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OPERATIVE SUBSIDIARITY AND MUNICIPAL AUTHORITY: THE CASE OF TORONTO’S WARD BOUNDARY REVIEW

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I. Introduction

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.”² 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*,³ where a city or town can do whatever the province empowers them to do, but not more.⁴ This paper 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.⁵ 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

¹ I am grateful to the many wise colleagues who assisted me in crafting this piece, particularly Hoi Kong, Stepan Wood, Richard Briffault, and Kellan Zale. I am also deeply indebted to the Osgoode Hall Law Journal’s thoughtful anonymous reviewers for their detailed and wise observations. Many thanks also to the participants at various conferences where the arguments in this paper were raised. All errors and omissions are my own.

² FCM Media, “Prime Minister highlights nation-building partnership with Canada’s local governments,” Federation of Canadian Municipalities (2 June 2017).

³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

⁴ Ron Levi & Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44 Osgoode Hall L.J. 409 at 418-19.

⁵ Stanley Makuch, Neil Craik & Signe B. Leisk, *Canadian Municipal and Planning Law* (Toronto: Thomson Carswell, 2004) at 82.

notion borrowed from the European Union, which advocates that decisions be made at the lowest level of government 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 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. 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 paper 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 advance 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 next focus on Toronto’s ward boundary review (WBR), which began in 2013 by City Council resolution, concluded in 2018 following quasi-judicial involvement, and was then overturned, in the middle of the city’s election, by provincial legislation shortly afterwards. 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. 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 and OMB decisions. This section details the labourous provincial framework related to the drawing of ward boundaries and the eventual mid-election override of the city's decision.

The paper 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.⁶ 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 ward boundary review, 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 reconceptualize municipal authority to comply with the expansive principles espoused by courts and enable a consistent approach to provincial legislative design concerning municipal authority.

II. 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."⁷ One of these sorting devices is the municipality.⁸ While early jurisprudence debated whether municipalities were to be considered governments or corporations under the law, it is now well-established that municipal decisions are subject to review per the *Charter of Rights and*

⁶ In this article, "municipal" or "city" means the one or more statutes that give corporate entities 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, S.O. 2001, c. 25 at s. 457(1)).

⁷ 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).

⁸ 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. Frug, Gerald E. "Decentering Decentralization" (1993) 60 U. Chi. L. Rev. 253.

Freedoms.⁹ 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.¹⁰

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;¹¹ political agency, whereby the provincial government refused to step in to remove Toronto's mayor;¹² and oversight, where the City successfully argued that more expansive provincial ombudsman powers should not apply to Toronto's affairs.¹³ Scholars, including Ron Levi and Mariana Valverde, opined that this increasing recognition of municipal power by federal and provincial governments and the courts speaks to the power of local residents, in that municipalities have the ears, perhaps better than any other government, of the many people that reside within their boundaries.¹⁴

⁹ See generally Robert G. Doumani and Jane Matthews Glenn, "Property, Planning and the Charter" (1989) 34 McGill Law Journal 1036. Note *Re McCutcheon and City of Toronto et al*, (1983) 147 D. L. R. (3d) (Ont. S. C.), where Linden J. stated at 663, "Municipalities, 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." See also Yishai Blank, "Localism in the New Global Legal Order" (2006) 47:1 Harvard Law Review 263; and David J. Barron, "A Localist Critique of the New Federalism" (2001) 51 Duke Law Journal 377.

¹⁰ *Pacific National Investment Ltd. v. Victoria (City)*, 2000 CarswellBV 2439, 2000 CarswellBC 2441, [2000] 2 S.C.R. 919, reconsideration/rehearing refused 2001 CarswellBC523, 2001 CarswellBC 524 (S.C.C.).

¹¹ See e.g. 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 (Government of Canada, "The Federal Gas Tax Fund: Permanent and Predictable Funding for Municipalities" (12 April 2017), online: <<http://www.infrastructure.gc.ca/plan/gtf-fte-eng.html>>.

¹² Adrian Morrow, "Ontario Minister says stripping Ford of mayoralty powers was legal, appropriate" *The Globe and Mail* (19 November 2013).

¹³ 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 (see Adrian Morrow, "Ontario set to strengthen Ombudsman's powers" *Globe and Mail* (6 March 2014), online: <<http://www.theglobeandmail.com/news/politics/ontario-set-to-strengthen-watchdogs-powers/article17339860/>> and Ontario Ombudsman, "Who we oversee: Municipalities" (17 April 2017), online: <<https://www.ombudsman.on.ca/About-Us/Who-We-Oversee/Municipalities.aspx>>.

¹⁴ Mariana Valverde, *Everyday Law on the Streets: City Governance in an Age of Diversity* (The University of Chicago Press, 2012).

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 asks fundamental questions about the relationship between the delegation of political power and the representation of civil society.¹⁵ 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.”¹⁶ 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,”¹⁷ with the idea that government powers should always reside at the lowest level possible.¹⁸ 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.¹⁹

To Yishai Blank, federalism and subsidiarity advance competing versions of the state.²⁰ 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.”²¹ Blank offers two distinctions between these principles. First, subsidiarity recognizes more than two jurisdictions (the central government and the province or state).²² In contrast, federalism “does not theorize cities,” leaving them as the responsibility of each individual province or state.²³ Subsidiarity recognizes the “uniqueness of every social sphere and its place in the total social structure,” including villages and communities that pre-dated the

¹⁵ Eugénie Brouillet, “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” (2011) 54 Sup Ct L Rev 601 at 604.

¹⁶ *Ibid.* at at 605.

¹⁷ Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at 114.

¹⁸ Yishai Blank, “Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance” (2009) 37:2 Fordham Law Journal 510 at 533.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 522.

²¹ *Ibid.*

²² *Ibid.* at 533.

²³ *Ibid.* at 549.

creation of the state.²⁴ 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.²⁵ 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.²⁶ Subsidiarity does not focus on strict executive competencies in each jurisdiction.²⁷ 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.”²⁸ Subsidiarity is a more flexible legal principle that accommodates the involvement of multiple scales in decision-making.²⁹ 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.³⁰ 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.”³¹ 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.³² 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 of the activity to be regulated.”³³ Municipal action is, in a sense, a “zooming in” on a localized area. The scale is the

²⁴ *Ibid.* at 541.

²⁵ *Ibid.* at 542.

²⁶ *Ibid.* at 542.

²⁷ *Ibid.* at 533.

²⁸ Brouillet, *supra* note 15 at 606.

²⁹ Frug, *supra* note 8.

³⁰ Blank, *supra* note 18 at 546.

³¹ Boaventura de Sousa Santos, “Law: A Map of Misreading – Toward a Postmodern Conception of Law” (1987) 14 *J.L. & Soc’y* 281 at 282.

³² *Ibid.*

³³ *Ibid.*

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.³⁴ Alain Delcamp states: “[i]t is evident that the notion of subsidiarity is unfocused and cannot itself, except with great difficulty, generate legal effects.”³⁵ 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 (and when), including scales within and beyond the municipality, such as neighbourhoods.³⁶ The rationality of subsidiarity both 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 subsidiarity.³⁷ This, he argues, leaves open the possibility that the dynamic, flexible nature of subsidiarity can lead to specific outcomes. Some scholars suggest

³⁴ 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) 94:2 *Columbia Law Review* 331-456 (whether the principle of subsidiarity is justiciable); Daniel T. Murphy, “Subsidiarity and/or Human Rights” 1994) 29 *U. Rich. L. Rev.* 67 and Dinah Shelton, “Subsidiarity, Democracy and Human Rights” in Donna Gomien, ed. *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide* (1993) at 43 (concerns regarding subsidiarity and adequate protection of human rights); Paolo G. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97:1 *The American Journal of International Law* 38-79 and 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* (1991) at 357 (subsidiarity as a paradoxical principle that both limits yet empowers and justifies the state); Rodolfo Sacco, “Diversity and Uniformity in the Law: (2001) 49 *AM.J. COMP. L.* 171 (subsidiarity’s potential to reduce the consistency and uniformity of the law); and Steven G. Calabresi and Lucy D. Bickford, “Federalism and Subsidiarity: Perspectives from U.S. Constitution” (2014) 55 *Nomos* 123-189 and Vicki C. Jackson, “Subsidiarity, the Judicial Role, and the Warren Court’s Contribution to the Revival of State Government” (2014) 55 *Nomos* 190-213 (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 paper.

³⁵ Alain Delcamp, “Principe de subsidiarité et décentralisation” (1993) 23 *Revue française de droit constitutionnel* 609 at 623, translated in Brouillet, *supra* note 15.

³⁶ Frug, *supra* note 8.

³⁷ Title I, Article 3b of the Treaty of Lisbon, amending the Treaty of the European Union and the Treaty establishing the European Community, Dec 13, 2007 OJ (C306) 50 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.”

that even where subsidiarity is codified, it may be non-justiciable.³⁸ 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.”³⁹

Given the normative aims of this present paper, I turn to Kong’s characterization of the Canadian federalism, which he asserts was “structured to safeguard a set of collective interests.”⁴⁰ 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.” In Kong’s view, subsidiarity can be incorporated into Canadian federalism.⁴¹ To Kong, subsidiarity serves as a means to limit the federal government’s autonomy and to require deliberation rather than unilateral decision-making.⁴² Put another way, subsidiarity tempers top-down state autonomy by acknowledging that its decisions affect other scales of government.⁴³

Building on Kong’s account, I suggest that the 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 scale, and then “each and every service, function, or responsibility needs to be thought of afresh.”⁴⁴ As 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.”⁴⁵ While the principle of subsidiarity accepts that there will likely be

³⁸ Clayton P. Gillette, “The Exercise of Trumps by Decentralized Governments” (1997) 83:7 *Virginia Law Review* 1347.

³⁹ Nico Steytler, “The powers of local government in decentralised systems of government: managing the ‘curse of common competencies’” (2005) 38:2 *The Comparative and International Law Journal of Southern Africa* 271 at 283.

⁴⁰ Hoi Kong, “Subsidiarity, Republicanism and the Division of Powers in Canada” (2015) 45 *Revue de droit de l’Université de Sherbrooke* 13 at 26.

⁴¹ *Ibid.* at 30.

⁴² *Ibid.* at 35.

⁴³ *Ibid.* at 37.

⁴⁴ Blank, *supra* note 18 at 536.

⁴⁵ Paul Schiff Berman, “Global Legal Pluralism” (2007) 80 *Southern California Law Review* 1155 at 1208.

intergovernmental approaches, it assumes that primary policy empowerment will be placed at the scale of a particular government.⁴⁶ 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.⁴⁷

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.⁴⁸ 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 [.]”⁴⁹ 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.

II. Judicial interpretation of municipal authority

The Legal Authority of Municipalities 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, 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.⁵⁰ It is this constitutional luminosity

⁴⁶ Blank, *supra* note 18 at 557.

⁴⁷ Berman, *supra* note 45 at 1209.

⁴⁸ Jacob T. Levy, “Federalism, Liberalism, and the Separation of Loyalties” (2007) 101:3 *The American Political Science Review* 459 at 462.

⁴⁹ *Reference re Assisted Human Reproduction Act*, *supra* note 41 at paras 192–93.

⁵⁰ Makuch et al., *supra* note 5 at 81.

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.⁵¹ 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.”⁵²

The interpretation of Canadian municipal power can be traced to the origins of municipalities under English law, which were not designed as democratically accountable.⁵³ 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 Dillion, an American jurist who objected to “municipal largesse and waste.”⁵⁴ Under this doctrine of “prescribed powers,” municipalities can act only when expressly authorized by statute, which is to be interpreted narrowly.⁵⁵ Dillon’s rule suggests a relationship between municipalities and provinces 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.⁵⁶ On a practical level, it means that municipal authority may not be exercised unless a province grants these governments the power to do so, although this authority can be implicit.⁵⁷ 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. In critiquing the city’s exercise of unauthorized power, Justice Iacobucci stated in *R. v. Greenbaum*: “The courts, as a result of this inferior legal position [of municipalities], have traditionally interpreted narrowly statutes respecting grants of powers to municipalities. This approach may be described as ‘Dillon’s rule,’ which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly

⁵¹ Levi & Valverde, *supra* note 4 at 416.

⁵² Makuch et al., *supra* note 5 at 81.

⁵³ Andrew Sancton, *Canadian Local Government: An Urban Perspective* (Oxford University Press, 2015) at 3-5; Makuch et al., *supra* note 5 at 82.

⁵⁴ *Ibid.* at 418-19 (Dillon’s rule emerged in reaction to municipalities incurring massive debts to finance public improvements).

⁵⁵ *Ibid.* at 416. See also Makuch et al., *supra* note 5 at 82.

⁵⁶ Eugene Q.C., Meehan, Robert, Chiarelli & Marie-France, Major, “The Constitutional Legal Status of Municipalities 1849-2004: Success Is a Journey, but Also a Destination” (2007) 22 Nat’l J. Const. L. 1 at 5.

⁵⁷ *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at 688-689.

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.”⁵⁸

Although cities are left out of the Constitution as a level of government,⁵⁹ the interpretation by the courts of municipal power has evolved.⁶⁰ In 1997, the notion of cities as “creatures of the province” was fervently articulated in the decision of the *Ontario Superior Court in East York v. Ontario (Attorney General)*.⁶¹ 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:⁶²

- (i) municipal institutions lack constitutional status;
- (ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides;
- (iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation; and
- (iv) municipal institutions may exercise only those powers which 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*, the SCC

⁵⁸ *Ibid.*

⁵⁹ See e.g. Daniel Weistock, “Federalism and Cities” in James E. Sterling and Jacob T. Levy (eds), *Federalism and Subsidiarity* (New York; New York University Press, 2015) at 259-287.

⁶⁰ *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136 (CanLII), [2009] 7 WWR 690; 92 BCLR (4th) 314; 42 CELR (3d) 79; [2009] BCJ No 193 (QL); 174 ACWS (3d) 103 at para. 107.

⁶¹ (1997), 34 O.R. (3d) 789 (Gen. Div.), aff'd (1997), 36 O.R. (3d) 733 (C.A.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. vii.

⁶² *Ibid.* at 797-98.

considered the proper interpretation of municipal power.⁶³ This case concerned the City of Vancouver, who 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, not because it preferred a narrow construction over a broad and purposive interpretation. The majority held that the city 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.⁶⁴ 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, “If 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.”⁶⁵

A short time later, Justice McLachlin’s dissent would be reflected in a two majority decisions, *Rascal Trucking*⁶⁶ and *Spraytech*.⁶⁷ 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*,⁶⁸ the Court allowed the town of Hudson, Quebec to ban the use of aesthetic pesticides, although considered non-toxic by provincial and federal regulators.⁶⁹ The SCC considered whether the “impossibility of dual compliance” should be the test used to determine whether a municipal bylaw could be complied with alongside empowering legislation. This test establishes that provincial legislation should not be deemed to be

⁶³ *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, 110 D.L.R. (4th) 1 at 244 [hereinafter “*Shell*”].

⁶⁴ *Ibid.* See also *Horton v. Greater Sudbury (City of)*, 2003 CanLII 34162 (ON SC), <<http://canlii.ca/t/616m>>, retrieved on 2018-04-16 at para. 26.

⁶⁵ *Ibid.* at 32.

⁶⁶ *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342 [hereinafter “*Rascal Trucking*”].

⁶⁷ *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [hereinafter “*Spraytech*”].

⁶⁸ *Ibid.*

⁶⁹ Ian M., Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., Looseleaf (Toronto: Carswell, 1971); quoted in *Spraytech*, *supra* note 64 at 258-59.

inoperative simply because it legislates in the same area as another government.⁷⁰ 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.”⁷¹ 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.”⁷² 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.”⁷³

Later, 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.⁷⁴ 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.”⁷⁵ Similarly, in *Croplife*, 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”.⁷⁶ The court signaled a shift away from the traditionally restrictive, prescribed approach to the interpretation of municipal power in favour of a broad purposive approach.⁷⁷ As held in *R. v. Guignard*: “This Court has often reiterated the social and political importance of local governments. It has

⁷⁰ *British Columbia Lottery Corp. v. City of Vancouver*, 1999 BCCA 18 (CanLII), 169 D.L.R. (4th) 141, at pp. 147-48. See also *Ontario v. City of Mississauga* (1981), 1981 CanLII 1860 (ON CA), 15 M.P.L.R. 212, 124 D.L.R. (3d) 385 at 232.

⁷¹ *Spraytech*, *supra* note 67.

⁷² *Ibid* at para. 23.

⁷³ *Rascal Trucking*, *supra* note 66 at para. 35.

⁷⁴ *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), 2004 S.C.C. 19, referenced in *R. v. Latouche*, 2010 ABPC 166 (CanLII) at para. 72.

⁷⁵ *Ibid.* at para. 6.

⁷⁶ *Croplife Canada v. Toronto (City)*, 2005 CarswellOnt 1877; 10 M.P.L.R. (4th) 1 (C.A.), leave to appeal refused, 2005 CarswellOnt 6587.

⁷⁷ *Galganov v. Russell (Township)*, 2012 ONCA 409, 99 M.P.L.R. (4th) 1, leave to appeal refused 2012 CarswellOnt 15189, 2012 CarswellOnt 15190 (S.C.C.).

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.”⁷⁸

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.”⁷⁹ The case established that municipalities, as being the closest level to affected citizens, should be given recognition in their decision-making.⁸⁰ In so doing, the SCC applied the language of the Constitution as a “living tree”⁸¹ 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.”⁸² 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.⁸³ 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.⁸⁴

⁷⁸ *R. v. Guignard*, [2002] 1 SCR 472, 2002 SCC 14 (CanLII) at para. 17.

⁷⁹ *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3 [hereinafter “*Canadian Western Bank*”] at para. 22-23.

⁸⁰ *Toronto (City) v. Goldlist Properties Inc.*, 2002 CanLII 62445 (ON SCDC) at para. 35.

⁸¹ *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.) at 136.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See e.g. *Canadian Western Bank*, *supra* note 79; *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, 2001 SCC 67 (CanLII), [2001] 3 S.C.R. 113; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 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.⁸⁵ The principle of subsidiarity was invoked to support judicial deference to municipal decision-making.⁸⁶ 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.”⁸⁷ The SCC considers subsidiarity as a principle when interpreting municipal action.⁸⁸ 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.⁸⁹

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.⁹⁰ As Mr. Justice LeBel cautioned in *Spraytech*, courts should not interpret a generous interpretation of municipal authority as license to “invent municipal authority where none exists.”⁹¹ Lower-court decisions echo Justice LeBel’s conclusion that municipal authority cannot be imbued absent provincial authority; while subsidiarity imports into

⁸⁵ *Canadian Western Bank*, *supra* note 79 at paras. 42-43 (The SCC 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).

⁸⁶ *Spraytech*, *supra* note 67.

⁸⁷ *Ibid.* at paras. 3-4. See also *Canadian Western Bank*, *supra* note 79 at para. 45).

⁸⁸ Note that *Spraytech*, *supra* note 68 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 debate as to whether L’Heureux-Dubé J. considered subsidiarity in one or both of these questions.

⁸⁹ *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 at paras. 72 and 183.

⁹⁰ *Canada Post Corporation v. Hamilton (City)*, 2016 ONCA 767 (CanLII) at para. 85.

⁹¹ *Spraytech*, *supra* note 67 at 366.

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.⁹²

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.⁹³ 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.⁹⁴ 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.⁹⁵ 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.

Municipal authority and legislative design

⁹² See e.g. *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273 (CanLII), para. 14; *Ontario Restaurant Hotel & Motel Association v. Toronto*, 2005 CanLII 36152 (ON CA), [2005] O.J. No. 4268 (C.A.), para. 3; *Spraytech*, *supra* note 68 at paras. 21 and 26; *Wainfleet Wind Energy Inc. v. The Corporation of the Township of Wainfleet* [2013] O.J. No. 1744; *Eng v Toronto*, 2012 ONSC 6818; *Madger v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387, 113 O.R. (3d), add’l reasons 2013 CarswellOnt 3752.

⁹³ Makuch et al., *supra* note 5 at 110.

⁹⁴ *Edwards*, *supra* note 81.

⁹⁵ Levi & Valverde, *supra* note 4 at 416 and 424-25.

Alongside judicial decisions, provincial legislation has modified the scope of municipal authority across the country. As C.J. Williams and John Mascarin state: “[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.”⁹⁶ The authors suggest that the legislative changes aren’t 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.”⁹⁷ Over the last two decades, provinces across the country have given more expansive powers to large municipalities, including more options for raising revenue⁹⁸ and in relation to housing.⁹⁹

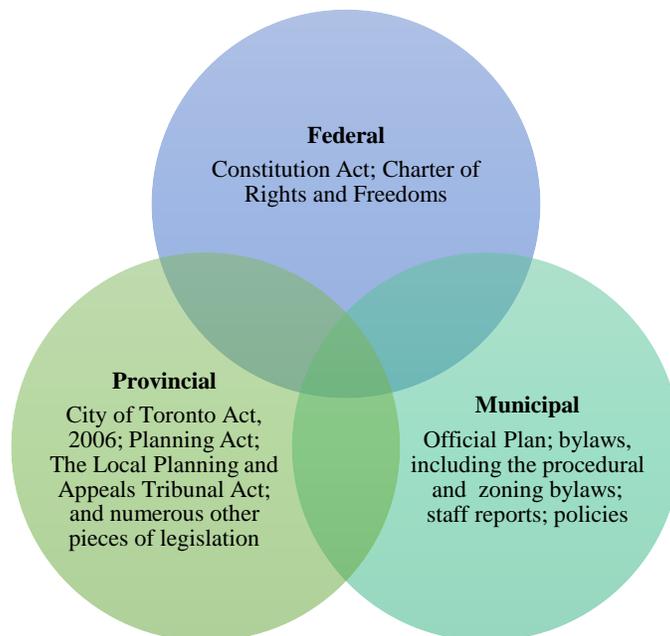


Figure 1 - Inventory of Laws and Rules

⁹⁶ C.J. Williams & John Mascarin, *Ontario Municipal Act 2001 and Commentary* (Toronto: Butterworth’s Canada Ltd., 2002), at 40-41.

⁹⁷ *Ibid.*

⁹⁸ *Municipal Government Act*, RSO 1990, Ch M-26.

⁹⁹ *Charter of Ville de Montréal*, RSO 2000, c. 56, Sch. I, Ch C-11.4.

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.¹⁰⁰ Figure 1 provides a detailed inventory of the laws and institutions applicable to Toronto’s legal authority.¹⁰¹ 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*¹⁰² 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 “general health and safety.”¹⁰³ 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 well short of those and the province has retained its power to override the municipality’s decisions.¹⁰⁴

Ontario has also introduced numerous other pieces of legislation that impact the decision-making powers of local governments, including the *Planning Act*,¹⁰⁵ the *Ontario Municipal Board Act*,¹⁰⁶ the *Municipal Conflict of Interest Act*,¹⁰⁷ the *Municipal Elections Act, 1996*,¹⁰⁸ and the *Municipal Freedom of Information and Protection of Privacy Act*¹⁰⁹ to name a few. This overlap of legislation complicates the actions that municipalities may take.¹¹⁰ I suggest that the principle of subsidiary can and should assist us with the normative and theoretical development of

¹⁰⁰ *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A at s. 93(1).

¹⁰¹ Valverde, *supra* note 14 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).

¹⁰² *Ibid.*

¹⁰³ *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273.

¹⁰⁴ Levi & Valverde, *supra* note 4 at 454-55.

¹⁰⁵ R.S.O. 1990, c. P.13.

¹⁰⁶ R.S.O. 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 paper.

¹⁰⁷ R.S.O. 1990, c. M.50.

¹⁰⁸ S.O. 1996, c. 32.

¹⁰⁹ R.S.O. 1990, c. M.56.

¹¹⁰ While not analyzed in this paper, 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); other times it defers to them entirely (Adrian Morrow, “Ontario Minister says stripping Ford of mayoralty powers was legal, appropriate” *The Globe and Mail* (19 November 2013)).

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. 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.

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.¹¹¹ 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.¹¹² 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*,¹¹³ which was introduced to address problems associated with electoral redistribution in Canada, such as the tendency for the exercise to be overly partisan and the frequent discrepancies in the geographic size and population of constituencies at the federal level.¹¹⁴

¹¹¹ City Clerk and City Solicitor, *Staff Report to City Council: Petition to redivide ward boundaries*, City of Toronto (2013), online: <<http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-60165.pdf>>.

¹¹² Ron Levy, "Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena" (2008) 53 R.D. McGill 1, online: <<http://lawjournal.mcgill.ca/userfiles/other/8981234-Levy.pdf>> at 10.

¹¹³ *Electoral Boundaries Readjustment Act*, R.S.C. 1985, ss. 4-6.

¹¹⁴ Canadian Urban Institute, Beate Bowron Etcetera Inc., The Davidson Group Inc., and Thomas Ostler, *Toronto ward boundary review: background research report* (2014).

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 redivide the City into wards or to dissolve the existing wards” and even eliminate wards altogether. The City then – 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.¹¹⁵ 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.¹¹⁶ 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 in the Act.¹¹⁷ This means that while the process for conducting a ward boundary review is long and complex, with years of work and numerous

¹¹⁵ *City of Toronto Act, 2006*, *supra* note 19 at 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).”

¹¹⁶ In 2018, the Province of Ontario enacted the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 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.

¹¹⁷ City Manager. “A ward boundary review for Toronto,” Staff Report to Executive Committee (2013), online: <<http://www.toronto.ca/legdocs/mmis/2013/ex/bgrd/backgroundfile-58333.pdf>> at 4.

required rounds of public consultation, when Toronto undertook its WBR it could be appealed to and overturned by the OMB.¹¹⁸ Second, while neither COTA nor the city’s procedural bylaw 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.¹¹⁹ 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.¹²⁰ 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 decision.”¹²¹ 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.”¹²²

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

¹¹⁸ *Ibid.* at 3.

¹¹⁹ *City of Toronto Act, 2006*, *supra* note 101 at s. 132.

¹²⁰ Andrew Sancton, “Commentary” in J. Courtney, P. MacKinnon, and D. E. Smith (Eds.), *Drawing Boundaries: Legislatures, Courts and Electoral Boundaries* (Saskatoon: Fifth House Publishers, 1992).

¹²¹ *Reference Re Provincial Electoral Boundaries (Sask.)* [1991] 2 SCR 158.

¹²² David Johnson, “Canadian Electoral Boundaries and Courts: Practices, Principles and Problems” (1994) 39 McGill L.J. 224 at 227.

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.¹²³ 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 ward boundary review, it is important to navigate the zig-zaggy 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 ward boundary review.

Any WBR process in Ontario is a legal minefield, with broad principles but no clear rules guiding potential for residents to appeal proposed boundaries to the LPAT. Contestations to the meaning of the term “communities of interest” illustrate the degree to which the OMB intervened in ward boundary reviews in the past. For example, in Kingston’s 2013 ward boundary review process, City Council’s decision was appealed to the OMB on the basis that it did not provide effective representation, in part because the bylaw failed to recognize “communities of interest” by splitting up an area represented by a single neighbourhood association.¹²⁴ The OMB sided with the appellant and amended the bylaw to account for the Sydenham Neighbourhood Association.¹²⁵ In Kitchener, the city’s 34 neighbourhood associations were the “communities of interest” used to inform its ward boundaries.¹²⁶ 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

¹²³ *Reference Re Provincial Electoral Boundaries (Sask.)*, *supra* note 121.

¹²⁴ *Ibid.* at 24.

¹²⁵ *Ibid.* at 25.

¹²⁶ *Ibid.* at 16.

so.¹²⁷ But, in practice, the OMB has overturned ward boundary reviews 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.¹²⁸

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 ward boundary review 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.¹²⁹ 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.¹³⁰ A strong impetus for the review was that the dangerously low threshold of having 500 citizens petition City Council to pass a bylaw dividing or redividing the city into wards or dissolving existing wards, upon the OMB could hear and make an order imposing new boundaries.¹³¹ 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 City staff and councillors. The objective was to keep the process at arm's-length from the City Manager's Office, who would oversee the WBR, while the consultants would make the final recommendations. Careful attention was placed on avoiding

¹²⁷ *Hambly, Re*, 64 OMBR 36, 2009 CarswellOnt 7748; *Teno v Lakeshore* (Town), 51 OMBR 473, 2005 CarswellOnt 6386.

¹²⁸ *Ottawa (City) v Osgoode Rural Community Assn*, 39 MPLR (3d), 2003 CarswellOnt.

¹²⁹ Zack Taylor, *Analysis and Commentary: City of Toronto Ward Boundary Review* (2012).

¹³⁰ City Clerk, *Committee decision on final report - Toronto ward boundary review*, Executive Committee Decision (2016), online: <<http://app.Toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.EX15.2>>.

¹³¹ *City of Toronto Act*, *supra* note 101 at s. 129(3) 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)."

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.¹³²

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.¹³³ 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.¹³⁴ City councillors were interviewed by the consultants at the start of the process, following the designation of the ward boundary options, and again towards the end of the review process.¹³⁵ In the first consultation stage, the consultants individually interviewed all 44 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.¹³⁶ In stage 2, the consultants had meetings with 42 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, despite their heavy involvement in the consultation process.¹³⁷ Under one section of COTA, Toronto has full power

¹³² City Clerk, *Consideration of a ward boundary review for Toronto*, City Council Decision (2013), online: <<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.EX32.2>>.

¹³³ Anonymous interview with City of Toronto staff member #4, City Manager's Office, Toronto, Ontario, Canada (7 May 2016) – author conducted.

¹³⁴ Anonymous interview with City of Toronto staff member #1, City Clerk's Office, Toronto, Ontario, Canada (18 December 2015) – author conducted.

¹³⁵ Canadian Urban Institute, Beate Bowron Etcetera Inc., The Davidson Group Inc., & Thomas Ostler, *Toronto ward boundary review: final report* (2016), online: <<https://static1.squarespace.com/static/53bc0914e4b0eb57996e4dee/t/5739fe5022482e97a8591392/1463418450864/TWBRFinalReportMay2016.pdf>>.

¹³⁶ Canadian Urban Institute et al., *supra* note 114 at 7.

¹³⁷ City Clerk, *Committee decision on final report - Toronto ward boundary review*, Executive Committee Decision (2016), online: <<http://app.Toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.EX15.2>>.

to steward the WBR process; as a result of another, Toronto could introduce a model led by an independent commission, as adopted at the federal level. The OMB has 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.¹³⁸ In its 2-1 decision on December 15, 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."¹³⁹

Provincial override of Toronto's ward boundaries

Toronto's election period for the statutorily scheduled municipal election commenced on May 1, 2018.¹⁴⁰ Thousands of candidates signed up in the first two months of the race, with a record number of historically marginalized vying for councillor positions.¹⁴¹ On June 7, 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.¹⁴² Bill 5, *The Better Local Government Act*, was enacted in law on August 14, 2018 and, as promised, amended the *City of Toronto Act, 2006* by reducing the size of city council to 25.¹⁴³ Several candidates for city council, mainly women and historically marginalized people, challenged Bill 5, as did the City of

¹³⁸ *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT) at para. 20.

¹³⁹ *Ibid.* at 51.

¹⁴⁰ *Municipal Elections Act*, 1996, S.O. 1996, c. 32.

¹⁴¹ *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 at para. 31.

¹⁴² Alexandra Flynn, "The legal case against Ford's assault on local democracy," *Spacing Magazine* (30 July 2018).

¹⁴³ S.O. 2018 C.11.

Toronto, once empowered to do so by City Council.¹⁴⁴ On September 10, 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 s. 1.¹⁴⁵ 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.¹⁴⁶

The appeal of Justice Belobaba’s 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.¹⁴⁷ 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.

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.¹⁴⁸ 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

¹⁴⁴ *City of Toronto et al v Ontario (Attorney General)*, *supra* note 141.

¹⁴⁵ *Ibid.* at para. 10.

¹⁴⁶ *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761.

¹⁴⁷ *Ibid.* at para. 2.

¹⁴⁸ Nicholas Blomley, “Introduction” in I. Braverman, N. Blomley, D. Delaney & A. Kedar, eds. *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014).

federal constitutions.”¹⁴⁹ By contrast, under the principle of subsidiarity, 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.¹⁵⁰ 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 ward boundary review 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 has. 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. Bill 5 unseated Toronto as having a say over this aspect its governance model overall, notwithstanding the crucial role of wards in local governance.

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

¹⁴⁹ Blank, *supra* note 18 at 550.

¹⁵⁰ See e.g. Gerald E. Frug, “The Geography of Community” (1996) 48 *Stanford Law Review* 1047 at 1055 and Gerald Frug, *supra* note 8.

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 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 paper 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, “The 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.”¹⁵¹ Kong agrees, stating that the acknowledgement of other forms of government is the principle

¹⁵¹ Berman, *supra* note 45 at 1209.

strength of subsidiarity.¹⁵² 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.¹⁵³ 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.¹⁵⁴ Operative subsidiarity provides a workable basis for legislative design. In the case of the WBR, operative 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.

¹⁵² Kong, *supra* note 40 at 30.

¹⁵³ Blank, *supra* note 18 at 536.

¹⁵⁴ Berman, *supra* note 45 at 1209.