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Games of Jurisdiction: How Local Governance Realities Challenge the “Creatures of the Province” Doctrine

MARIANA VALVERDE*

The question of local democracy has been revived politically and legally in Ontario in the wake of the provincial government’s sudden interference in the 2018 Toronto municipal election. This article contributes to the discussions on the legal status of local governments in a way that sheds light on the Ontario government’s relation with the City of Toronto, but that is not Toronto-specific or even specific to municipal corporations, which are only one of the many forms of actually existing local government bodies. This is done in three parts. The first is an argument in favour of bracketing black-letter constitutional law in order to develop a fine-grained understanding of the multiple games of jurisdiction that have been played and continue to be played throughout Canada, often with unpredictable results. Second, a look at the history of local government in Ontario, with particular attention to a neglected provincial commission on “municipal institutions,” leads to a concluding section offering some reflections on how black-letter Canadian law, especially in Ontario, has shaped what political scientists call “practices of citizenship,” not always in a democratic direction.

THE COMPLEX DYNAMICS OF LOCAL GOVERNMENT IN CANADA have often been reduced, in both legal argument and scholarly work, to the narrow question of the provincial government’s power over municipal corporations, often thought to be settled by invoking the “creatures of the province” doctrine. Recently, the proposal for a Toronto City Charter, which has drawn a great deal of public attention in Ontario, narrows the issues even more, by separating large urban areas from other localities. In recent years the Ontario government has carried out many forced amalgamations in townships, small towns, and rural areas, and elected regional chairs have been replaced by appointed ones—issues that highlight the lack of local democracy outside of the big-city context on which the City Charter movement focuses.¹ This article is largely in sympathy with both the City Charter arguments and the rereading of constitutional jurisprudence covered elsewhere in this Special Issue, but its focus is neither on the text of the constitution nor on the specific situation of big cities, in Ontario or elsewhere in Canada. Instead, it uses historically informed reflections on Canadian local government to contextualize the Ontario government’s move in 2018 to cut Toronto’s City Council in the midst of an election. Unlike the City Charter advocates, it does not do so by exceptionalizing big cosmopolitan cities, but by demonstrating that both current politics and past history show that the complex, multiplayer game of jurisdiction, as played in Canada, could be adapted to further local democracy everywhere in the country.

I. PRELIMINARIES: BEYOND CITY CHARTERS

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¹ Charter City Toronto, “Charter City Toronto: A Proposal to Empower and Protect Toronto,” online: <www.chartercitytoronto.ca/> [perma.cc/MV2S-2456].

A brief comment on the origins of this article, and my involvement in matters of local government is in order, especially since the record shows that I acted as an expert witness for the City of Toronto in its challenge to Ontario's *Better Local Government Act, 2018* (Bill 5).² This section will also explain why I do not think that the City Charter movement, with which I have much sympathy, is what Canadian local democracy needs at this time.

Matters of local government came into the foreground for citizens and scholars in the late 1990s and the early 2000s, when the "charter for the City of Toronto" arguments developed in the dual context of the federal Liberals' promise of a "New Deal for Cities," on the one hand,³ and the forced amalgamation of the six Metro Toronto municipalities in 1998 on the other.

The city-charter movement is experiencing a renaissance today, as seen in several contributions to this Special Issue. Influential Toronto councillor Josh Matlow, for example, has spoken publicly to lend his support to a revival of the City Charter movement,⁴ although of course today the COVID crisis dominates affairs at the municipal level, as well as at other levels of government.

However sympathetic one might be to the effort to protect municipalities, and Toronto City Council, from arbitrary exercises of provincial power invoking the "creatures of the province" doctrine in a manner that many would call undemocratic, questions can nevertheless be raised about whether reviving the City Charter movement of twenty years ago is the best way to respond to contemporary developments. The City Charter movement—loosely linked to the concerted but ultimately unsuccessful effort to remove the City of Toronto from the jurisdiction of the Ontario Municipal Board⁵—is a sincere call for local democracy, but one which exceptionalizes big cosmopolitan cities, and has been criticized by some for not being as inclusive as it ought to be. Roger Keil and other urban scholars (who have written elsewhere about the political disempowerment of the inner suburbs) have raised concerns about the extent to which the charter campaign reflects the demographic, economic, and political realities of today's cities.⁶ And apart from the issue of representativeness, if one takes a pan-Canadian point of view and notes the

² SO 2018, c 11 [Bill 5].

³ In 2004 Prime Minister Paul Martin spoke at the annual meeting of the Federation of Canadian Municipalities and proposed a "New Deal for Cities," although whether this would involve a change in their constitutional status rather than funding was not at all clear. See e.g. T J Plunkett, "A Nation of Cities Awaits Paul Martin's 'New Deal' — Federal Funds for 'Creatures of the Province'" *Policy Options* (1 February 2004), online: <<https://policyoptions.irpp.org/magazines/canadas-cities/a-nation-of-cities-awaits-paul-martins-new-deal-federal-funds-for-creatures-of-the-province>> [perma.cc/DX6C-U897].

⁴ See e.g. Oliver Moore, "Residents' Group Unveils Proposal for a Toronto City Charter," *The Globe and Mail* (5 November 2019), online: <www.theglobeandmail.com/canada/toronto/article-residents-group-unveils-proposal-for-a-toronto-city-charter/> [perma.cc/6NPV-5KDX].

⁵ In 2018 the OMB was replaced by the Local Planning Appeals Tribunal, set up to be somewhat more deferential to municipal councils. In May 2019 a provincial bill severely limiting municipalities' power to control development was greeted negatively in Toronto with the cry "The OMB is back," meant to sound as a warning. See Jennifer Pagliaro, "Residents Pack City Hall as Return of OMB Looms," *The Star* (27 May 2019), online: <www.thestar.com/news/city_hall/2019/05/27/residents-pack-city-hall-as-return-of-omb-looms.html> [perma.cc/A7V8-EMU8].

⁶ Roger Keil & Doug Young, "A Charter for the People? A Research Note on the Debate about Municipal Autonomy in Toronto" (2003) 39: 1 *Urban Affairs Rev* at 87; Enid Slack & Richard Bird, "Merging Municipalities: Is Bigger Better?" (Toronto: Institute for Municipal Finance and Governance, Munk School of Global Affairs, University of Toronto), available online: <https://tspace.library.utoronto.ca/bitstream/1807/81253/1/imfg_paper_14_slack_bird_Feb_27_2013.pdf> [perma.cc/G947-8G5Y]; Andrew Sancton, *Municipal Mergers and De-Mergers in Quebec and Ontario* (Quebec City: Université Laval, 2005).

infrastructure and other inequities that plague non-urban parts of Canada (as well as the often sudden mergers of municipalities that have taken place in Ontario since the days of Premier Mike Harris), one can ask whether it is appropriate now to go further than the City Charter campaign's somewhat limited goals, and seek to obtain democracy at the local scale, whether that government be urban or rural.

At the time of the forced amalgamation of the six Metro Toronto municipalities in 1998, demanding a city-specific Charter, along the lines of what other major cities in Canada and abroad have, was a very plausible strategy. Political scientists as well as politicians in both Ottawa and Toronto had become keenly aware of the discordance between the huge economic and cultural weight of Toronto and the Ontario legal situation, which was that the City of Toronto was governed by and through the same provincial municipal statute that governed towns and rural townships. (Eventually the city obtained a specific *City of Toronto Act, 2006*,⁷ but despite much rhetoric about what in the U.S. is called “home rule,” the legal situation changed only slightly).⁸

The overall social and cultural context within which the “new deal for cities” and similar phrases emerged is very important. The late 1990s was a time when social scientists around the world were generating a vast literature on what came to be called “global cities”—that is, cities powerful enough to function as quasi-independent economic actors, competing with each other for global business and global professional-class migrants, with little input from national states.⁹ These social scientists pointed out that migrants often migrated not to a country but to a city, and global investment also sought out particular cities, not countries. Toronto did not figure in the top rank of the global cities but trends documented in the Greater Toronto Area were in keeping with the global city literature: from the 1990s onward it became clear that both international migration and cross-border real estate investment were primarily interested in Toronto, or in similarly cosmopolitan Vancouver, not so much Canada in general.

The call for a special Charter for the City of Toronto made sense in the international context of the new visibility of global cities, as well as in the local political context of anti-amalgamation sentiment (voiced by groups such as the Coalition for Local Democracy). However, in the fifteen years or so since that time, the optimism about the City of Toronto as a rising global city has been greatly moderated, if not completely overshadowed, by new concerns about increasing intra-city inequalities, including worrying census data suggesting greater spatial segregation by race and class. Most notably, the vast data sets collected and analyzed by the University of Toronto team, led by Professor David Hulchanski, show that the “megacity” of Toronto is not quite the unified megalopolis with global appeal that was portrayed both in official city sources and in the local media fifteen or twenty years ago.¹⁰ As studies by the local United Way, the City of Toronto, and various scholars have shown, Toronto is a city in which the “inner suburbs” became more

⁷ SO 2006, c 11, Sched A.

⁸ Ron Levi & Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44:3 *Osgoode Hall L J* 409.

⁹ The most influential author in the global cities literature is undoubtedly Dutch-American Columbia University sociologist Saskia Sassen. See Saskia Sassen, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York: New Press, 1998), and, most famously, Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 2001).

¹⁰ J David Hulchanski, *The Three Cities within Toronto: Income Polarization Among Toronto's Neighbourhoods, 1970-2005* (Toronto: Cities Centre, University of Toronto, 2010). The more cheerful images of the City of Toronto produced in the 1990s and into the 2000s both in official circles and in the local press are documented and discussed in Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012).

racialized and poorer while the white professional classes got richer. Post-amalgamation Toronto has become a highly differentiated space in which many areas are privileged while others suffer in a situation of growing poverty and marginalization, compounded by increasingly visible systemic racism. Policy initiatives aimed at documenting and remedying spatial and economic inequities, such as the United Way's influential "Poverty by Postal Code" reports (the first in 2004, the second in 2011) and the subsequent "priority neighbourhood" designation are leading examples of efforts made locally to acknowledge the internal inequities that came to the fore in the twenty-first century.¹¹

Given the massive changes that have transformed the spaces found within the boundaries of the old "Metro"—now the unified megacity of Toronto—paralleled by increasingly pessimistic data about racial exclusion and intra-city economic inequities, I would argue that it has become politically and ethically problematic to dust off City Charter arguments elaborated fifteen or twenty years ago, at a rather different, more optimistic time.

The sudden move made by the Doug Ford provincial government in 2018 to disregard the City of Toronto's careful ward boundary review, and to impose on the city the same boundaries previously drawn for federal and provincial purpose—a move that as other articles in this Issue document had the instant effect of throwing an in-progress election into disarray—angered many of the same people who had been angered by the Mike Harris provincial government's antidemocratic megacity merger of 1998, including former mayor John Sewell. The City Charter campaign was thus revived in 2018-2019 in response to Ford's interference with the ward boundaries, as mentioned above. However, I will argue here for a different, more pragmatic, and less big city-specific approach to local democracy.

To conclude this section, one can be quite critical both of the content and the process followed by the Ford government in June of 2018, but one can nevertheless also harbour worries about the political wisdom of seeking a privileged legal status for the largest city in the province. Among other reasons, unilateral provincial top-down governance moves, and cutbacks to important local services, are by no means confined to the City of Toronto or to large cities in Ontario.¹² Today, municipalities all over Ontario are subject to the same constant threat of sudden amalgamation, complete restructuring, overturning of locally-elaborated official plans, and, perhaps most scandalous, the replacement of elected leaders by appointed ones. The threats are less likely to be carried out in areas of the province that have traditionally voted Conservative, as long as the Conservatives are in power. However, the province's legal powers continue to hang like swords over all municipalities, and these powers remain available for use by future majority governments of any political stripe. Furthermore, cities from Montreal to Edmonton and Calgary have at various points also faced either forced amalgamations or revocations of City Charters; arguably, moves in favour of local democracy could benefit from a broader, pan-Canadian perspective, or at least from solidarity amongst localities. For these reasons, it may now be a good

¹¹ The website of the United Way Greater Toronto (which serves Peel, Toronto, and York Region) contains a lengthy series of very well-researched reports on poverty and related issues that sound an increasingly worried tone, beginning about 2000 and into the present day, including the two Poverty by Postal Code reports mentioned above. See United Way Greater Toronto, "A Foundation for Everything We Do: Our Current Reports," online: <www.unitedwaygt.org/research-and-reports> [perma.cc/G267-VRQJ].

¹² Soon after political rival Patrick Brown announced he would run for chair of Peel Region, in the spring of 2018, the Doug Ford government announced that elected regional chairs would be replaced by appointed ones in several second-tier municipalities including Peel. Brown knew he would not be appointed as chair of Peel and so ran instead, successfully, for mayor of the city of Brampton, a first-tier municipality in Peel Region.

time to begin to move away from the global cities worldwide political frame that undergirded the City Charter movement.

In the present context, there is no logical reason why the quest for local democracy and good, locally responsive municipal government should be limited to large cities, or indeed to cities of any size.¹³ Instead of reviving the City Charter arguments, we might adopt local law expert Yishai Blank's terminology of "localities"—entities which may or may not coincide with legal municipalities¹⁴ but which certainly include local communities that are not urbanized, and whose citizens are as entitled to local democracy as those living in urban areas.

Before putting forward any new proposals for nurturing local democracy, however, a brief foray into legal theory is in order. This will help to show that just as City Charter advocates have perhaps obscured local governance realities by focusing on large cosmopolitan centres, so too have constitutional law scholars not always rendered visible the on-the-ground manoeuvres between and amongst governments and non-government authorities that constitute what I call "the game of jurisdiction." Socio-legal scholars always repeat that "law in the books" is not the same as "law in action." So too, jurisdiction in the books in Canada favours the "creatures of the province" view—although arguments to the effect that local subsidiarity can be reconciled with cooperative federalism have been made as well.¹⁵ However, jurisdiction in action is far more complex and dynamic, and features many more players, than is suggested by traditional readings of section 92 of *The Constitution Act, 1867*.¹⁶ There are many grey areas, and many situations in which the federal versus provincial two-player approach to jurisdiction does not capture what is at stake. A more dynamic understanding, in which jurisdiction is seen as not simply a static map of which government or which court has the authority over X, but as an unpredictable, multiplayer, open-ended game, can help further concrete legal and political debates on local governance.

II. ZERO-SUM SOVEREIGNTY VERSUS DYNAMIC GAMES OF JURISDICTION

Constitutional law discussions tend to presuppose that political power is all about *sovereignty*. When people ask whether municipalities are governments, there is often an assumption that to be a government is to possess a good number of the attributes of sovereignty. I would suggest that it is more useful to think instead of government as *jurisdiction*.¹⁷ Sovereignty is certainly one very important governmental game—one that is a zero-sum game, such that if provinces lose, the federal government gains, or if individual rights win, the state loses. But sovereignty is not the

¹³ Mary Stokes' recent Osgoode PhD thesis on the legal history of nineteenth century Ontario municipalities also critiques the city-centrism of much Canadian local government law; Mary Stokes, *Law, Autonomy and Local Government: A Legal History of Municipal Corporations in Canada West/Ontario, 1850-1870*, (PhD Dissertation, Osgoode Hall Law School, 2018) [unpublished]. My thanks to Mary Stokes for providing me with pre-publication copies of thesis chapters.

¹⁴ Yishai Blank, "The City and the World" (2006) 44:3 *Columbia J Transnat'l L* 876 at 877-8; see also Yishai Blank, "Localism and the New Global Legal Order" (2006) 47:1 *Harvard Intl LJ* 263.

¹⁵ Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of the Toronto Ward Boundary Review" (2019) 56:2 *Osgoode Hall LJ* 271 at 287.

¹⁶ 30 & 31 *Vict, c 3*, s 92 [*The Constitution Act, 1867*]. Section 92 of *The Constitution Act* sets out the provincial heads of power.

¹⁷ I have developed this at more length in Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2006) 15:4 *Soc & Leg Stud* 139, and Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (London: Routledge, 2015) [Valverde, *Chronotopes*].

only game of government (as Canadian socio-legal scholar Shiri Pasternak has shown in the context of Indigenous governance and Indigenous autonomy).¹⁸

If we draw inspiration not from John Locke or John Stuart Mill, as constitutional scholars often do, but from contemporary social theory (as well as the legal pluralism literature), governmental power no longer looks like a zero-sum game. Historical as well as contemporary empirical research shows that two entities that are in tension or conflict can in fact both gain new (though usually qualitatively different) powers at the same time. When power multiplies, instead of being fought over in zero-sum games, the process is not visible in most constitutional law cases. It is, however, readily visible in other areas of law. Environmental governance and climate change mitigation projects, for example, contain many instances of the rise of new obligations and powers that are distributed so as to add to each entity's power (e.g., including conservation authorities, private land trusts, local and provincial governments, and sometimes First Nations as well). And in Canada today, some studies of Indigenous law and politics have concluded that much is to be gained, for Indigenous communities, from asserting jurisdiction without entering into a debate about sovereignty that is unlikely to end well for the Indigenous communities.¹⁹ Beyond Indigenous issues, and beyond climate-change policies, there are many governance situations in which the game of *sovereignty* has been clearly bracketed, as actors focus on playing the much more flexible and non-zero-sum game of *jurisdiction*.²⁰

Arguably, local governments can make gains, for themselves and their citizens, by claiming selected jurisdictions and powers, such as new revenue sources and more flexibility in borrowing powers. This can be done without posing a direct challenge to the Canadian constitutional doctrine that there are only two Crowns, provincial and federal. In Canada, sovereignty may well remain exhaustively divided, for the foreseeable future, between the federal government and the provinces (despite rhetoric at the political level about Nation-to-Nation relationships between settler colonial governments and First Nations). But the static apportioning of sovereignty between these two levels of government does not suffice to explain the more complex multi-player situations that go on, on the ground.

The point that municipal governments have often made in practice, but usually not in a legal context, is that political and legal power is found, and indeed is often created from scratch, in many situations where sovereignty is not on the table. The game of jurisdiction is not always about seizing as much power as possible: often, political games are played by disavowing or abdicating jurisdiction. First Nations have been victims of this particular move in the game of jurisdiction, as provinces disavow responsibility for infrastructure or for food shortages by claiming that Indians are federal.²¹ At the local level, in the summer of 2020, citizens of Toronto became confused as Mayor John Tory tried to delay implementing possibly unpopular measures to combat COVID-19, such as making masks compulsory, by claiming that only the province had that power. In contrast, Premier Doug Ford said that municipalities (or perhaps local Medical Officers of Health) could and should impose their own measures. Indeed, the cat-and-mouse

¹⁸ Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake against the State* (Minneapolis: University of Minnesota Press, 2017).

¹⁹ *Ibid.*

²⁰ See *ibid.*; Shaun McVeigh & Shaunnagh Dorsett, *Jurisdiction* (Abingdon, Oxfordshire: Routledge, 2012); Shaun McVeigh, ed, *The Jurisprudence of Jurisdiction* (Abingdon, Oxfordshire: Routledge-Cavendish, 2007); and Valverde, *Chronotopes*, *supra* note 17.

²¹ See e.g. Constance Backhouse, "Race Definition Run Amuck: 'Slaying the Dragon of Eskimo Status' in *Re Eskimos*, 1939" in Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society for Canadian Legal History, University of Toronto Press, 1999) at 34.

game—in the US especially, but also in Canada—whereby various levels of government tried to simultaneously take credit for tackling COVID-19 while avoiding possible political fallout from closing businesses would be a perfect arena in which to study jurisdiction in action. Public health jurisdiction is murky even in the books, with the power to declare emergencies being distributed throughout the political system; but governance realities in this realm are even more complex and unpredictable, and they do not always follow the zero-sum logic of “either it’s federal or it’s provincial.”

Political and legal power has of course often been *shared*. This is a very common legal situation in a federal state (especially in a state where some First Nations are gaining joint jurisdiction and/or shared governance in certain areas, from child welfare to parks management). But the point here is that not all exercises of political or legal power are covered by a formal “in the books” arrangement for overlapping or shared jurisdictions.

Shared governance or joint jurisdiction arrangements, formal or informal or in between, sometimes involve not just dividing up an existing amount or kind of power but *multiplying* the powers at hand. Numerous on-the-ground governance agreements have been made pursuant to the duty to consult whereby First Nations obtain a share of future natural resource revenues and/or the power to administer certain issues and certain geographic spaces jointly with one or more public authorities. Here the duty to consult has the effect of creating new powers (and responsibilities), rather than simply dividing up an existing power.

In general, if we pay attention to jurisdiction in practice, socio-legal scholars who document these struggles in every field of governance while they are in process (rather than analyzing only those judicial decisions that try to put an end to disputes) can provide food for thought for lawyers representing municipal (as well as other) interests.

One example of how using an interdisciplinary socio-legal lens can bring about new insights that is highly relevant to the City of Toronto’s continuing appeal of the provincial law known as Bill 5 is that political scientists would all concur, as an uncontroversial truth, that even if the text of section 92(8)²² does not clearly differentiate elected councils from the ill-defined category of “municipal institutions,” elected councils *are* indeed, for many purposes and in many contexts, a level of government. Political science departments all around the country offer courses in “local government” as a matter of routine. Those courses discuss matters such as the power of council, the power of mayors, elections, the ward system versus the councillor-at-large system, the presence or absence of political parties at the local scale, and so forth. These are the matters that interest political scientists the most because they have direct parallels at higher levels, but attention is often paid (especially in case studies) to governance matters that exceed the scope of traditional political science: transportation policy, for example, or climate actions.

There would be nearly universal support among Canadian social scientists for the claim that Canada has at least four types of government: First Nations, the federal government, the provinces, and municipalities. Under the heading “Municipal Government,” the respected *Canadian Encyclopedia* tells us that “Municipal governments include cities, towns, villages and rural (county) or metropolitan municipalities.”²³ Along the same lines, the Library of Parliament website, a website widely considered to be a source of accurate, nonpartisan legal information for

²² *The Constitution Act, 1867*, *supra* note 16, s 92(8). Section 92(8) states that municipal institutions in the province are subjects of exclusive provincial jurisdiction.

²³ T J Plunkett, “Municipal Government” (7 February 2006), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/municipal-government> [perma.cc/XA34-QLRH].

Canadians, states in its very first paragraph that, “Canada has three main levels of government ... 3. *The municipal level* (from the Latin *municipalis*, meaning of a *citizen* of a free town).²⁴

The “citizen of a free town” phrase, evoking the medieval doctrine about city air making serfs free if they managed to get to a city, is significant.²⁵ For both historians of local government and for social scientists today—as well as for much, if not all, of the public, which routinely uses the phrase “local government” even though it is not in *The Constitution Acts*²⁶—municipal *councils* are an important and historic element in a complex and constantly evolving democratic political system. The relevant unit of local government, for the purposes of thinking about what democracy means at the local scale, is the elected local council, whether that be a city council or a township council (or perhaps a Band council in the case of First Nations, although the Band council system is controversial in many First Nations²⁷). Municipal *institutions* such as fire departments, public utilities, public library systems, and transit authorities are not on the same plane as elected municipal councils. It is elected councils that embody democracy at the local level, just as at the federal level it is Parliament that embodies democracy and not federal Crown corporations. The Crown corporations, just like public utilities or public housing authorities, are definitely public rather than private, but they do not embody democracy.

Unfortunately, the few Canadian legal scholars who have discussed the status of municipal corporations have only asked the narrow question of whether municipal corporations are, or should be, autonomous rather than remaining “creatures of the province.” However, as Yishai Blank’s argument in favour of the language of “localities” suggests, singling out the municipal corporation as the one and only legal form of local democracy is problematic (especially in a country such as Canada, with very large areas, mainly in the North, where municipal corporations are very thin on the ground).²⁸

How far formal law can or will recognize the reality of multiple powers and multiple jurisdictions overlapping all across the map of Canada cannot be predicted in advance. Nevertheless, the reality is that non-sovereign jurisdictions wielding considerable if limited powers are in many contexts already recognized by higher governments. To give but one of many examples: my extensive research on Waterfront Toronto for a different project encountered dozens, probably hundreds, of routine statements to the effect that Waterfront Toronto is a “tri-government” agency, and/or was created by the three governments.²⁹ Naming the city a government in that context does not make the city actually more powerful, of course, but the

²⁴ Parliament of Canada, “Our Country, Our Parliament: An Introduction to How Canada’s Parliament Works: The Three Levels of Government,” online: *Parliament of Canada*

<https://lop.parl.ca/about/parliament/education/ourcountryourparliament/html_booklet/three-levels-government-e.html> [perma.cc/8H82-UTRG] [emphasis in original].

²⁵ Gerald Frug, *City Making: Building Communities without Building Walls* (Princeton: Princeton University Press, 1999).

²⁶ *The Constitution Act, 1867*, *supra* note 16; *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*The Constitution Act, 1982*].

²⁷ On Band councils and alternatives see Jody Wilson-Reybold, *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada* (Vancouver: Purich Books, 2019).

²⁸ A good example of this binary thinking is Warren Magnusson, “Are Municipalities Creatures of the Province” (2005) 39:2 *Journal of Canadian Studies* 5, which argues that municipalities should be recognized as an autonomous level of government. My argument is that we should stop asking whether or not municipalities ‘really’ are or are not governments, and instead focus on specific powers and competencies (that is, we should play the game of jurisdiction, not the game of zero-sum sovereignty).

²⁹ See e.g. Alexandra Flynn & Mariana Valverde, “Planning on the Waterfront: Setting the Agenda for Toronto’s ‘Smart City’ Project” (2019) 20:5 *Planning Theory & Practice* 769 at 770.

routine use of the word “government” shows that even in official discourse there is much more flexibility than is suggested by the zero-sum picture painted in section 92 of *The Constitution Act, 1867*.³⁰

The consequences of ignoring bodies whose jurisdiction has long been recognized, but especially those bodies that are democratically elected and thus play a key role in our political system, can be illuminated by focusing on one curious, and to my knowledge unreported, moment in the Ontario Court of Appeal hearing on Bill 5.³¹ In his oral argument, Mr. Robin Basu, representing the Ontario government, declared: “municipalities are like Indian Bands.”³² As Mr. Basu elaborated in his subsequent argument, what he meant to argue by using this not very reconciliation-friendly phrase is that just as Indian Bands are, in *The Constitution Act, 1867*,³³ and in the *Indian Act*,³⁴ mere creatures of the federal government, so too municipalities can be made and unmade by the province. Under questioning by the panel of Ontario Court of Appeal judges, Mr. Basu argued that the province can do anything, including changing the rules of an election in progress, as long as a law to that effect was duly passed in the legislature. (In oral argument the justices did not specifically ask him about the “Indian Bands” analogy.) Municipalities, Mr. Basu argued, enjoy only whatever self-government and whatever juridical security the sovereign—in their case the province—deigns to grant them.³⁵ Throughout Mr. Basu’s arguments, nothing was said about the fact that Toronto City Council was granted the title of “government” in the very name of the law he defended, the *Better Local Government Act, 2018*.³⁶

Mr. Basu’s antiquated phrase “Indian Bands” is worth pondering, given that, as noted above, it is in the First Nations context that so many of the creative moves in the game of jurisdiction have been invented in recent Canadian history. (Quebec of course is the prime historical example of creative jurisdiction plays, which often benefit from the ambiguousness created by slightly mistranslated words; the fact that the premier of Quebec is known in Quebec itself as the Prime Minister of Quebec, for instance, is a curious Canadian fact that has ceased to draw domestic attention.)

Mr. Basu’s statement about “Indian Bands” is rather at odds with current realities. Federally, the Minister of what used to be Indian Affairs but is now Crown-Indigenous Relations, Carolyn Bennett, does not describe her work as administering “Indian Bands.” She describes it as seeking out First Nations and other representatives of Indigenous Peoples in order to further Nation-to-Nation” conversations, as even a casual glance through speeches and press releases on her department’s website reveals. Of course the governance and financial realities of Crown-Indigenous relations show that “the assertion of sovereignty” lurks dangerously just under the surface of jurisdictional games involving First Nations, but the change in language is not meaningless.

In keeping with the old “Indian Affairs” terminology, Ontario still has a Ministry of Municipal Affairs. But, turning Mr. Basu’s statement on its head, someone who is following

³⁰ *Supra* note 16, s 92.

³¹ See the Ontario Court of Appeal decision, *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761.

³² This is from my handwritten notes, taken in court. It is not found in the Attorney General’s factum.

³³ *Supra* note 16, s 91(24). Section 91(24) states that “Indians, and lands reserved for Indians” are subject of exclusive federal legislation.

³⁴ *Indian Act*, RSC 1985, c I-5.

³⁵ This article has benefited a great deal from reading the intervenors’ facta, especially the intervener factum from the Federation of Canadian Municipalities, and also from discussing the issues with attendees at a workshop held in September 2019 at the University of Toronto, although any legal or other infelicities are purely mine.

³⁶ Bill 5, *supra* note 2.

Indigenous legal developments might say that if the phrase “Indian Affairs” has been consigned to the dustbin of Canadian federal government history, why could the province of Ontario not evolve along similarly enlightened lines, and rename the Ministry of Municipal Affairs the Ministry of Provincial-Municipal Relations?

Indeed, without switching to a black-letter law perspective, it is appropriate to mention that the Supreme Court of Canada has recognized that the bare text of section 92(8) of *The Constitution Act, 1867*³⁷ does not reflect or provide for local democracy practices that have existed in Canada since before Confederation. In *Godbout v Longueuil (City)* [*Godbout*], Justice La Forest (with McLachlin and L’Heureux-Dubé JJ concurring) stated that:

... municipalities—though institutionally distinct from the provincial governments that create them—cannot but be described as “governmental entities”. I base this finding on a number of considerations.

First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. To my mind, this itself is a highly significant (although perhaps not a decisive) indicium of “government” in the requisite sense. Secondly, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as “government”, is indistinguishable from the taxing powers of Parliament or the provinces. Thirdly, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction.³⁸

Importantly, as noted above, for jurisdiction in practice as well as for law, not all local public authorities and municipal institutions are, or are seen as, governments.³⁹ As the factum presented by the Federation of Canadian Municipalities in the Bill 5 appeal to the Ontario Court of Appeal argues, elected municipal councils (which precede the 1849 *Baldwin Act*, not just Confederation⁴⁰) are politically not on the same plane as local transit authorities and other special-purpose bodies.⁴¹ Waterfront Toronto, for instance, is a public entity managing publicly-owned land for public purposes, but it is not a government. It is not a government because it is governed

³⁷ *Supra* note 16, s 92(8). Section 92(8) states that municipal institutions in the province are subjects of exclusive provincial jurisdiction.

³⁸ *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 50-51.

³⁹ School boards are historically key local governance institutions, but both funding and administration have shifted from local to provincial levels in complicated ways, which makes the position of elected school trustee a peculiarity in local governance. The fact that school boards were set up in Ontario well before Confederation, with heads of farming families electing trustees directly, is an interesting point in Canadian political history that ought to receive due consideration by local government scholars. See Bruce Curtis, *True Government by Choice Men? School Inspectors, Education and State Formation in Canada West* (Toronto: University of Toronto Press, 1992).

⁴⁰ The second report of the 1880s Ontario Commission notes that a mayor and aldermen were elected as early as 1663 in Quebec—although municipal government in New France was an intermittent affair well before 1763. See Ontario, Legislative Assembly, *Sessional Paper no. 13*, Victoria 52 (1889) at 7ff.

⁴¹ *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732, Factum of the Intervenor, Federation of Canadian Municipalities at 3, online: <www.ontariocourts.ca/coa/C65861/files/C65861.FOI.FederationofCanadianMunicipalities.pdf> [perma.cc/CE4X-MJME].

by an appointed board, but also, importantly in my view, because both its aims and powers are limited. This is contrary to the Supreme Court’s definition, in *Godbout*, of governmental entities, as cited above. Furthermore, Waterfront Toronto was created in 2001 to run for only twenty-five years. Continuity, or perhaps more modestly, a default setting of continuity, is one of the features of government that citizens take for granted. Continuity is essential for democracy precisely to ensure that citizens who are unhappy with their current elected representatives can envisage a day when they will vote them out of office.

When one type of local political entity (municipal councils) has been formed by means of elections since the earliest days of white settlement in this country,⁴² and, furthermore, the political entity is expected both by the relevant statutes and by the citizenry to deal for an indefinite period of time with an indefinite number of issues, it is rather problematic, to say the least, to lump it with “municipal institutions.” Elections are not a sure indicator of government status; arguably school boards, while elected, have too narrow a purpose or function to count as governments. However, it would be difficult to find anyone, in international circles as well as in Canada, who would disagree that fair elections are a necessary if not sufficient condition of democratic government. Of course, municipal lawyers well know that Canadian law does not guarantee municipal elections, fair or otherwise, on its face. The right of citizens to vote on a regular and fair basis is only provided, in black letter law, at the provincial and federal levels. Nevertheless the “living tree” doctrine could be used to argue that in this respect Canadian black letter law may be seriously out of step with political and social reality, not to mention with the very long history of elected local governments in Ontario and in the other provinces.

To conclude this section: Mr. Basu’s comment about municipalities being like Indian Bands was perhaps more unfortunate than he realized. Among other things, his choice of an antiquated language not current in Ottawa may be a useful reminder to today’s legal actors that the doctrine that elected municipal councils are but “creatures of the province,” along with every other minor, special-purpose, local institution, dates back to the era when First Nations people were wards of the Crown, women could not vote, and human rights law did not exist, much less the *Charter*.

But while it is useful to recall the very long history of elected local government in Canada, a history that reaches back well before Confederation, it is also necessary to pause briefly to consider the parallel history whereby the government of Ontario tried and sometimes succeeded in using the powers conferred on it by section 92⁴³ to demote local governments, treating them as mere administrative institutions. (It should be said that it would be ideal here to have information for all of English Canada—Quebec has a unique history of local government⁴⁴—but the secondary sources that would be needed to do so do not exist, so I am confining myself to Ontario.)

⁴² In Upper and Lower Canada, in the United Provinces of Canada and in early Ontario (that is, from the 1770s through to the mid-nineteenth century), elections of township officials and municipal councils were often subject to property requirements, as was the case in England, but to my knowledge no ‘higher’ government tried to interfere with local elections.

⁴³ *The Constitution Act, 1867*, *supra* note 16, s 92.

⁴⁴ UQAM-based historian Jean-Marie Fecteau produced, on his own or with collaborators, an impressive body of work that sheds much light on the history of local government in Quebec as well as the history of the management of crime and social problems by charities and by the province. A key work is Jean-Marie Fecteau, *La liberté du pauvre: Crime et pauvreté au XIXe siècle Québécois* (Montréal: VLB, 2004).

III. HISTORY MATTERS TODAY: WHY WERE MUNICIPAL CORPORATIONS CREATED IN ONTARIO?

In the 1880s, the “Reform” government of Ontario (under Premier Oliver Mowat) appointed a three-person commission on municipal *institutions*. This generated two large reports, in 1888 and 1889, which reflected the winds of urban reform gaining force in the United States, the winds that resulted in municipal corporations having their powers, and especially their revenue-raising abilities, greatly curtailed by state legislatures and courts. As Jon Teaford and other U.S. urban historians have shown, courts and state legislatures mainly represented non-urban and non-immigrant interests and believed that the municipal level of government was uniquely corrupt and uniquely wasteful.⁴⁵

In 1888, the Ontario commissioners heard in person from a number of Toronto “gentlemen,” many of them serving or past councillors or aldermen. These gentlemen apparently took the opportunity to loudly call for “a charter” for Toronto. (It is not known whether this call emerged just for the purpose of this government inquiry, or whether it had existed locally since the days of the 1837 Rebellion.) Foreshadowing recent City Charter arguments, they argued that if Toronto were granted a charter, the city would no longer have to run to the legislature to get approval for every little request.⁴⁶

Employing the coercive gaze of provincial sovereignty that Ontarians have experienced in more recent years, the provincially-appointed commissioners dismissed this request out of hand. Charters do not necessarily give more powers, the commissioners said. But their real objection (set out elsewhere in their report) was that special charters and one-off laws mar the beautiful “symmetry” of Ontario municipal law.⁴⁷ The commissioners stated as a self-evident fact that Ontario municipalities, or at least all municipal corporations, must be governed in the same way, with the same law.

Interestingly, special Acts passed by Parliament by local request to create new local bodies or grant some specific powers were ubiquitous in nineteenth-century England. To the dismay of the symmetry-seeking Ontario commissioners, England still had over one thousand one-off turnpike trusts fifty years after the English *Municipal Corporations Act 1835* attempted to standardize the municipal incorporation process in England/Wales.⁴⁸ The Ontario of the rigid

⁴⁵ Key works in this literature are Jon C Teaford, *The Municipal Revolution in America: The Rise of Modern Urban Governance, 1650-1825* (Chicago: University of Chicago Press, 1975); and Jon Teaford, *The Unheralded Triumph: City Government in America, 1870-1900* (Baltimore: Johns Hopkins University Press, 1984). A historically informed account of municipal American law that has had great influence is Gerald Frug, “The City as a Legal Concept” (1980) 93:6 Harv L Rev 1057. Some partial histories that are relevant to Toronto are included in Alan F J Artibise & Gilbert A Stelter, eds, *The Usable Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan, 1979) [Artibise & Stelter, *The Usable Past*], and also in Gilbert A Stelter & Alan F J Artibise, eds, *The Canadian City: Essays in Urban History* (Toronto: McClelland and Stewart, 1977). For an overview of the state of municipal law, in Ontario and beyond, in the 1890s, see the sixty-five pages on municipal government in R E Kingsford, *Commentaries on the Law of Ontario: Being Blackstone’s Commentaries on the Laws of England, Adapted to the Province of Ontario* (Toronto: The Carswell Co. (Ltd.), 1896) at 270-335.

⁴⁶ Ontario, Legislative Assembly, *Sessional Paper no. 42*, 51 Victoria (1888) at 32.

⁴⁷ *Ibid* at 75.

⁴⁸ John Barratt argues persuasively that the much-heralded English Municipal Act of 1835 was largely aimed at providing the central government with some tools—and some information—with which to crack down on municipal corporations and boroughs that were mispending public funds from rates or from other sources. See John Barratt, “Public Trusts” (2006) 69:4 Mod L Rev 514. Reading Barratt one understands why so few municipalities chose to

concession-road grid (whose beauty they praise in an ode to Governor Simcoe's surveying work) should not have its "symmetry" spoiled by special acts or charters, the commissioners argued. What the Toronto gentlemen thought about the quick dismissal of their City Charter request, history does not record.

In their second report, published in 1889, the commissioners describe the process of white settlement in Upper Canada with considerable erudition. The commissioners conclude that with the large influx of United Empire (UE) Loyalists from south of the border, "it seems to have been thought necessary [by Governor Simcoe] to make *some show of township government* to satisfy a people who had long been accustomed to discuss and determine their own affairs at town meetings."⁴⁹

The UE Loyalists may perhaps have been satisfied by "some show" of township government (although again, there is virtually no scholarship on this point). But the winds of political and legal reform, that were blowing in England as well as in Canada, generated in Canada not only "responsible government" but also the 1837 Rebellion, with rebels like William Lyon Mackenzie expressing some Republican sympathies.

Subsequent to the Rebellion, as is well known, responsible government was created. Political hiccups ensued, with Quebec and Ontario being merged and then de-amalgamated. For present purposes it need only be noted that part of the new responsible governmental project was a general Ontario municipal incorporation act, the 1849 *Baldwin Act*—which has been the basis of municipal incorporation law all across Canada into the present.

While the 1849 *Baldwin Act* is well known, it is not generally known that despite municipal incorporation being available, many towns in Ontario continued instead to be governed by and through "Boards of Police" (in the eighteenth-century sense of "police," meaning the power to create and maintain urban order, as in the U.S. doctrine of the "police power of the state").⁵⁰ In addition, magistrates meeting in Quarter Sessions, who had for decades decided many local matters (such as where to build a road and how to pay for it) continued to exercise some non-democratic power after 1849.⁵¹

The 1889 commissioners' report opines that Boards of Police, which were more numerous than municipal corporations in mid-century Ontario, are the perfect Canadian local government compromise. These bodies allowed some local autonomy, even though provincially-appointed county officials and magistrates continued to wield power. But, crucially, the commissioners clearly felt that the Board of Police legal form steered a wise, moderate, Canadian course between the two evils of American and English local government. On the one hand, Boards of Police were far less democratic than the American town meetings, which the commissioners thought were too

incorporate after 1835, a fact deplored but not explained by Sidney & Beatrice Webb, authors of the still currently useful eleven volume series *English Local Government* (London: Longmans, 1906-1913).

⁴⁹ *Sessional Paper no. 13, supra*, note 40 at 15 [emphasis added].

⁵⁰ Importantly, boards of police were also created as corporations—just not "municipal corporations." Ignoring local public corporations that were not created as *Baldwin Act* municipal corporations hides from view the myriad non-government entities that were incorporated and granted considerable if narrow powers (such as the Toronto Transit Commission and the Harbour Commission, in Toronto). These often undermined municipal powers from the inside, so to speak, while the province undermined them from the outside. On these powerful entities see Artibise & Stelter, *The Usable Past*, *supra* note 45.

⁵¹ See G P de T Glazebrook, "The Origins of Local Government" and C F J Whebell, "Robert Baldwin and Decentralization," both in F H Armstrong et al, eds, *Aspects of Nineteenth-Century Ontario: Essays Presented to James J Talman* (Toronto: University of Toronto Press, 1974). On municipal incorporation later in the century, see Greg Stott, "Enhancing Status through Incorporation: Suburban Municipalities in Nineteenth-Century Ontario" (2007) 33:6 *J of Urban History* 885.

unruly. On the other hand, the Boards of Police lacked the exceptional economic and legal power long exercised in England by the corporation of the City of London, and to a lesser extent by the municipal corporations of major U.S. cities, especially New York City. The Ontario commissioners studied many U.S. city governments in detail, having sent lengthy inquiries by post to these governments that generated otherwise unobtainable information. They then used their original research on local government in the U.S. (which extended to all manner of municipal institutions, not just councils) to warn the Ontario government against doing anything that would enable cities to be prosperous and financially self-sufficient *as corporations*.⁵²

Corporations, after all, own property collectively. This form of corporate power was decried when used by municipalities, even as business corporations were able to prosper due to the creation of legal tools such as limited liability and share capital. Hendrik Hartog writes about the ultimately successful long-term attack by non-urban state elites on the revenues of the corporation of the City of New York.⁵³ He shows that the assault on the corporation of the City of New York's finances was not an exception in the U.S., even though the revenue sources of that municipal corporation had long been exceptional (just as the corporation of the City of London was exceptional in England, financially as well as legally).⁵⁴ Hartog's argument that the curtailing of legal and financial powers previously held by at some wealthy municipal corporations portended the legal and financial shackles that bind cities such as Detroit today⁵⁵ has long been accepted as valid by legal historians of the U.S. However, it has not been noted that Hartog's story of the City of New York has many parallels with the Canadian situation, as the 1880s Ontario commission mentioned above shows.

As mentioned above, Ontario localities that did incorporate, after the 1849 *Baldwin Act*, were still subject to a great deal of extra-municipal provincial control. For example, the 1849 *Baldwin Act* graciously allowed municipal incorporations to issue debentures, but taxing limitations began to be imposed in 1866. In the late 1880s, the Ontario commissioners could mention as a well-known fact needing no evidence that municipalities, especially cities, are congenital spendthrifts.⁵⁶

The Dillon doctrine of limited, prescribed municipal powers that dominated Canadian as well as American jurisprudence from the 1880s onward⁵⁷ was thus arguably but the legal tip of a large social-political-economic-cultural iceberg that combined fear of urban, immigrant, and working-class choices with a marked elite preference for federal and provincial public works.

⁵² The Corporation of the City of London's historic struggles against the British monarchy, especially Charles I and Charles II, have been repeatedly recounted by urban historians. For a look at later developments see Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: Clarendon Press, 1996), an excellent overview of the historic process by which the central government, in the UK, constantly found new, often indirect ways of exercising more control over elected municipal councils. More relevant for Canada, however, in my view, is the history of the Corporation of the City of New York told by Hendrik Hartog in his 1983 book: Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York, 1730-1870* (Chapel Hill, NC: University of North Carolina Press, 1983).

⁵³ Hartog, *supra* note 52.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ In England in the 1910s, Sidney Webb and Beatrice Webb, in their multivolume series on English Local Government, similarly decried the wasteful expenses incurred by municipal corporations, especially that of the city of London. The two volumes *The Manor and the Borough* (London: Longmans, 1906) and *The Parish and the County* (London: Longmans, 1908) are extremely informative despite the Webbs' many biases, and have not been replaced by a newer systematic study of the history of English local government.

⁵⁷ On the Dillon doctrine in Canada see Levi & Valverde, *supra* note 8.

A high point in Ontario's attack on the legal powers of municipal councils was the creation of the Ontario Railway and Municipal Board in 1906—in 1932 renamed the Ontario Municipal Board (OMB), recently turned into the Local Planning Appeals Tribunal. Two major works analyze recent decisions by the OMB, but its early history is not well documented.⁵⁸ At the time when it was created, Ontario elites, including many Torontonians, were suspicious of the power of elected municipal councils; the three Ontario commissioners were not unrepresentative at least of elite opinion. Later, the emergence of provincial planning legislation in the mid-twentieth century gave the province a very powerful new set of tools with which to curtail local initiative, partly through the OMB and partly through other mechanisms, such as the Ministerial Zoning Orders recently used by the Ford government.

The legal history of local government in Ontario in the twentieth century has drawn next to no scholarly attention, but it is clear that the playing field of local government and local governance was rendered more complicated in this century. For example, the federal government made cameo appearances in the local scene at various points in the twentieth century, first to help provide housing for returning World War I vets and later to set up the Canadian Housing and Mortgage Corporation (CMHC). The federal government is careful not to infringe directly on provincial jurisdiction, but in areas such as establishing overlapping COVID rules, or financing affordable housing, the federal government has been finding ways to participate actively in local governance matters. And indeed, citizens expect Ottawa to act, for instance to help bail out cities that are in financial crisis due to COVID.

In general, it could be said that federal governments, mainly by careful use of discretionary funding decisions, but also through using jurisdictions or competencies they have which help to shape urban life, have found ways to skirt the “creatures of the province” doctrine without explicitly challenging it. These jurisdictions or competencies include areas such as banking, ports and airports, the use of federal Crown corporations, and participation in and funding of special-purpose bodies such as Waterfront Toronto. The federal government's presence in urban affairs is neither systematic nor predictable. In some cases, provincial and local politicians resist federal intervention, but in other cases they demand it loudly, sometimes simultaneously. For example, there have been frequent municipal calls for greater federal action on climate change, so that cities are not left to their own devices in ensuring infrastructure sustainability.

Besides a variety of federal interventions in local, and especially urban, governance the twentieth century also witnessed the entrance of relatively new actors, namely new corporations somewhere between public and private. These included Ontario Hydro and its successors as well as the unelected but powerful Conservation Authorities, whose power to block and guide development on watersheds is quite strong, although nearly invisible, politically.⁵⁹

I am not aware of any source that provides a full picture, even for a single point in time, of the complexities of the multiple, overlapping jurisdictions that for the most part manage to peacefully coexist on the same local space. But despite the lack of a systematic analysis of the

⁵⁸ John G Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002); Aaron A Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013). An interesting case study of the OMB's role in the Spadina Expressway affair, a little-known legal story, is Ian Milligan, “‘This Board has a Duty to Intervene’: Challenging the Spadina Expressway through the Ontario Municipal Board, 1963-1971” (2011) 39:2 *Urban History Rev* 25.

⁵⁹ Conservation authorities are unique to Ontario. The thirty-six authorities have the power to prevent buildings from being erected and can and do demand stable funding from the municipalities that exist within their watershed-based catchment area, but how they are accountable to citizens or even elected representatives is unclear.

jurisdictional and resourcing complexities, enough evidence could be mustered to conclude that if we want to strengthen the powers and jurisdictions of elected local governments, we have to first understand the very complex governance context in which they exist. That context is never static, since several multiplayer games of jurisdiction are being played at the same time, often in separate rooms, and seldom in public view.⁶⁰ The outcome of particular matches in the game of jurisdiction is often unpredictable—as is the case in the realm of Indigenous rights, where the duty to consult can lead to very different results depending on the context and the character of the Indigenous communities involved. The aggregate outcome of the interaction between different games being played in the same space and/or at the same time is even more unpredictable.

IV. CONCLUSION: PRECARIOUS LOCAL CITIZENSHIP, CONTINGENT LOCAL DEMOCRACY

The most sustained analysis of Canadian municipal incorporation from a socio-legal theory perspective is still a 1992 monograph by Engin Isin.⁶¹ Isin was a Turkish refugee who came to Canada as a graduate student and wrote a doctoral thesis in the geography department at the University of Toronto on the unlikely topic of the legal history of cities, especially municipal corporations, in central Canada. His thesis was published in 1992.

There are some research deficiencies in the book⁶²—not surprisingly, given the limitations of being a refugee working on Canadian municipal incorporation in a geography department with no socio-legal scholars. But its overall thesis—that municipal incorporation in central Canada was invented not to empower citizens or create democracy but rather to further colonial administrative aims⁶³—remains both innovative and solid. In particular, the story told by Isin, using the scarce primary and secondary sources then available, contrasts sharply with the Whig-history narrative of democracy increasing over time that still pervades some municipal law textbooks.

This article confirms Isin’s argument to a large extent. But I would add a great deal of nuance. The record shows that despite the obvious interest by “higher” powers (mainly the provincial government, and to a lesser extent courts) to subordinate municipal councils and impose limits on their activities,⁶⁴ nevertheless, Isin’s phrase “cities without citizens” is a little too one-sided, too stark.

⁶⁰ Throughout 2020, for example, a major struggle has been fought over Greater Toronto Area transit decisions and transit assets, in which the City of Toronto, the Toronto Transit Commission and the provincial agency Metrolinx are the main but not only players. The fact that Metrolinx is an arms-length agency rather than being within the ministerial accountability pyramid, and that its doings are far less transparent than those of the city’s transit commission, makes this particular game of jurisdiction and resources extremely difficult to analyze.

⁶¹ Engin F Isin, *Cities Without Citizens: The Modernity of the City as a Corporation* (Montreal: Black Rose Books, 1992).

⁶² Works that now have to be read alongside Isin’s include: Richard Splane, *Social Welfare in Ontario 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965), which despite its modest title is actually an excellent study of the origins of the Ontario administrative state; Allan Greer & Ian Radforth, eds, *Colonial Leviathan: State Formation in Mid-Nineteenth Century Canada* (Toronto: University of Toronto Press 1992); Curtis, *supra* note 39, on Ontario school inspectors in the 1840s; Randall White, *Ontario, 1610-1985: A Political and Economic History* (Toronto: Dundurn Press, 1985); and Artibise & Stelter, *The Usable Past*, *supra* note 45.

⁶³ Isin, *supra* note 61.

⁶⁴ U.S. scholarship has highlighted the stark contrast between increased limitations on municipal corporations and the creation of legal tools empowering for-profit corporations. See e.g. Joan C Williams, “The Invention of the Municipal Corporation: A Case Study in Legal Change” (1985) 34:2 Am U L Rev 369. This story of contrasts has not to my

Generalizing, it could be said that throughout Canadian history the monopolization of political and legal power by the two Crowns, federal and provincial, has always been more of an aspirational claim than a reality. The twin assumptions made by Mr. Basu in his effort to defend the *Better Local Government Act, 2018*⁶⁵—namely that sovereignty is everything, and sovereignty is either federal or provincial—is not borne out either by the history of local government in Ontario nor by contemporary social, economic, and political realities. Even at the strictly legal level, First Nations are now recognized as having some inherent rights, and municipal councils have been designated as “governments” in numerous contexts. In addition, across Canada, countless public authorities, from transit authorities to school boards to park management boards, calmly exercise often extensive legal powers. Such powers can be dismissed as “delegated” rather than inherent, perhaps, but the line between delegated and inherent rights and powers becomes blurrier the closer one gets to the ground.

Sudden unilateral acts such as instant municipal mergers with no referendum and no consultation draw the most attention, for good reasons. Nevertheless, it is important not to focus solely on sudden, top-down Crown actions, and appreciate the complex and often unpredictable moves being made every day by entities both within and outside government proper—moves that together make up the complex and not fully mapped dynamics of local government and local governance. In public view or outside of public view, new moves in the open-ended game of jurisdiction are constantly being invented.

Appreciating the complex and dynamic character of struggles over jurisdiction sheds new light on the rather simplistic form that litigation imposes on political disputes. Municipal lawsuits or constitutional challenges to provincial power necessarily impose the blinkers that all litigation imposes on political, social, and legal realities. Litigation has to focus narrowly on a single two-player, politico-legal relationship: Party A versus Party B. But the final outcome of litigation—or, more accurately, the effective, ultimate outcome of each constellation of processes and events within which a specific litigation is always just one element—is shaped by an indefinite number of multiplayer games that pre-existed the litigation and that do not end when litigation ends. These games are not only complex in themselves but, importantly, they interact with one another in unpredictable ways. The current COVID crisis has created significant complexities from a governance point of view, for example, and could be researched in depth to generate insights that would be useful well beyond the realm of public health.

The complexity of the actual games of jurisdiction, resources, and powers that are being played every day across Canada means that constitutional arguments need to be strongly supplemented by historical and social science evidence about practices of local democracy. Many of these practices, including refraining from changing the rules of a municipal election mid-stream, citizens feel are protected, even if that is not the case in black letter law. Neither cities nor any other provincially-created municipal corporation enjoy formal constitutional status. However, that does not mean that the broader Canadian tradition of considerable, if never formally guaranteed, local democracy (including the historical, routine practice of holding of elections for school boards and local councils in Upper Canada) can be ignored in legal proceedings.

knowledge been told for Canada. See *e.g.* R C B Risk, “The Nineteenth Century Foundations of the Business Corporation in Ontario” (1973) 23:3 UTLJ 270. Risk’s well-known article does not ask why municipal corporations, which are far older than joint-stock or limited liability corporations, had their powers and finances curtailed during the era when limited liability and other tools facilitating for-profit corporation innovation were being created.

⁶⁵ *Supra* note 2.

Amending *The Constitution Acts*⁶⁶ to recognize not only the municipal right to vote but also the general right of communities to govern themselves for many, if limited, purposes would certainly be desirable. Such a legal modernization is of course highly unlikely, not least because the constitutional amendment process is monopolized by the very entities whose powers would be affected, perhaps negatively, by any change. Even if formal changes to the text of *The Constitution Acts*⁶⁷ are unlikely, it is worth remembering that in common law jurisdictions the words used in legal documents, perhaps especially in *The Constitution Acts*,⁶⁸ are only given effective meaning over time—as the Supreme Court’s jurisprudence on Indigenous issues shows. From the famous local liquor licencing Privy Council cases of the turn of the twentieth century, to federal efforts to recognize Quebec’s distinct status, to the Supreme Court’s pesticide cases, the game of jurisdiction has taken many, often unexpected, forms, with these new forms sometimes recognized by courts or higher-level governments. Municipalities have not been as completely absent from this chess board as formal constitutional law would suggest.

Even if the Supreme Court were to agree that fair local elections under stable rules are a democratic right enshrined in Canadian law, that guarantee would be just one small element of the far larger, more complex, historically-shaped political-legal assemblage that is known worldwide as Canadian democracy.

⁶⁶ *Supra* note 16; *The Constitution Act, 1982*, *supra* note 24.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*