include oversight over municipal actions. Initially, this included the power to investigate Toronto decisions, but following this proposal was dropped following objections from the City of Toronto.

and provincial governments and the courts speak to the power of local residents; municipalities have the ears, perhaps better than any other level of government, of the many people that reside within their boundaries.¹⁵

The principle of subsidiarity is one way that scholars have made sense of local power. The roots of the term trace back to religious philosopher Thomas Aquinas, who asked fundamental questions about the relationship between the delegation of political power and the representation of civil society.¹⁶ Subsidiarity means, “the smallest possible social or political entities should have all the rights and powers they need to regulate their own affairs freely and effectively.”¹⁷ Peter Hogg describes subsidiarity as “a principle of social organization that prescribes that decisions affecting individuals should, as far as possible, be made by the level of government closest to the individuals affected,”¹⁸ with the idea that government powers should always reside at the lowest level possible.¹⁹ We can conceive of subsidiarity as either negative, whereby the larger-scaled entity must not intervene when the smaller can manage its affairs on its own, or positive, where subsidiarity requires that a larger entity must be given explicit powers to accomplish its goals.²⁰

To Yishai Blank, federalism and subsidiarity advance competing versions of the state.²¹ He writes that each of these principles of government

presents a different view of the state and its relationship with society; each manifests a distinct approach to the role of cities in the act of government; each advocates different sets of political identification and relationships among spheres of human existence; and each is organized through different legal principles, institutions and procedures.²²

Blank offers two distinctions between these principles. First, subsidiarity recognizes more than two jurisdictions (the central government and the province or state).²³ In contrast, federalism “does not theorize cities,” leaving them as the

15. Levi & Valverde, *supra* note 3 at 424.

16. Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?: Proceedings from Osgoode's Annual Constitutional Cases Conference, Toronto, 2011* (Toronto: Supreme Court Law Review in association with Osgoode Hall Law School, 2011) 601 at 604.

17. *Ibid* at 605.

18. Peter Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 2002) at 114.

19. Yishai Blank, “Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance” (2010) 37 *Fordham Urb LJ* 510 at 533.

20. *Ibid*.

21. *Ibid* at 522.

22. *Ibid*.

23. *Ibid* at 533.

responsibility of each individual province or state.²⁴ Subsidiarity recognizes the “uniqueness of every social sphere and its place in the total social structure,” including villages and communities that pre-dated the creation of the state.²⁵ Thus, the idea that power should reside at the “closest” level possible cannot be perceived in a technical or absolute manner; it is, instead, a substantive term that seeks to find the right ‘fit’ between the activity in question and the governing unit.²⁶ Second, subsidiarity calls for a positive autonomy towards constituent units, whereas federalism asserts a negative autonomy, meaning that one governing unit should not interfere with the conduct of another.²⁷ Subsidiarity does not focus on strict executive competencies in each jurisdiction.²⁸ Under subsidiarity, each unit should make its decisions without intervention, but it should be assisted by other units if needed to achieve the asserted goal.

In essence, subsidiarity is a dynamic rather than a rigid principle that offers “a degree of flexibility to governance by striking a balance between respect for the diverse entities present and a level of state cohesion.”²⁹ Subsidiarity is a more flexible legal principle that accommodates the involvement of multiple scales in decision-making.³⁰ To Blank, subsidiarity is messy and fragmented, offering a place for cities of divergent sizes and powers to assume authority for matters like housing and homelessness, which federalism struggles to accommodate.³¹ This notion of subsidiarity also has echoes in Boaventura de Sousa Santos’ notion of scale. Santos stated that “laws are maps; written laws are cartographic maps; customary, informal laws are mental maps.”³² Santos offers an analogy between maps and law by distinguishing between “large scale” and “small scale.” A large-scale map shows less land but far more detail (“a miniaturized version of reality”) and small-scale more land, showing relative positions, but ultimately less detail.³³ Scale differs in its presentation of detail or relative positions, and it may “zoom in” on particular phenomena. Scale is relevant in how law is crafted as “laws use different criteria to determine the meaningful details and the relevant features

24. *Ibid* at 549.

25. *Ibid* at 541.

26. *Ibid* at 542.

27. *Ibid* at 542.

28. *Ibid* at 533.

29. Brouillet, *supra* note 16 at 606.

30. Frug, *supra* note 9.

31. Blank, *supra* note 19 at 546.

32. Boaventura de Sousa Santos, “Law: A Map of Misreading – Toward a Postmodern Conception of Law” (1987) 14 *JL & Soc’y* 281 at 282.

33. *Ibid* at 283.

of the activity to be regulated.”³⁴ Municipal action is, in a sense, a “zooming in” on a localized area. The scale is the zoomed-in city, enabling a more careful consideration of the policies and decisions that affect a localized area. Subsidiarity acts as a legal principle to include this scale in its decision-making model but recognizes that the subject matter of this more careful focus may extend beyond the enumerated powers that a province grants a municipality.

A main critique of the principle of subsidiarity is the difficulty in its application.³⁵ Alain Delcamp states: “It is evident that the notion of subsidiarity is unfocused and cannot itself, except with great difficulty, generate legal effects.”³⁶ To Delcamp, the dynamic nature of subsidiarity means that there are many arguments as to which localized institutions and boundaries are the idealized sites for decision-making and how (and when) they can be empowered to act, including scales within and beyond the municipality, such as neighbourhoods.³⁷ The rationality of subsidiarity enables localized governance, yet the lack of precision in the specific roles of formal units of governance leads to confusion in as to how to rightly apply the principle. Blank is more optimistic about its normative potential, citing as an example the Lisbon Treaty, which mentions the importance of consultation at the local level in order to advance the principle of

34. *Ibid* at 287.

35. Note the other main area of critique, including the appropriateness of subsidiarity in light of rule of law, human rights, judicial review, and public choice. See *e.g.* George A Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States” (1994) 94 Colum L Rev 331 (whether the principle of subsidiarity is justiciable). See *e.g.* Daniel T Murphy, “Subsidiarity And/Or Human Rights” (1994) 29 U Rich L Rev 67; Dinah Shelton, “Subsidiarity, Democracy and Human Rights” in Donna Gomien, ed, *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide* (New York, Oxford, 1993) 43 (concerns regarding subsidiarity and adequate protection of human rights). See *e.g.* Paolo G Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97 AJIL 38; James W Skillen & Rockne M McCarthy, “Three Views of Social Pluralism: A Critical Evaluation” in James W Skillen & Rockne M McCarthy eds, *Political Order and the Plural Structure of Society* (Georgia, Scholars Press, 1991) at 357 (subsidiarity as a paradoxical principle that both limits yet empowers and justifies the state). See *e.g.* Rodolfo Sacco, “Diversity and Uniformity in the Law” (2001) 49 Am J Comp Law 171 (subsidiarity’s potential to reduce the consistency and uniformity of the law). See *e.g.* Steven G Calabresi & Lucy D Bickford, “Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law” (2014) 55 Nomos 123; Vicki C Jackson, “Subsidiarity, the Judicial Role, and the Warren Court’s Contribution to the Revival of State Government” (2014) 55 Nomos 190 (whether or not subsidiarity is linked to economics and externalities). These and other critiques regarding subsidiarity are not addressed here given the scope of this article.

36. Alain Delcamp, “Principe de subsidiarité et décentralisation” (1993) 23 Rev fr dr constl 609 at 623, translated in Brouillet, *supra* note 16 at 611.

37. Frug, *supra* note 9.

subsidiarity.³⁸ This, he argues, leaves open the possibility that the dynamic, flexible nature of subsidiarity can lead to specific outcomes. Some scholars suggest that even where subsidiarity is codified, it may be non-justiciable.³⁹ However, in some jurisdictions, codification then prevents interference; for example, in South Africa national or provincial laws only prevail over the municipality where they do not “compromise or impede a municipality’s ability or right to exercise.”⁴⁰

Given the normative aims of this article, I turn to Hoi Kong’s characterization of the Canadian federalism, which he asserts was “structured to safeguard a set of collective interests.”⁴¹ Kong states:

When the activities that constitute a nation (including activities tied to the creation of a common public culture) and the goods that flow from these activities (including goods relating to the individual autonomy of group members) require state institutions that are controlled by members of the nation, nations can make a plausible claim to a measure of self-government.⁴²

In Kong’s view, subsidiarity can be incorporated into Canadian federalism.⁴³ To Kong, subsidiarity serves as a means to limit the federal government’s autonomy and to require deliberation rather than unilateral decision-making.⁴⁴ Put another way, subsidiarity tempers top-down state autonomy by acknowledging that its decisions affect other scales of government.⁴⁵

Building on Kong’s account, I suggest that subsidiarity can be operationalized to address the reality of multiple scales of government action. I advance the notion of “operative subsidiarity,” which means that the provincial government would first look to the policy area to be addressed, prior to determining the appropriate

38. *Treaty of Lisbon*, 13 December 2007, OJ (C306) 50 (entered in force on 1 December 2009, amending the Treaty of the European Union and the Treaty establishing the European Community). It states:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at the central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.

39. Clayton P Gillette, “The Exercise of Trumps by Decentralized Governments” (1997) 83 Va L Rev 1347.

40. Nico Steytler, “The powers of local government in decentralised systems of government: managing the ‘curse of common competencies’” (2005) 38 Comp & Intl LJS Afr 271 at 283.

41. Hoi Kong, “Subsidiarity, Republicanism and the Division of Powers in Canada” (2015) 45 RDUS 13 at 26.

42. *Ibid* at 26.

43. *Ibid* at 30.

44. *Ibid* at 35.

45. *Ibid* at 37.

scale, and then “each and every service, function, or responsibility needs to be thought of afresh.”⁴⁶ As Paul Schiff Berman writes, “a subsidiarity regime does not pose an outright bar to governance at the ‘higher’ level of authority. But it does not offer a blank check either. The idea is to foster careful and repeated *consideration* of other potential lawmaking communities.”⁴⁷ While the principle of subsidiarity accepts that there will likely be intergovernmental approaches, it assumes that primary policy empowerment will be placed at the scale of a particular government.⁴⁸ It is not a presumption that the local government is always equipped or appropriate to oversee every policy area that touches a municipality; instead, there must be an assessment taken based on the needs and resources in question.⁴⁹

I argue that operative subsidiarity is a standard that allows us to ask whether a provincial government has decided on the appropriate government scale of policy action and has then ensured that all other provincial legislation permits the government to fully act. Subsidiarity offers a lens by which all provincial legislation can be assessed, based on how it works together, as to whether or not a local government has been given the authority to act.⁵⁰ In dissent in *Reference re Assisted Human Reproduction Act*, Supreme Court of Canada Justices LeBel and Deschamps wrote, “this is where the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an interpretive principle.”⁵¹ What differs in this account is that operative subsidiarity may provide a basis for understanding how provincial legislative design affects the exercise of municipal power; not just in one empowering statute, but across all legislation that affects the local government. Before setting out the case of Toronto’s ward boundaries, which provides a fulsome illustration of the potential application of operative subsidiarity, the next section sets out judicial treatment of municipal authority.

46. Blank, *supra* note 19 at 536.

47. Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 S Cal L Rev 1155 at 1208.

48. Blank, *supra* note 19 at 557.

49. Berman, *supra* note 47 at 1209.

50. Jacob Levy, “Federalism, Liberalism, and the Separation of Loyalties” (2007) 101 Am Pol Sci Rev 459 at 462.

51. *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 273.

II. JUDICIAL INTERPRETATION OF MUNICIPAL AUTHORITY UNDER THE CONSTITUTION

The legal story of municipal power continues to evolve in Canada. In this story, the courts play a fundamental role. Under section 92(8) of the *Constitution Act, 1867*,⁵² municipal status and jurisdiction are crystal clear: “Municipal institutions” are within the province’s exclusive authority and have no protection against changes imposed on them by provinces.⁵³ It is this constitutional luminosity that have led municipalities to be called “creatures of the province,” with provincial governments empowered to set rules regarding what municipalities can and cannot do.⁵⁴ This means that the review of government decisions looks very different for municipalities than their federal or provincial counterparts; municipalities are “entities with a defined jurisdictional sphere, are required to act within their appointed jurisdictional limits, and failure to do so may result in the courts quashing the municipal action as *ultra vires*, or beyond its legal competence.”⁵⁵

The interpretation of Canadian municipal power can be traced to the origins of municipalities under English law, which were not designed as democratically accountable.⁵⁶ Their place within Canada’s federal fabric was also framed by a nineteenth-century doctrine of municipal authority known as “Dillon’s Rule,” which resulted in the first comprehensive municipal act. Dillon’s Rule refers to the framework established by John Dillon, an American jurist who objected to “municipal largesse and waste.”⁵⁷ Under this doctrine of “prescribed powers,” municipalities can act only when expressly authorized by statute, which is to be interpreted narrowly.⁵⁸ Dillon’s Rule suggests a relationship between municipalities and provinces is like that of a parent and child, with provinces keeping a “watchful eye” on how municipal powers are exercised in concern that they will be inappropriately used.⁵⁹ On a practical level, it means that municipal authority may not be exercised unless a province grants these governments the

52. *Constitution Act*, *supra* note 2.

53. Makuch, Craik & Leisk, *supra* note 4 at 81.

54. Levi & Valverde, *supra* note 3 at 416.

55. Makuch, Craik & Leisk, *supra* note 4 at 81.

56. Andrew Sancton, *Canadian Local Government: An Urban Perspective* (Oxford University Press, 2015) at 3-5; Makuch, Craik & Leisk, *supra* note 4 at 82.

57. Levi & Valverde, *supra* note 3 at 418.

58. *Ibid* at 416. See also Makuch, Craik & Leisk, *supra* note 4 at 82.

59. Eugene Meehan, Robert Chiarelli & Marie-France Major, “The Constitutional Legal Status of Municipalities 1849-2004: Success is a Journey, But Also a Destination” (2007) 22 NJCL 1 at 4-5. See also Levi & Valverde, *supra* note 3 at 416.

power to do so, although this authority can be implicit.⁶⁰ The SCC referenced Dillon's Rule most recently in 1993 in *R v Greenbaum*, a case involving a street vendor who was unable to receive a permit to sell t-shirts on Toronto streets as a result of a city by-law.⁶¹ In critiquing the city's exercise of unauthorized power, Justice Iacobucci stated:

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.⁶²

Although cities are left out of the Constitution as a level of government,⁶³ the interpretation by the courts of municipal power has evolved.⁶⁴ In 1997, the notion of cities as "creatures of the legislature" was fervently articulated in the decision of the *East York (Borough) v Ontario (Attorney General)*.⁶⁵ This case challenged the unilateral decision of the Province of Ontario to amalgamate one regional and six lower-tier municipalities into the Toronto megacity in 1998 without consent of the affected municipalities. While referencing the lack of evidence of consultation and the vast number of people who voted against the amalgamation in locally-held referendums, the Superior Court 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 determined that the power to restructure Toronto is within provincial authority under the *Constitution Act* and set out four "clear" principles regarding the constitutional status of Canadian cities:⁶⁶ (1) municipal institutions lack constitutional status; (2) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides; (3) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation; and (4) municipal

60. *R v Greenbaum*, [1993] 1 SCR 674 at 688-89.

61. *Ibid.*

62. *Ibid.*

63. See e.g. Daniel Weinstock, "Federalism and Cities" in James E Fleming and Jacob T Levy, eds, *Federalism and Subsidiarity* (New York: New York University Press, 2014) 259.

64. *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136 at para 109.

65. *East York (Borough) v Ontario (Attorney General)* (1997), 34 OR (3d) 789 (Gen Div), aff'd (1997), 36 OR (3d) 733 (CA), leave to appeal to SCC refused, [1998] 1 SCR vii.

66. *Ibid* at 797-98.

institutions may exercise only those powers which should be that which are conferred upon them by statute.

In contrast to these “clear” principles, there is more nuance when it comes to the interpretation of the *intra vires* actions taken by local governments. In *Shell Canada Products v Vancouver (City)*, the SCC considered the proper interpretation of municipal power.⁶⁷ This case concerned the City of Vancouver, which resolved not to do business with Shell, relying on an omnibus provision to justify the action. In *Shell*, the dispute between the justices was not based on the proper construction of municipal powers, but instead the purpose of the municipality. The majority ruled against the City of Vancouver based on the view that the impugned resolutions were not passed for a municipal purpose, preferring a narrow construction over a broad and purposive interpretation. The majority held that the City of Vancouver did not have the authority to make such a decision. However, the case included a strong dissent authored by Justice McLachlin (as she then was), who argued in favour of judicial deference for elected municipal bodies on the democratic basis that their purpose is to serve the people who elected them.⁶⁸ Justice McLachlin rooted her argument in the proposition that the construction of statutes relating to municipal authority should be subject to a more expansive interpretation, stating that “[i]f municipalities are to be able to respond to the needs and wishes of their citizens, they must be given a broad jurisdiction to make local decisions reflecting local values.”⁶⁹

A short time later, Justice McLachlin’s dissent would be reflected in two majority decisions, *Nanaimo (City) v Rascal Trucking*⁷⁰ and *114957 Canada Ltee (Spraytech, Societe d’arrosage) v Hudson (Town)*.⁷¹ In the 2001 *Spraytech* decision, the SCC again considered whether a municipal by-law that restricted the use of pesticides was *ultra vires*, or beyond the authority of a local government. In *Spraytech*,⁷² the Court allowed the town of Hudson, Québec to ban the use of aesthetic pesticides, although considered non-toxic by provincial and federal regulators.⁷³ The SCC considered whether the “impossibility of dual

67. [1994] 1 SCR 231 at 244 [*Shell*].

68. *Ibid.* See also *Horton v Greater Sudbury (City of)*, 66 OR (3d) 359 16 at para 26 (ONSC).

69. *Ibid.* at 32.

70. *Nanaimo (City) v Rascal Trucking Ltd*, [2000] 1 SCR 342 [*Rascal Trucking*].

71. *114957 Canada Ltee (Spraytech, Societe d’arrosage) v Hudson (Town)*, [2001] 2 SCR 241 [*Spraytech*].

72. *Ibid.*

73. Ian M Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed (Toronto: Thomson Carswell, 2003) (looseleaf updated 2008) at 369, quoted in *Spraytech*, *supra* note 71 at para 18.

compliance” should be the test used to determine whether a municipal by-law could be complied with alongside empowering legislation. This test establishes that provincial legislation should not be deemed to be inoperative simply because it legislates in the same area as another government.⁷⁴ In framing municipalities and their authority, the SCC stated that “municipalities as statutory bodies 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.”⁷⁵ However, the SCC acknowledged the important representative role of local governments: “Whatever rules of construction are applied they must not be used to usurp the legitimate role of municipal bodies as community representatives.”⁷⁶ In a different case the SCC also stated that municipalities “balance complex and divergent interests” in decision-making, thus warranting that “*intra vires* decisions of municipalities be reviewed upon a deferential standard.”⁷⁷

Later, in *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*, the SCC considered the right of a city to issue and regulate taxi plate licences. In this case, there was no explicit reference in the enabling legislation, and the City was accused of holding a position that was discriminatory and a breach of *Charter* rights.⁷⁸ Justice Bastarache noted the shift in the interpretation of municipal authority by the courts, stating: “The ‘benevolent’ and ‘strict’ construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced.”⁷⁹ Similarly, in *Croplife Canada v Toronto (City)*, the Ontario Court of Appeal adopted an expansive interpretation of municipal authority, stating that general welfare powers “are to be interpreted broadly and generously within their context and statutory limits to achieve the legitimate interests of the municipality and its inhabitants.”⁸⁰ The Court signalled a shift away from the traditionally restrictive,

74. See *BC Lottery Corp v Vancouver (City)*, 1999 BCCA 18 at para 19. See also *Attorney General for Ontario et al v City of Mississauga (1981)*, 33 OR (2d) 395 (CA).

75. *Spraytech*, *supra* note 71.

76. *Ibid* at para 23, quoting *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 244.

77. *Rascal Trucking*, *supra* note 70 at para 35.

78. *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 [*Taxi Drivers*] (referenced in *R v Latouche*, 2010 ABPC 166 at para 72).

79. *Ibid* at para 6.

80. *Croplife Canada v Toronto (City)* (2005), 75 OR (3d) 357 at para 37 (CA), leave to appeal to SCC refused, 31036 (17 November 2005).

prescribed approach to the interpretation of municipal power in favour of a broad purposive approach.⁸¹ As held in *R v Guignard*:

This Court has often reiterated the social and political importance of local governments. It has stressed that their 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.⁸²

Recently, in *Canadian Western Bank v Alberta*, the SCC was unwavering that the Constitution is to be applied with the principle of “co-operative federalism” with a clear place for municipalities. The SCC explained co-operative federalism as follows:

The division of powers, one of the basic components of federalism, was designed to uphold ... diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada’s unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.⁸³

The case established that municipalities, “as being the closest level to affected citizens, should be given recognition in their” decision-making.⁸⁴ In so doing, the SCC applied the language of the Constitution as a “living tree”⁸⁵ that must be “tailored to the changing political and cultural realities of Canadian society,” and “continually be reassessed in light of the fundamental values it was designed to serve.”⁸⁶ Constitutional doctrines are thus used to balance the overlap of rules made by governments, reconcile diversity, and ensure sufficient predictability in the operation of powers.⁸⁷ The principle of co-operative federalism decries having “watertight compartments” within which governments may act, leaving an important role for municipalities as stewards of the local community.⁸⁸

81. *Galganov v Russell (Township)*, 2012 ONCA 409, leave to appeal to SCC refused, 34965 (6 December 2012).

82. *R v Guignard*, 2002 SCC 14 at para 17.

83. *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 22 [*Canadian Western Bank*].

84. *Toronto (City) v Goldlist Properties Inc* (2002), 58 OR (3d) 232 at para 35 (SC Div Ct).

85. *Edwards v Attorney-General for Canada* (1929), [1930] AC 124 (PC) at 136.

86. *Ibid.*

87. *Ibid.*

88. See e.g. *Canadian Western Bank*, *supra* note 83; *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161; *Law Society of British Columbia v Mangat*, 2001 SCC 67; *OPSEU v Ontario*, [1987] 2 SCR 2.

As explained by the SCC, co-operative federalism incorporates a number of doctrines, including subsidiarity, which serve as an important component in the interpretation of municipal action.⁸⁹ The principle of subsidiarity was invoked to support judicial deference to municipal decision-making.⁹⁰ The SCC first mentioned the principle of subsidiarity in *Spraytech*. Justice L'Heureux-Dubé, writing for the majority in favour of a less stringent interpretation of municipal power, stated:

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making 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 distinctiveness, and to population diversity.⁹¹

The SCC considers subsidiarity as a principle when interpreting municipal action.⁹² In a four-four decision on the proper application of the principle, the SCC held that subsidiarity operates as a principle affirming that “legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen’s concerns,” but does not override the status of municipalities as creatures of the province.⁹³

Subsidiarity does not mandate that all governmental decisions must be taken at particular level of government, closest to the affected parties or not, nor does it suggest a re-reading of constitutional division of powers.⁹⁴ As Justice LeBel cautioned in *Spraytech*, courts should not interpret a generous interpretation of municipal authority as license to “invent municipal authority where none exists.”⁹⁵ Lower-court decisions echo Justice LeBel’s conclusion that municipal

89. See *Canadian Western Bank*, *supra* note 83 at paras 42-43. The case held that interjurisdictional immunity doctrine, a strict interpretation of constitutional powers, is inconsistent with these constitutional doctrines. These doctrines and principles include the pith and substance doctrine, the double aspect doctrine, the necessarily incidental or ancillary doctrine, the interjurisdictional immunity doctrine, the doctrine of paramountcy, and the doctrine of subsidiarity.

90. *Spraytech*, *supra* note 71.

91. *Ibid* at paras 3-4. See also *Canadian Western Bank*, *supra* note 83 at para 45.

92. Note that *Spraytech*, *supra* note 71, did not consider whether a bylaw was passed for a municipal purpose, but instead focused on whether: (1) the bylaw was implicitly authorized by an omnibus provision; and (2) the municipality was preempted from regulating pesticides because a provincial enactment occupied the field. There remains a debate as to whether Justice L'Heureux-Dubé considered subsidiarity in one or both of these questions.

93. *Reference re Assisted Human Reproduction Act*, *supra* note 51 at paras 72 and 183.

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

95. *Spraytech*, *supra* note 71 at 366.

authority cannot be imbedded absent provincial authority; while subsidiarity imports into case law respect for municipalities as governments to be seen as representative of their constituents, the principle does not grant authority where none exists in provincial statute.⁹⁶

The principle of subsidiarity, however, does provide two particularly useful tools to help understand municipal authority: First, it cements the view that municipalities should be conceptualized as democratic governments that make decisions on behalf of their citizens.⁹⁷ Second, read together with co-operative federalism, the principle asks for consistency and clarity in interpreting the actions of governments. Constitutional doctrines anticipate overlap in the rules made by governments and try to make sense of whether the rules can work together or not.⁹⁸ The next section turns to this very question in the context of legislation, specifically examining how subsidiarity can help to make sense of municipal power where numerous pieces of provincial legislation overlap without consistency or clarity.

III. MUNICIPAL AUTHORITY AND LEGISLATIVE DESIGN: THE CASE OF TORONTO'S WARD BOUNDARY REVIEW

In the European Union, subsidiarity is a political principle, invoked to elaborate the basic political character of municipalities.⁹⁹ The EU application includes legislative provisions that empower municipalities, in contrast to Canada, where subsidiarity has been invoked by the courts. However, while the courts have introduced principles to help guide determinations of municipal authority, practical questions remain as to the extent municipalities can act given an overlap of provincial legislation that can complicate municipal authority.

A. MUNICIPAL AUTHORITY AND LEGISLATIVE DESIGN

Alongside judicial decisions, provincial legislation has modified the scope of municipal authority across the country. As C.J. Williams and John Mascarin state:

96. See *Friends of Lansdowne Inc v Ottawa (City)*, 2012 ONCA 273 at para 14; *Ontario Restaurant Hotel & Motel Association v Toronto (2005)*, 202 OAC 395 at para 3; *Spraytech*, *supra* note 71 at paras 21, 26; *Wainfleet Wind Energy Inc v Township of Wainfleet*, 2013 ONSC 2194; *Eng v Toronto (City)*, 2012 ONSC 6818; *Magder v Ford*, 2013 ONSC 1842.

97. Makuch, Craik & Leisk, *supra* note 4 at 110.

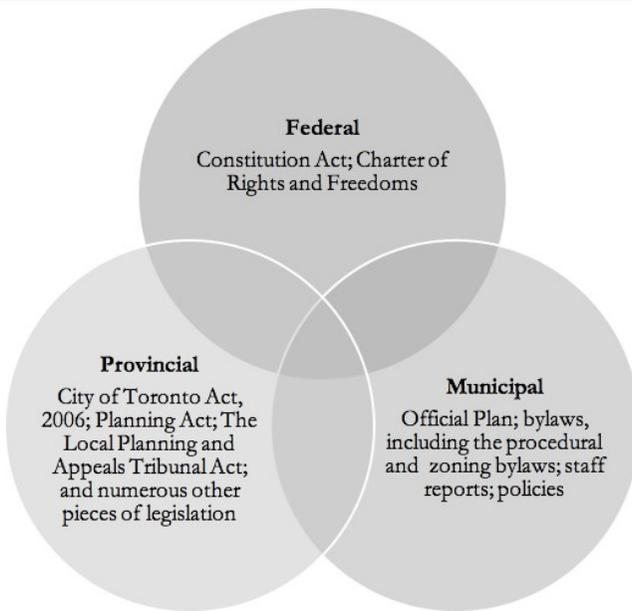
98. *Edwards*, *supra* note 85.

99. Levi & Valverde, *supra* note 3 at 424.

[W]hile the old prescriptive model has not totally been eradicated, the new statute signifies a willingness on the part of the province to provide local government with greater autonomy, latitude and flexibility, which of course has been balanced by provincial control mechanisms, the most obvious of which is the rampant regulation-making authority incorporated throughout the legislation.¹⁰⁰

The authors suggest that the legislative changes are not revolutionary, but are “a significant step in the right direction for municipalities by replacing the concept of prescriptive delegation with a new model based on broad and flexible grants of authority that are balanced with various control measures to ensure public accessibility and participation as well as municipal accountability and transparency.”¹⁰¹ Over the last two decades, provinces across the country have given more expansive powers to large municipalities, including more options for raising revenue¹⁰² and in relation to housing.¹⁰³

FIGURE 1 -INVENTORY OF LAWS AND RULES



100. CJ Williams & John Mascarin, *Ontario Municipal Act 2001 and Commentary* (Toronto: Butterworth's, 2002) at 40-41.

101. *Ibid.*

102. *Municipal Government Act*, RSO 1990, c M-45.

103. *Charter of Ville de Montréal*, CQLR c C-11.4, Schedule I.

But, in practice, Canadian cities are subject to numerous restrictions, ranging from the mechanisms it may use to raise revenue to the levies of tow truck drivers.¹⁰⁴ Figure 1 provides an inventory of the laws and institutions applicable to Toronto's legal authority.¹⁰⁵ This image illustrates the complex overlapping of rules that govern municipal jurisdiction. As interpreted by the courts, provinces have broad authority to enact legislation that affects municipalities, especially when it comes to the organization of municipal institutions. In Toronto, for example, the Province of Ontario introduced city-specific legislation called the *City of Toronto Act, 2006* that gave the city more expansive powers to self-govern in matters within its jurisdiction, including section 8, which grants broad discretion to the city to pass laws related to "health, safety and well-being of persons."¹⁰⁶ Although the *City of Toronto Act, 2006* has been likened to the home rule status of some American cities, which gives jurisdiction over areas of responsibility such as education, zoning, and planning, Toronto's powers fall short and the province has retained its power to override the municipality's decisions.¹⁰⁷

Ontario has also introduced numerous other pieces of legislation that impact the decision-making powers of local governments, including the *Planning Act*,¹⁰⁸ the *Local Planning Tribunals Appeals Act*,¹⁰⁹ the *Municipal Conflict of Interest Act*,¹¹⁰ the *Municipal Elections Act, 1996*,¹¹¹ and the *Municipal Freedom of Information and Protection of Privacy Act*.¹¹² This overlap of legislation complicates the actions

104. *City of Toronto Act*, *supra* note 6, s 8(2)(6).

105. Mariana Valverde, *Everyday Law on the Streets: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 21 and 28. The visual representation is an adaptation of Valverde's "legal inventory of laws," which aims to provide an overview of the "basic legal architecture" engaged in particular disputes.

106. *Friends of Lansdowne Inc v Ottawa (City)*, 2012 ONCA 273 at para 23.

107. Levi & Valverde, *supra* note 3 at 454-55.

108. *Planning Act*, RSO 1990, c P.13.

109. *Ontario Municipal Board Act*, RSO 1990, c O.28. Please note that at the time of writing, the Province of Ontario had recently replaced the Act with *Bill 139, the Local Planning Appeal Tribunal Act*. This Act would have any effect on matters related to municipal ward boundaries and, therefore, the analysis in this article.

110. *The Ontario Municipal Board Act*, RSO 1990 c O.28 was replaced with the *Local Planning Appeals Tribunal Act*, SO 2017, c 23 [LPAT]. The changes to do not affect powers related to municipal boundaries and, therefore, the analysis in this article.

111. *Municipal Elections Act*, SO 1996, c 32.

112. *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M-56.

that municipalities may take.¹¹³ I suggest that the principle of subsidiarity can and should assist us with the normative and theoretical development of understanding municipal power and autonomy. The application of operative subsidiarity asks how applicable legislative acts, working together, act to ensure consistency in the articulation of the municipal role. I assert that operative subsidiarity should act as a tool of interpretation at the provincial level in setting out the power of a municipality to act within a policy area.

B. MUNICIPAL WARD BOUNDARY REVIEWS

Canada does not have a country-wide approach to the timing or process of electoral boundary reviews, other than at the federal level. Every ten years, federal commissions are established in each of Canada's ten provinces to recommend changes to electoral boundaries. The commissions are independent bodies and make final decisions as to federal electoral boundaries, with ministers of Parliament and others taking part in the process equally as consulted parties.¹¹⁴ The province's chief justice appoints a judge to chair the commission, and the Speaker of the House of Commons appoints the other two members from among the province's residents. The commissions are "radically" decentralized, with each of the ten commissions operating independently.¹¹⁵ After engaging in a public consultation process, each commission submits a report on what it considered in revising the boundaries and proposing a revised electoral map to the House of Commons. Each commission then considers any objections and recommendations from Members of Parliament and prepares a final report, which outlines the final electoral boundaries for the respective province. The process is set out in the *Electoral Boundaries Readjustment Act*,¹¹⁶ "which was introduced to address problems associated with electoral redistribution in Canada, such as the

113. While not analyzed in this article, it is worthwhile to note that provincial deference to municipalities has been inconsistently applied across the country: at times, the province refuses to endorse municipal decisions. See e.g. Robert Benzie "Kathleen Wynne stopping John Tory's plan for tolls on DVP, Gardiner," *The Toronto Star* (26 January 2017) <www.thestar.com/news/queenspark/2017/01/26/kathleen-wynne-stopping-john-torys-plan-for-tolls-on-dvp-gardiner.html> [perma.cc/D2JL-57CM]. Other times it defers to them entirely. See e.g. Morrow, *supra* note 13.

114. Toronto, City Clerk and City Solicitor, *Petition to Redivide Ward Boundaries*, (Staff Report Action Required), (Toronto, 2013), online <www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-60165.pdf> [perma.cc/3M23-K4P7].

115. Ron Levy, "Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena" (2008) 53 McGill LJ 1 at 10, 54.

116. *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3.

tendency for the exercise to be overly partisan and the frequent discrepancies in the geographic size and population of constituencies at the federal level.”¹¹⁷

In contrast, the rules relating to boundary reviews in municipalities differ strongly by jurisdiction. For example, in London, Ontario, staff are required to review ward populations each term; in Halifax, wards are considered every eight years. Ontario municipalities have purportedly broad discretion to determine the number of wards or electoral districts that they wish to have within their municipal boundaries. When *COTA* was enacted, and until legislative changes were introduced in 2018, Toronto was given authority with respect to establishing, changing or dissolving wards. *COTA* clarified this power in section 128(1), where it states: “Without limiting sections 7 and 8, those sections authorize the City to divide or re-divide the City into wards or to dissolve the existing wards” and even eliminate wards altogether. The City—like other Ontario municipalities now—was empowered to determine its manner of representation, whether through the election of councillors based on ward, elected at-large, or some combination of the two. However, a closer look reveals constraints and impediments to the exercise of this power, notwithstanding the purported freedom given to the city to regulate this aspect of their affairs.

The City’s authority over its system of representation is dramatically tempered by other rules. First, *COTA* empowers 500 electors in the City of Toronto to petition City Council to pass a bylaw dividing or redividing the City into wards or dissolving existing wards.¹¹⁸ If the City does not pass a bylaw within 90 days after receiving the petition, any of the electors may apply to the Local Planning Appeals Tribunal (LPAT), known until 2018 as the Ontario Municipal Board (OMB), upon which the LPAT may hear the application and make an order.¹¹⁹ Ironically, city staff estimate that the timeline required for the introduction of new ward boundaries is at least two years, far more than the 90 days prescribed

117. Canadian Urban Institute, Beate Bowron Etcetera Inc, The Davidson Group Inc, and Thomas Ostler, “Toronto ward boundary review: background research report” (2014) at 3, online: <www.drawthelines.ca> [perma.cc/QG9W-USPW] [*Boundary Review*].

118. *City of Toronto Act, 2006* as it appeared on September 2018, *supra* note 6, s 129(3) defines “elector” as “a person whose name appears on the voters’ list, as amended up until the close of voting on voting day, for the last regular election preceding a petition being presented to council under subsection (1).”

119. In 2018, the Province of Ontario enacted the *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c 23, Schedule 1, which changes the name and certain practices and procedures of the OMB. The new act does not address ward boundary review processes although does increase deference to City Council decisions. To the date of publication, there have been no considerations by the LPAT of municipal WBR changes. Note that a fulsome application of these changes to WBR processes is not considered in this article.

in the Act.¹²⁰ This means that while the process for conducting a ward boundary review is long and complex with years of work and numerous required rounds of public consultation, when Toronto undertook its WBR it could be appealed to and overturned by the OMB.¹²¹ Second, while neither *COTA* nor the city's procedural by-law set out the process that must be followed to designate new ward boundaries, the legislation does require that the powers of the City be exercised by City Council.¹²² A strict reading of the legislation implies that an independent body like the federal commission would not be able to make the final decision on the placement of ward boundaries, although the City has never tried nor tested this approach.

Third, municipalities are subject to quasi-judicial constraints relating to boundary-making. As political scientist Andrew Sancton notes, there are no SCC decisions that apply to the drawing of municipal boundaries and, indeed, the courts have specifically provided that the principles that apply to the federal and provincial governments do not apply to municipalities.¹²³ In practice, as a result of OMB pronouncements, Ontario municipalities have observed the common-law requirements related to electoral districts set out in the landmark Supreme Court of Canada case, *Reference Re Provincial Electoral Boundaries (Sask)*, known colloquially as the “Carter case.”¹²⁴ This case considered the meaning of the “right to vote” in section 3 of Canada’s *Charter of Rights and Freedoms*. Section 3 grants every citizen the right to “vote in an election of members of the House of Commons or a legislative assembly and to be qualified for membership therein.” The case was brought by lawyer and resident Rogers Carter, who observed that the electoral boundaries (or ridings) approved in the Province of Saskatchewan led to significant deviations in population across the province. The result was that, “a single vote in the smaller riding carried 63.5% more electoral weight than a single vote in the larger riding.”¹²⁵

120. City Manager, “A ward boundary review for Toronto,” Staff Report to Executive Committee (2013), online: <www.toronto.ca/legdocs/mmis/2013/ex/bgrd/backgroundfile-58333.pdf> [perma.cc/YFJ6-2SP6] at 4.

121. *Ibid* at 3.

122. *City of Toronto Act, 2006*, *supra* note 6.

123. Andrew Sancton, “Commentary” in John C Courtney, Peter MacKinnon & David E Smith, eds, *Drawing Boundaries: Legislatures, Courts and Electoral Boundaries* (Saskatoon: Fifth House Publishers, 1992) 90 at 92.

124. *Reference Re Provincial Electoral Boundaries (Sask)*, [1991] 2 SCR 158 [Carter].

125. David Johnson, “Canadian Electoral Boundaries and Courts: Practices, Principles and Problems” (1994) 39 McGill LJ 224 at 227.

In affirming that there may be population differences across ridings, the SCC clarified that voter parity was the only measure to assess effective representation, but not the only criterion by which boundaries should be evaluated. In considering electoral boundaries, the first criterion is that approximately the same numbers of voters are represented in each electoral area, a criterion known as “voter parity.” However, to achieve “effective representation,” other criteria are also important, namely geography, community history, community interests, minority representation, and other factors.¹²⁶ These other criteria justify a departure from strict voter parity; however, the courts have said that the population of each electoral district should not deviate by more than 25 percent. The result is that provincial authority effectively empowers the LPAT or, at the time of Toronto’s WBR, the OMB, to decide whether municipalities have fulfilled the SCC principles. However, unlike the courts, quasi-judicial decisions do not follow *stare decisis*, meaning that adjudicators are not bound by previous LPAT or OMB decisions. Therefore, for any municipality undertaking a WBR, it is important to navigate a complex compendium of past cases. Because LPAT or OMB decisions are not binding on subsequent hearings, there is no single set of prescribed rules that municipalities must follow to prevent the tribunal from overturning a WBR.

Any WBR process in Ontario is a legal minefield, with broad principles but no clear rules guiding potential for residents to appeal proposed boundaries. Contestations to the meaning of the term “communities of interest” illustrate the degree to which the OMB intervened in WBRs in the past. For example, in Kingston’s 2013 WBR process, City Council’s decision was appealed to the OMB on the basis that it did not provide effective representation, in part because the by-law failed to recognize “communities of interest” by splitting up an area represented by a single neighbourhood association.¹²⁷ The OMB sided with the appellant and amended the by-law to account for the Sydenham Neighbourhood Association.¹²⁸ In Kitchener, the city’s 34 neighbourhood associations were the “communities of interest” used to inform its ward boundaries.¹²⁹ So, recognition of neighbourhoods as “communities of interest” is important to the OMB, but there are no specific guidelines offered, nor adherence to a municipality’s interpretation of the term. Likewise, the OMB has stated that ward boundary decisions will be amended or repealed only if there is a compelling reason to do

126. *Reference Re Provincial Electoral Boundaries (Sask)*, *supra* note 125.

127. *Boundary Review*, *supra* note 118 at 24–25.

128. *Ibid* at 25.

129. *Ibid* at 16.

so.¹³⁰ But, in practice, the OMB has overturned WBRs in cities such as Ottawa after several years of community consultations, reports, and decision-making only to have the city restart the process or accept the OMB's ward design.¹³¹ The next section outlines the case study of Toronto's ward boundary review to explain how the notion of operative subsidiarity can be used to clarify municipal authority in Canada.

C. TORONTO'S WARD BOUNDARY REVIEW

Wards are deeply entrenched in the governance models of most Canadian municipalities, including Toronto, as vehicles for representative democracy. The 2013 WBR was Toronto's first municipal-led ward boundary review since the city's amalgamation in 1998. When the review began, the populations of Toronto's wards were widely unequal, with some wards having twice the population of others.¹³² For example, ward 18 (in the former City of Toronto) and ward 29 (in the former Borough of East York) each contained fewer than 45,000 residents, approximately half of the population of ward 23 (in the former City of North York), which had almost 90,000 residents.

In June 2013, City Council approved a WBR process.¹³³ A strong impetus for the review was that the dangerously low threshold of having 500 citizens petition City Council to pass a by-law dividing or redividing the city into wards or dissolving existing wards, upon which the OMB could hear and make an order imposing new boundaries.¹³⁴ *COTA* also requires that City Council must make final decisions on all but a handful of delegated powers. To city staff, this meant that the decision on ward boundaries could not be delegated to an independent commission akin to the federal process. Instead, city staff recommended that consultants be retained to conduct the review, independent from staff and councillors. The objective was to keep the process at arm's-length from the City

130. *Hambly, Re*, 64 OMBR 36 at para 8; *Teno v Lakeshore (Town)*, 51 OMBR 473 at para 36.

131. *Ottawa (City) v Osgoode Rural Community Assn*, 45 OMBR 129.

132. Alexandra Flynn, "(Re)creating Boundary Lines: Assessing Toronto's Ward Boundary Review Process" in IMFG Papers on Municipal Finance and Governance (2017) at 5, online: <https://tspace.library.utoronto.ca/bitstream/1807/81191/1/imfgpaper_no32_torontowbr_alflynn_june_22_2017.pdf> citing Zack Taylor, *Analysis and Commentary: City of Toronto Ward Boundary Review* (2012).

133. Toronto, City Clerk, *Committee Decision on Final Report – Toronto Ward Boundary Review*, (Executive Committee Decision), (2016), online <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.EX15.2> [*Committee Decision*].

134. *City of Toronto Act*, *supra* note 6, s 129(3). This section defines "elector" as "a person whose name appears on the voters' list, as amended up to the close of voting on voting day, for the last regular election preceding a petition being presented to council under subsection (1)."

Manager's Office, who would oversee the WBR, while the consultants would make the final recommendations. Careful attention was placed on avoiding language that would limit the consultants' options, in particular by setting out in advance the number of wards, which was the factor that led to the OMB's rejection of Ottawa's WBR a few years earlier.¹³⁵

COTA constrained Toronto's ability to design a WBR that emulated the federal government's arm's length process given *COTA*'s limits to delegation. As a result, councillors played an especially important role in the WBR. The WBR process was designed by staff and approved by the Executive Committee and City Council. Staff recommended a process that involved hiring external consultants to develop a set of recommendations, following extensive public and stakeholder consultations, which would then go to Executive Committee and City Council for approval.¹³⁶ Staff advised councillors that the OMB could overturn City Council's WBR process and decision if the review were overly limited or prescribed, so the hope was that this fear would further protect the process from undue political influence.¹³⁷ City councillors were interviewed at the start of the process, following the designation of the ward boundary options, and again towards the end of the review process.¹³⁸ In the first consultation stage, the consultants individually interviewed all forty-four members of the 2010-2014 City Council and seven new 2014-2018 Members of Council to solicit their perspective on the issues related to the current Toronto ward configuration.¹³⁹ In stage 2, the consultants had meetings with forty-two members of Council and three members of the Mayor's staff.

In short, the WBR illustrated a top-down, constrained process. City councillors were the ultimate decision-makers both in the final decision and in the creation of the process.¹⁴⁰ Under one section of *COTA*, Toronto had full power to steward the WBR process; as a result of another, Toronto could not

135. *Committee Decision, supra* note 134.

136. Interview of City of Toronto Staff Member #4 (7 May 2016) conducted by author in City Manager's Office (Toronto, Ontario, Canada).

137. Interview of City of Toronto Staff Member #1 (18 December 2015) conducted by author in City Manager's Office (Toronto, Ontario, Canada).

138. Canadian Urban Institute, Beate Bowron Etcetera Inc, The Davidson Group Inc, & Thomas Ostler, "Toronto ward boundary review: final report" (May 2016), online: <www.static1.squarespace.com/static/53bc0914e4b0eb57996e4dee/t/5739fe5022482e97a8591392/1463418450864/TWBRFinalReportMay2016.pdf>.

139. *Ibid* at 7.

140. *Committee Decision, supra* note 134. see also City Clerk and City Solicitor, Staff Report to City Council: A Ward Boundary Review for Toronto, City of Toronto (2013), online: <<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.EX32.2>>.

introduce a model led by an independent commission, as adopted at the federal level. The OMB had the power to step in and determine ward boundaries based on the application of 500 electors, with the quasi-tribunal's decisions offering little guidance on how to construct a process free of scrutiny. Thus, the City of Toronto had to craft its process to fit within the narrow confines of legislative constraints, with a disproportionately privileged role for councillors. In the end, Toronto's deliberate, careful process succeeded and was upheld by the OMB on appeal, based on the appropriate application of the *Carter* decision, and in particular the "effective representation" of the resulting 47 wards.¹⁴¹ In its 2-1 decision on 15 December, 2017, the OMB upheld Toronto's WBR, stating that, "[Toronto's] ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable."¹⁴²

D. PROVINCIAL OVERRIDE OF TORONTO'S WARD BOUNDARIES

Toronto's election period for the statutorily scheduled municipal election commenced on 1 May, 2018.¹⁴³ Thousands of candidates signed up in the first two months of the race, with a record number of historically marginalized vying for councillor positions.¹⁴⁴ 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. The next month, Premier Ford announced that one of the first acts of the new government would be the reduction in the number of City of Toronto wards from 47 to 25, and the boundaries would match those of the federal electoral districts. Toronto's mayor had a tepid response to the provincial decision.¹⁴⁵ Bill 5, *The Better Local Government Act*, was enacted in law on 14 August, 2018 and, as promised, amended the *City of Toronto Act, 2006* by reducing the size of city council to 25.¹⁴⁶ Several candidates for city council, mainly women and historically marginalized people, challenged Bill 5, as did the

141. *Di Ciano v Toronto (City)*, 2017 CanLII 85757 at para 20.

142. *Ibid* at para 51.

143. *Municipal Elections Act, 1996*, SO 1996, c 32, s 10.1(3).

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

145. See Alexandra Flynn, "The legal case against Ford's assault on local democracy," *Spacing Magazine* (30 July 2018): online: <www.spacing.ca/toronto/2018/07/30/the-legal-case-against-fords-assault-on-local-democracy/> [<https://perma.cc/7L2J-7J6G>].

146. *The Better Local Government Act*, SO 2018, c 11.

City of Toronto, once empowered to do so by City Council.¹⁴⁷ On 10 September, 2018, Superior Court Justice Edward Belobaba found that Bill 5 “substantially interfered with both the candidate’s and the voter’s right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*” and could not be saved under section 1.¹⁴⁸ In a whirlwind decision, following the government’s threat that they would invoke the notwithstanding clause to override Justice Belobaba’s decision, the Court of Appeal later granted the Province of Ontario’s request for a stay, with the result that the election moved forward under a 25-ward model.¹⁴⁹

The Court of Appeal decision is pending, with numerous grounds of appeal possible outside of Charter section 2(b), including unwritten constitutional principles and the applicability of *Charter* section 3 to municipalities.¹⁵⁰ Amongst the issues that may be considered by the courts is the question of subsidiarity. In particular, how the notion of municipalities as “creatures of the province” nests with the increasing amount of deference granted to local governments as democratic bodies and their integral role as actors within the principle of cooperative federalism. An appellate decision on the merits may also resolve critical questions of subsidiarity in the drawing of electoral boundaries. If so, the Court could further resolve decades of jurisprudence that both asserts a co-operative federalism that includes a respectful role for municipalities and upholds provincial authority over municipalities.

E. OPERATIVE SUBSIDIARITY AND MUNICIPAL WARD BOUNDARIES

What would an application of the principle of subsidiary mean for the WBR process and for municipal authority more broadly? The *Constitution Act* articulates that the powers of municipalities fall within the responsibility of the province. Provinces can set out a prescriptive, hierarchical model or grant broad powers to municipalities to make decisions within their spheres of jurisdiction.¹⁵¹ As Blank writes, “it is precisely the fact that federalism as a principle has nothing to say about cities that causes the neglect of constitutional protection to cities in most federal constitutions.”¹⁵² By contrast, under the principle of subsidiarity,

147. *City of Toronto et al*, *supra* note 145.

148. *Ibid* at para 10.

149. *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761.

150. *Ibid* at para 2.

151. Nicholas Blomley, “Introduction” in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography*, (California: Stanford University Press, 2014) 1.

152. Blank, *supra* note 19 at 550.

cities are important because of their unique location of human association. The bottom line is that it is human connection felt at the localized level that has reinforced the importance of municipal forms of government.¹⁵³ The SCC has invoked subsidiarity alongside the principle of co-operative federalism, which recognizes municipalities as distinct governments that are empowered to act on behalf of their citizens.

However, the actual powers of municipalities are complicated by the overlap of provincial legislation, which blurs the scale at which decisions are to be made. Even before the provincial government introduced Bill 5, Toronto's WBR process proceeded both under *COTA*'s constraints and in fear of OMB appeal. At the time of the WBR, *COTA* purportedly gave full autonomy to Toronto to decide its WBR process, yet the province also granted the OMB the power to override municipal ward decisions and substitute its own version. The construct of empowerment is significantly limited, calling into question how much power the city actually had. The WBR process was designed to comply with provincial laws that forced the city to design a careful process that could withstand OMB scrutiny, and yet limited Toronto's capacity to adopt a process that was arms-length from City Council, such as the federal commission model, which seeks to prevent gerrymandering. The result in Toronto was a WBR process that heavily relied on the input and buy-in of councillors, calling into question how independent the decision was from the self-interested will of these elected actors. This unintended consequence cannot possibly be what the province had in mind.

A framework of operative subsidiarity would help to clarify the interpretation of municipal authority. Operative subsidiarity draws attention to the question of consistency in scale and jurisdiction. In the context of ward boundaries, for example, Bill 5 is not a single provincial bill that overrides the City of Toronto's decision in the creation of its electoral districts. Instead, it is part of a larger narrative of the provincial government's lack of comfort in municipalities as having full autonomy in the drawing of ward boundaries. Operative subsidiarity illuminates that Toronto was always constrained, through various legal instruments, in having full authority to create its wards, based on *COTA* provisions and the oversight function of the OMB. Seen through the lens of operative subsidiarity, the City of Toronto had to maneuver amongst various legislative provisions, impacting both the process and outcome.

Operative subsidiarity would improve consistency and clarity in municipal legislation. There are two plausible routes in its application. First, operative

153. See *e.g.* Jerry Frug, "The Geography of Community" (1996) 48 *Stan L Rev* 1047 at 1055; Frug, *supra* note 9.

subsidiarity, as a tool of legislative design, would require provinces to determine how various pieces of legislation work together to empower local governments. In the context of the WBR, prior to the enactment of Bill 5, where applications of the *Charter* and overlapping pieces of legislation muddle the autonomy purportedly granted by the province, municipalities could focus their query on how such laws are meant to co-exist. If enacted by the province as an interpretation tool, this would facilitate the interpretation of current enabling statutes in favour of fulsome municipality authority. Second, operative subsidiarity could be adopted as a guiding principle for quasi-judicial interpretation of municipal action. Like subsidiarity, it could be applied alongside other constitutional principles to recognize municipalities as distinct governments representative of their constituents in situations like the WBR where multiple pieces of legislation complicate municipal authority.

IV. CONCLUSION

This article contributes to the conversation on how the principle of subsidiarity can be operationalized when provinces craft municipal authority. It does not seek to offer an ambitious theory of municipal authority, but, instead, offers a modest lens upon which provincial laws concerning local power can be streamlined for consistency. As Berman writes, “[t]he line-drawing problems are potentially difficult and often politically contested, but even just the habits of mind generated by *thinking* in terms of subsidiarity can help ensure that lawmaking communities at least take into account other potentially relevant lawmaking communities.”¹⁵⁴ Kong agrees, stating that the acknowledgement of other forms of government is the principle strength of subsidiarity.¹⁵⁵ Thus, consideration of the municipal scale is the way in which subsidiarity can be operationalized; in particular, by invoking the principle to understand the implications of multiple laws that may constrain the effective policy-making power of local governments.

Operative subsidiarity looks first to the matter to be addressed and then designs how that scale can be empowered to act.¹⁵⁶ The municipality may not in fact be the right scale. The benefit, however, is to design a model that makes sense, is consistent, and which achieves legitimacy.¹⁵⁷ Operative subsidiarity provides a workable basis for legislative design. In the case of the WBR, operative

154. Berman, *supra* note 47 at 1209 [emphasis in original].

155. Kong, *supra* note 41 at 30.

156. Blank, *supra* note 19 at 536.

157. Berman, *supra* note 47 at 1209.

subsidiarity offers a means of observing the patchwork of legislation that seems to simultaneously grant power yet undermines municipal autonomy, and which limits the extent to which the city may devise a WBR approach that can achieve policy aims in an accountable process. Instead, the province should start by querying the right scale of authority, then re-imagining electoral design policy with clear, enabling legislation. Without it, we are left with a WBR process—and municipal policy generally—that does not achieve the fundamental objective of representative democracy and uncertainty in respect of municipal authority.