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Power and Purpose:  
Canadian Municipal Law  
in Transition

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Zack Taylor and Alec Dobson





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By  
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## **About the Urban Project**

The Urban Project is an initiative led by the Federation of Canadian Municipalities (FCM) that brings city leaders together with other levels of government, academia, civil society, and the private sector to identify actionable and scalable solutions to the biggest challenges facing Canada's cities. With generous support from Maytree, Metcalf Foundation, McConnell Foundation, and TD Bank Group, IMFG has commissioned a series of papers focused on municipal legislative and fiscal autonomy, governance, and intergovernmental relations, drawing on discussions convened by the Urban Project.

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## **Disclaimer**

This paper is not intended to provide legal advice. Legislation and regulations are constantly changing. Discussion of legal documents should be checked against official sources before they are used for professional or other purposes. The paper reflects only the views of the authors.

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# Power and Purpose: Canadian Municipal Law in Transition

Zack Taylor and Alec Dobson

## **Abstract**

This overview of municipal law in Canada's 10 provinces identifies similarities and variations among and within provinces in the articulation of municipal purposes and the provincial-municipal relationship, municipal powers and jurisdiction, the organization of municipal institutions, and finance. The paper also comments on asymmetrical arrangements for large cities, commonly referred to as city charters. Far from being static, Canadian municipal law is in a period of transition. The legal scope of municipal authority has expanded over the past 25 years as most provinces have revised their general municipal acts and adopted special laws for major cities. While the overall trend has been toward more permissive authority and the recognition of municipalities as democratic, accountable, and responsible governments, there are significant variations across the provinces, and some have gone further than others in expanding the legal authority of municipalities. We conclude that the practical potential of this wave of legislative reform remains unknown and perhaps unrealized, and requires further research.

**Keywords:** municipal governance, municipal powers, Canada, municipal law, intergovernmental relations

**JEL codes:** H11, H70

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## Power and Purpose: Canadian Municipal Law in Transition

### I. Introduction

#### *1.1 The provincial-municipal relationship: An enduring tension*

It is frequently said that Canadian municipalities are “creatures of the provinces.” This is a constitutional fact, identical to American and Australian local governments’ relationship to their states, and British local authorities’ relationship to Parliament. In Anglo-American democracies, general-purpose municipalities are public corporations that derive their existence entirely from enactments of sovereign legislatures and exercise only the authority that is delegated to them by law. In the words of former Chief Justice McLachlin in *Catalyst Paper Corp. v North Cowichan (District)*:

Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review ([2012] 1 SCR 5, at para. 11).<sup>1</sup>

Despite this narrow legal construction of local governments in Canada and elsewhere as corporations, municipalities are also understood to embody a second purpose: as accountable, democratic governing authorities representing localities. Local politicians and community leaders routinely demand greater legal autonomy and fiscal resources and condemn unilateral provincial actions in the local government sphere, arguing that the governments that are closest to local communities are the most sensitive to their needs and will make the best decisions for them.

This tension between the central and the local has always been present, and always will be. Since before Confederation, the relationship between provincial and local government has shifted as public expectations of local government, and also the policy needs of an increasingly urban population, have changed.

Three distinct trends are evident since the Second World War, and especially since the late 1990s. The first is *local empowerment*: provinces have generally expanded the scope of authority delegated to local governments, sometimes by adding specific areas of jurisdiction to municipalities’ express powers. A few have also

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1. See also *Greenbaum v Toronto*, [1993] 1 S.C.R. 674, in which the Supreme Court of Canada declared: “municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.” See also *Ontario Public School Boards’ Assn. v Ontario (Attorney General)*, [1997], 151 D.L.R. (4th) 346, in which the Ontario Supreme Court stated: “Municipal governments and special purpose municipal institutions such as school boards are creatures of the provincial government. Subject to the constitutional limits in s. 93 of the Constitution Act, 1867, these institutions have no constitutional status or independent autonomy and the province has absolute and unfettered legal power to do with them as it wills.”

granted municipalities a broader, but still limited, general authority to accomplish locally determined ends and several have established separate legal or regulatory frameworks for large cities, sometimes known as “city charters.”

**Table 1.1** summarizes major changes to general municipal law and city charters. The chronology suggests that reform originated in Western Canada first before diffusing to Ontario, Quebec, and then to some of the Atlantic provinces. Nova Scotia and Newfoundland and Labrador are conspicuous for not following their peers. In addition, several provinces have restructured local government institutions—including altering their boundaries—to increase the municipal system’s fiscal and administrative capacity to make and implement policies and deliver services.

**Table 1.1: Significant changes to municipal legislation since the mid-1990s, including selected additions**

Year	Prov.	Statute	Added		
			Natural person power	Spheres	Statement of purpose
1994	AB	<i>Municipal Government Act</i> (Bill 31, comprehensive revision)	X	X	X
1996	MB	<i>Municipal Act</i> , 1996 (replaced <i>Municipal Act</i> , 1988)		X	X
1997–2000	BC	<i>Municipal Act</i> amended several times, ultimately renamed the <i>Local Government Act</i> , 2000		X	X
2001	ON	<i>Municipal Act</i> (Bill 111, comprehensive revision)	X	X	X
2002	SK	<i>Cities Act</i> (Bill 75, comprehensive revision replacing <i>Urban Municipality Act</i> , 1984)	X	X	X
2002	MB	<i>City of Winnipeg Charter Act</i> (Bill 39, replaced <i>City of Winnipeg Act</i> , 1972)	X	X	X
2003	BC	<i>Community Charter</i> (Bill 14, replaced certain aspects of the <i>Local Government Act</i> ; pertains to municipalities only, not regional districts, and not to the City of Vancouver)	X	X	X
2005	SK	<i>Municipalities Act</i> (Bill 106, amendments to mirror <i>Cities Act</i> , 2002)	X	X	X

Table 1.1, continued

Year	Prov.	Statute	Added		
			Natural person power	Spheres	Statement of purpose
2006	ON	<i>City of Toronto Act</i> (Bill 53, detached City from general <i>Municipal Act</i> )	X	X	X
		<i>Municipal Act</i> amendments (Bill 130, brought many general <i>Municipal Act</i> provisions into line with the <i>City of Toronto Act</i> , 2006)			
2009	SK	<i>Northern Municipalities Act</i> (Bill 110, amendments to mirror <i>Cities Act</i> , 2002, and <i>Municipalities Act</i> , 2005)	X	X	X
2017	QC	<i>An Act mainly to recognize that municipalities are local governments and to increase their autonomy and powers</i> (Bill 122, an omnibus bill that gave municipalities additional specific powers)			
2017	NB	<i>Local Governance Act</i> (Bill 44, replaced <i>Municipalities Act</i> , 1973)	X	X	X
2017	PE	<i>Municipal Government Act</i> (Bill 58, replaced <i>Municipalities Act</i> , 1988, <i>Charlottetown Area Municipalities Act</i> , 1988, <i>City of Summerside Act</i> , 1988)	X	X	X
2018	AB	“City charter” regulations for Calgary and Edmonton established that modify the <i>Municipal Government Act</i> .			

The second trend is provincial policy centralization (Tindal et al. 2013, 186–189; Feldman 1974; Taylor 2019, 71–77). Provinces use legal mandates and conditional grants to direct or steer local priorities, particularly in housing, social policy, and land-use planning, either to provide a minimum level and consistent standard of service across the greater jurisdiction or to coordinate the policies of proximate local

governments. At the same time, provinces make decisions that profoundly affect local government decision-making, including the financing, planning, and operation of large-scale infrastructure systems and facilities, such as highways and transit lines, trunk water and sewer systems, electricity production and distribution systems, and facilities such as hospitals and courthouses.

On the face of it, local empowerment and provincial policy centralization embody contradictory impulses. Local governments have more authority and the capacity to exercise it than ever before, yet unilateral provincial government intervention in municipal affairs—sometimes strategic, sometimes arbitrary—continues. In certain domains, municipalities are policy *takers*, functioning as the field offices of provincial ministries; in others, they are policy *makers*, devising innovative solutions to local problems. Canadian governance is a web of federal, provincial, local, and Indigenous governments, agencies, and other public bodies whose authority, resources, and capacities are interwoven in complex ways. Provincial intervention and municipal autonomy inevitably coexist. Nevertheless, the question of whether the configuration of the provincial-municipal relationship reflects contemporary values and meets current needs is perennial. This paper informs this discussion by providing a comparative survey of the provincial statutory frameworks that govern municipalities.

While we do not systematically review case law in this paper, the third trend is *the expansion of judicial deference to local legislation*. Since the 1990s, the Supreme Court of Canada has tended to interpret municipal action more generously, although it has not read a protected sphere of local self-governance into the constitution.

### **1.2 What is municipal law?**

Broadly construed, the body of municipal law includes all legislation, regulations, policy guidelines, and judicial and tribunal decisions that enable, constrain, and otherwise influence the activities of municipal corporations. Within this wide net, arriving at a precise number of provincial statutes that touch on the municipal domain is difficult. Côté and Fenn (2014, 3) identify more than 70 separate provincial statutes that do so in Ontario, while the Association of Municipalities of Ontario estimates the number at 280.<sup>2</sup> And this does not include federal statutes on matters such as environmental and labour standards or public housing. A stricter definition includes only provincial statutes that establish the existence and primary authority of municipal corporations.<sup>3</sup> This body of law is the focus of this paper. **Box 1.1** highlights distinctions between general and special legislation in the municipal field.

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2. Correspondence with the Association of Municipalities of Ontario, 8 October 2019.

3. The creation and empowerment of municipalities can occur through separate legal instruments. In Saskatchewan and British Columbia, a general statute empowers the executive to incorporate municipalities by order-in-council; however, the jurisdiction and authority of such municipalities is defined by the general act. Ontario and other provinces have used special laws to establish new municipalities (including through amalgamation), which draw their authority from a general *Municipal Act* or equivalent.

*Box 1.1: General and Special Legislation: A Key Distinction*

Readers should note a technical distinction between two types of legislation—general and special—which is more commonly made in the United States than in Canada. *Special legislation* applies to a specific person or corporation (including municipal corporations). *General legislation*, by contrast, applies to all subjects in the polity or a defined class (see Binney 1893). This distinction should not be confused with that between public and private legislation.

The *City of Toronto Act, 2006*, and the *Vancouver Incorporation Act, 1886*, are special statutes because they each apply to one municipality only. Ontario's *Municipal Act, 2001*, is a unified general statute that applies to all municipalities except for the City of Toronto. Saskatchewan takes a less unified approach. It has separate general statutes for three categories of municipal corporations: cities, rural municipalities, and northern municipalities. In Québec, meanwhile, the *Municipal Code of Québec* pertains to smaller, rural municipalities, while the *Cities and Towns Act* applies to larger, urban ones. Both specify processes of incorporation and boundary change, as well as institutions and procedures. The grant of authority which defines municipal jurisdiction, however, is contained in a separate general *Municipal Powers Act*.

*1.3 Objectives, scope, and limitations*

This paper examines the organization and scope of municipalities' authority and responsibilities as defined in provincial laws to present an accessible, systematic, up-to-date comparison of provincial statutes that reveals commonality and variation across the country—perhaps the first such comparison since Lidstone (2004) and Garcea (2004).

We do not systematically assess the degree to which municipalities make use of their authority. Indeed, municipalities may not fully exploit their legal authority. Such an assessment would require close examination of specific municipalities—more than 3,000 in Canada—and is beyond the scope of this paper. Rather, our goal is to describe the content of provincial legal frameworks for municipal government, focusing especially on comprehensive revisions to general municipal legislation made since the 1990s.

Our coverage is necessarily selective. Of the many types of local public authorities in Canada—school boards, watershed management boards, local improvement districts, and so on—our focus is on general-purpose municipalities. Moreover, in keeping with the objectives of the Urban Project, our focus is on the *enabling* and *constraining* aspects of provincial legislation: what statute law directly empowers municipalities to do and what it prevents them from doing. We do not discuss statutes ancillary to this focus, such as legislation governing the conduct of municipal elections, nor do we discuss municipalities' regulatory authority over land use, private businesses, and building standards, provincially regulated pooled

municipal pension systems, or municipal liability in negligence. To catalogue these intricacies across the 10 provinces would be impracticable and obscure the broad patterns and trends we seek to identify. Finally, our focus is on statutory provisions, not case law, although we reference judicial interpretations of legislation from time to time.

#### *1.4 Outline of the paper*

The remainder of the paper is divided into six sections:

Section 2, **Defining the Provincial-Municipal Relationship**, discusses the recent adoption of statutory provisions that define or regulate the provincial-municipal relationship. In several provinces, statutes have been amended to recognize municipalities as a “level” or “order” of government or as democratic governments, to specify the purpose of local government, and to establish a provincial duty to consult municipalities before making decisions that affect them, including recognizing the role of municipal associations as interlocutors.

Section 3, **Powers and Jurisdiction**, outlines the powers and areas of jurisdiction authorized in *general* municipal legislation—Municipal Acts and equivalents that define the authority of all general-purpose local governments within each province or territory or of specific categories of municipalities.

In Section 4, **Institutions**, we review statutory provisions governing institutional structures: municipal incorporation, internal organization, boundary changes, the organization of municipal councils, the authority to enter into formal relationships with other bodies, and municipal accountability. We focus on the differences in provincial municipal statutes in addressing inter-municipal boundary changes, whether municipalities are empowered to create separate corporations, some of the options available to municipalities to provide services, the methods prescribed for the selection of municipal heads of council, the powers available to heads of council, the independent ability of municipalities to organize their own political structure, statutory measures respecting ethical standards and the accountability of municipal councillors, and legislative protections for municipal politicians.

Section 5, **Finance**, catalogues the range of revenue sources authorized by provincial legislation for operating and capital purposes, including the scope of and limitations on borrowing.

Section 6, **Asymmetrical Arrangements**, describes several provinces’ use of special legislation and regulation to establish idiosyncratic powers, jurisdiction, and requirements for large cities, commonly referred to as “city charters.” In some cases, these charters have removed specific municipalities from the application of general municipal legislation so that the municipality’s authority is derived from the special law; in others they take the form of special laws or regulations “layered” over the general framework.

In the **Conclusion** we discuss variations in local government laws among provinces, identify trends, and draw conclusions for the future.



## 2. Defining the Provincial-Municipal Relationship

A central task of provincial legal frameworks for local government is to define the relationship between a province and its municipalities. Yet for most of Canada’s history, provinces did not articulate in their statutes an explicit purpose for local governments beyond specifying their specific functions, nor did they set out “rules of engagement” for provincial-municipal interactions. This absence makes more sense if we appreciate that in the British constitutional and legal tradition, municipal governments originated as corporations whose voting shareholders were local burghers or landowners (Isin 1992) and that until the 19th century, there was no legal distinction between public and private corporations. Only with the extension of the electoral franchise to the general adult population rather than property owners only (a process that in some Canadian provinces remained incomplete until well after the Second World War) did municipal councils become democratic, accountable, and representative bodies in any meaningful sense.

Moreover, it was only in the postwar period, as the fiscal entanglements and principal-agent relationships between provinces and municipalities multiplied, that provincial-municipal interaction became understood as a form of intergovernmental relations parallel to, or nested within, Canadian federalism. At the same time, provincial-municipal relations increasingly involved the formalized interaction of provincial governments with municipal associations at an executive or political level (Shott 2015).

This context helps us understand why provinces have only recently added explicit articulations of municipalities’ purpose and democratic function, as well as a recognition of intergovernmental relationships, to general municipal laws (see **Table 2.1**).<sup>4</sup> Each of these additions is discussed in turn.

*Table 2.1: Defining the provincial-municipal relationship*

	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
Statement of municipalities’ purpose	X	X	X	X	X		X	X	X	
Good government		X	X	X	X		X	X	X	
Provide services		X	X	X			X	X	X	
Safe and viable community		X	X	X			X	X	X	

4. For ease of interpretation, summary tables in which information is presented by province are organized in order from west to east.

Table 2.1, continued

	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
Foster wellbeing		Yes	Yes				Yes			
Wise stewardship of public assets			Yes						Yes	
Public participation									Yes	
Intermunicipal collaboration		Yes								
Responsible and accountable	Yes		Yes		Yes	Yes*		Yes*		
<b>Provincial duty to consult</b>	Yes				Yes					

\* In preamble

### 2.1 Statements of purpose

Most general municipal laws—those of Québec and of Newfoundland and Labrador being conspicuous exceptions—include a statement of the purpose of local government. Some provinces emphasize providing “good government” and public services. Laws in Alberta, Saskatchewan (mirrored in the *Cities Act* and the *Municipalities Act*), Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island contain almost identical phrasing: “The purposes of a municipality are ... (a) to provide good government; (b) to provide services, facilities or other things that, in the opinion of the council of the municipality, are necessary or desirable for all or a part of the municipality; and (c) to develop and maintain safe and viable communities.”

Some provinces include additional items. Saskatchewan and Prince Edward Island add “providing for stewardship of the municipality’s public assets.” Alberta adds “to foster the well-being of the environment,” while Saskatchewan and New Brunswick include “to foster economic, social and environmental well-being.” Curiously, given the commonly held notion that local government’s superior accessibility to the public is an important virtue and rationale for its existence, Prince Edward Island is alone among the provinces in making “encouraging and enabling public participation in matters affecting the municipality” a basic purpose. Alberta

is unique in mentioning intermunicipal collaboration: “to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.”

Other provinces use wording that acknowledges municipalities as accountable and responsible democratic authorities, and even an “order” of government. The Nova Scotia *Municipal Government Act* states in its preamble that “the Province recognizes that municipalities have legislative authority and responsibility with respect to the matters dealt with in this Act” and that “municipalities are a responsible order of government accountable to the people.”

Similarly, Ontario’s *Municipal Act* states that “Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.”

British Columbia’s *Community Charter* goes perhaps the furthest in stating that “Municipalities and their councils are recognized as an order of government within their jurisdiction that (a) is democratically elected, autonomous, responsible, and accountable, (b) is established and continued by the will of the residents of their communities, and (c) provides for the municipal purposes of their communities.”

Québec’s *Municipal Powers Act* and *Cities and Towns Act* do not articulate a purpose for local government. However, the preamble to Québec’s omnibus Bill 122, *An Act Mainly to Recognize that Municipalities are Local Governments and to Increase Their Autonomy and Powers* (2017, c. 13), states that “the National Assembly recognizes that municipalities are, in the exercise of their powers, local governments that are an integral part of the Québec State” and that “elected municipal officers have the necessary legitimacy, from a representative democracy perspective, to govern according to their powers and responsibilities.”

## **2.2 Duty to consult**

British Columbia and Ontario have also legislated a duty on the part of the province to consult municipalities, individually or collectively, before making decisions that affect them. Building on its recognition of municipalities as an order of government, section 2 of British Columbia’s *Community Charter* articulates principles to govern the relationship between the province and municipalities: mutual respect, a duty to consult, and a commitment to resolving conflict through negotiation.

Section 3(1) of Ontario’s *Municipal Act* states that “The Province of Ontario endorses the principle of ongoing consultation between the Province and municipalities in relation to matters of mutual interest and, consistent with this principle, the Province shall consult with municipalities in accordance with a memorandum of understanding entered into between the Province and the Association of Municipalities of Ontario.”<sup>5</sup> Yet in the Ontario Court of Appeal’s decision on the

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5. This is paralleled in the *City of Toronto Act*, 2006: “The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based

provincial government's reorganization of Toronto's ward boundaries in 2018, the province's neglect of this obligation did not prevent its acting unilaterally.<sup>6</sup>

While not obliging the province to consult with municipalities, Québec law establishes the Table Québec-municipalités to advise the minister, comprising municipal association leaders and the mayors of Montréal and Québec City, as well as parallel "tables" for Montréal and Québec metropolitan planning purposes (*Act Respecting the Ministère des Affaires municipales, des Régions et de l'Occupation du Territoire*, s. 21).

Other provinces, including Alberta and Québec, have also adopted memoranda of understanding with municipal associations or individual municipalities that establish a duty to consult, either generally or on specific tasks. In 2015, the Government of Alberta, the Alberta Urban Municipalities Association, and the Alberta Association of Municipal Districts and Counties (now known as Rural Municipalities of Alberta) established a framework MOU to regulate mutual consultation during the review of the *Municipal Government Act* (Government of Alberta 2015).

In Québec, in parallel to Bill 121, which recognized Montréal's position as the major metropolis of Québec and conferred additional powers and resources on it, the 2018 "Réflexe Montréal" framework agreement outlines a delegation of responsibility from the province to the municipality (Government of Québec 2016).

### 2.3 Summary

The potential legal effect of the explicit articulation of municipal purposes, including their recognition as accountable and responsible governments, is unclear, because it has not been the subject of significant judicial interpretation. The Toronto ward boundary case suggests that these changes do not affect provincial governments' constitutional supremacy over municipal affairs. Municipal corporations remain the legal creations of provincial legislatures, which may alter their powers and institutions as they see fit.

These statements may, however, play an important symbolic role insofar as they support provisions that delegate specific authority to municipalities (see **Section 3**) and underlie formalized intergovernmental relationships such as memoranda of understanding or Québec's Tables. At a general level, statutory recognition of municipalities' democratic function sets a collaborative and respectful tone that departs from the traditional framing of municipal governments as constitutionally subordinate "policy takers."

on mutual respect, consultation and co-operation." (s. 1(2)) and "For the purposes of maintaining such a relationship, it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City." (s. 1(3)).

6. *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732. In his dissent, Justice MacPherson agreed with the majority that there was no implied protection for local governments from provincial interference in the unwritten constitution; however, he also recognized that the province did not act on its obligation to consult with the City of Toronto on important matters that affect it (ss. 107–108).

### 3. Powers and Jurisdiction

#### 3.1 Grant of authority

All municipal legislation contains a *grant of authority*, that is, a set of provisions that delegate to municipalities particular roles and responsibilities. These can be more or less general in their construction, at one extreme enabling municipalities to perform only enumerated functions, at the other defining general fields within which municipalities have broad discretion.

Grants of authority are both *enabling* and *constraining*, in that they not only create municipal authority, they also limit it to certain subjects and circumscribe its use. Broadly speaking, grants of authority have become more expansive since the 1990s, when the cycle of statutory modernization began with Alberta's revised 1994 *Municipal Government Act*. This section discusses provisions found in general municipal legislation, that is, legislation applying to all municipalities or categories of municipalities. So-called "big city charters" are discussed in **Section 6**.

##### 3.1.1 General welfare power

A municipality's general welfare power typically refers to an omnibus provision in the provincial enabling statute giving municipalities power to act for their own well-being, and for the well-being of their residents. Provincial legislation uses a variety of phrases to describe the general welfare power of municipalities. Alberta's *Municipal Government Act* gives municipalities power to pass bylaws for "the safety, health and welfare of people and the protection of people and property" (s. 7). The *Municipal Powers Act* of Québec gives local municipalities the power to pass bylaws "to ensure peace, order, good government, and the general welfare of its citizens" (s. 85). The Ontario *Municipal Act* empowers municipalities to pass bylaws for the "economic, social and environmental well-being of the municipality, and the health, safety and well-being of persons" (s. 11).

Elsewhere, the general welfare power arises by implication through an interrelationship between the statutory "purposes" of the municipality described in the empowering statute(s) and the powers afforded to the municipality to achieve its purposes. For example, in British Columbia, sections 3 and 4(1) of the *Community Charter* provide that:

3. The purposes of this Act are to provide municipalities and their councils with... (b) the authority and discretion to address existing and future community needs, and (c) the flexibility to determine the public interest of their communities and to respond to different needs and changing circumstances of their communities; and 4 (1). The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

Newfoundland and Labrador is the only province that does not grant its municipalities an omnibus general welfare power. While the province has held

consultations on modernizing its municipal laws (Newfoundland and Labrador 2017), it has not yet done so.

### 3.1.2 Express powers

Before the 1990s, and dating back to the colonial period, most municipal legislation restrictively defined municipalities’ jurisdiction by enumerating lists of discrete powers (Lidstone 2007, 402–403). Municipalities were authorized to perform only those functions that were expressly included—hence its characterization as the *express powers* doctrine. This approach was reinforced by the Canadian courts prior to the 1990s, which Makuch, Craik, and Meisk (2004, 84) describe as follows:

The courts, as a result of this inferior legal position, have traditionally interpreted narrowly statutes respecting grants of powers to municipalities. This approach may be described as “Dillon’s Rule,” which states that a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the express power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation.

Listing express powers has the advantage of affording municipalities certainty that bylaws and regulations passed in conformity with the enumerated powers will not be found to be *ultra vires*—that is, beyond municipal jurisdiction. Yet no list of express powers can be exhaustive. In Canada, as in the United States, the need to adapt to changing circumstances has led municipalities to petition the legislature for amendments to general legislation or for special legislation to permit additional functions. The consequent burden on legislative committees spurred the creation of municipal boards and departments and ministries of municipal affairs in the early 20th century (Taylor 2019, 57–59).

**Table 3.1: Grant of authority**

Power	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
General welfare power	X	X	X	X	X	X	X	X	X	
Express powers	X	X	X	X	X	X	X	X	X	X
Spheres of jurisdiction (#)	X (13)	X (9)	X (8)	X (18)	X (11)	X (8)	X (18)		X (21)	

### 3.1.3 Spheres of jurisdiction

In the 1990s, provincial governments began to amend their municipal laws to grant municipalities authority over broadly defined categories, called *spheres of jurisdiction*,

with fewer supplementary express powers. This legislative scheme is now used in the municipal statutes of eight provinces, with considerable provincial variation, and in some separate city statutes, including those for Winnipeg (a hybrid form), Toronto, and Montréal. Nevertheless, as **Table 3.1** shows, all provincial statutes retain some express powers that apply to specific municipal needs. The number and specificity of spheres has increased over time. While Alberta’s 1994 statute—the first to establish spheres of jurisdiction (LeSage and McMillan 2008, 16)—contains nine, more recent municipal legislation contains even more. New Brunswick’s *Local Governance Act*, which came into effect in 2018, has 18 spheres, and Prince Edward Island’s 2017 *Municipal Government Act* specifies 21 spheres. General municipal laws in Nova Scotia and Newfoundland and Labrador do not provide for spheres of jurisdiction. For a summary of the spheres identified in each province’s legislation, see **Table 3.2**.

In British Columbia, the *Community Charter* distinguishes between spheres exclusive to municipal governments and spheres shared by the province and municipalities, which require provincial sanction (s. 9). The British Columbia Court of Appeal has commented on the impact of the concurrent spheres in the *Canadian Plastic Bag Association* case, in which the Court of Appeal quashed a Victoria city council bylaw made without provincial approval. (As of this writing, Victoria is seeking leave to appeal the decision to the Supreme Court of Canada.) Further, in British Columbia, neither the *Local Government Act* (which governs the powers available to regional districts and electoral areas) nor the *Vancouver Charter* describe spheres of powers; instead, these two statutes rely on the enumeration of detailed express powers.

In Ontario, the *Municipal Act*, 2001, sets forth 11 broad permissive powers, or “spheres of jurisdiction” (s. 11(3)), which can be exercised by lower-tier or upper-tier municipalities, as well as rules prescribing the division of authority in two-tier systems (s. 11(4)). In addition, the Act sets out eight “matters” under which municipalities can pass bylaws (s. 11(2)). Ontario’s *Municipal Act*, 2001, and the *City of Toronto Act*, 2006, include other specific express powers.

In Québec, the *Municipal Powers Act* grants local municipalities powers within eight “fields” and further express powers to local municipalities and regional county municipalities.

**Table 3.2: Summary of spheres of jurisdiction in general municipal legislation**

	BC	AB	SK	MB	ON	QC	NB	PE	# of provs.
Number of subjects	14	9	12	18	11	8	18	21	
Public places and activities, culture	X	X	X	X	X	X	X	X	8
Animals	X	X	X	X	X		X	X	7
Business activities	X	X	X	X	X		X	X	7

Table 3.2, continued

	BC	AB	SK	MB	ON	QC	NB	PE	# of provs.
Number of subjects	14	9	12	18	11	8	18	21	
Transport systems		X	X	X	X	X	X	X	7
Public utilities		X	X	X	X	X	X	X	7
Welfare, safety, and protection of people	X	X	X	X		X	X	X	7
Nuisances	X	X	X	X		X	X	X	7
Municipal services	X	X	X				X		4
Enforcement of bylaws		X		X			X	X	4
Buildings	X				X		X	X	4
Natural environment	X					X	X	X	4
Streets			X	X	X		X		4
Vehicles and pedestrians			X	X			X		3
Explosives/blast- ing	X			X			X		3
Economic development					X	X		X	3
Maintaining safe properties				X			X	X	3
Vehicle parking				X	X		X		3
Soil displacement	X			X					2
Drainage				X	X				2
Buildings & vacant dwellings maintenance				X			X		2
Public health and sanitation	X					X			2
Weapons/fire-arms	X							X	2



Table 3.2, continued

	BC	AB	SK	MB	ON	QC	NB	PE	# of provs.
<b>Number of subjects</b>	14	9	12	18	11	8	18	21	
Cemeteries	X							X	2
Building removal			X					X	2
Peace, order, and good government			X				X		2
Expropriation and property dealings							X	X	2
Condominium conversions				X					1
Works along roads				X					1
Off road vehicles				X					1
Fire fighting				X					1
Managing waste					X				1
Libraries								X	1
Police								X	1
Pension and benefit plans								X	1

**Note:** Nova Scotia and Newfoundland and Labrador are omitted because they do not establish spheres of jurisdiction.

### 3.1.4 Judicial interpretation

Before the 1990s, municipal powers were usually interpreted narrowly to constrain a municipality's power to illegitimately restrict or control its residents' common- or civil-law rights (Lidstone 2007, 403–404). Lidstone argues that the broad interpretation of the municipal general welfare power began to gain acceptance at the time of the Supreme Court of Canada's decision in the *Shell Canada Products* case. In that decision, the dissent, written by Justice McLachlin, urged that courts "adopt a generous, deferential standard of review toward the decisions of municipalities" in part because "a generous approach to municipal powers is arguably more in keeping with the true nature of modern municipalities" (Lidstone 2007, 405–406).

Following the *Shell Canada Products* decision, the Supreme Court of Canada has tended to adopt the reasoning of the minority in that case, and has given impugned

municipal bylaws a broad and deferential interpretation in the *Rascal Trucking*, *Spraytech*, and *United Taxi Drivers* decisions (see Makuch and Schuman 2015, s. 1). Nevertheless, the provinces retain constitutional authority over municipalities within the fields of provincial jurisdiction, as shown in the 2019 decision of the Ontario Court of Appeal in the Toronto city wards case (*Toronto v Ontario*). (As of this writing, Toronto is seeking leave to appeal this decision to the Supreme Court of Canada.)

### 3.2 Natural person power

Natural person power enables a corporation to act as an individual in areas such as entering contracts, suing or being sued, hiring and firing employees, and taking any other corporate acts not prohibited by law. During the 1970s, most provinces modernized their corporation laws to give business corporations expansive powers akin to those of a human being—in legal terms, a “natural person” (*St. Paul (County) No. 19*).

In recognition of municipalities’ legal status as corporations empowered to exercise powers on behalf of their electors and residents, some provincial governments extended natural person power to municipalities to mimic the powers of provincially mandated business corporations. The grant of natural person power does not create new enumerated powers or spheres of jurisdiction, but potentially expands the municipality’s ability to act independently within its areas of jurisdiction as established in provincial law.

#### 3.2.1 Uneven extension and limitations

As **Table 3.3** shows, municipalities have been granted “natural person power” in some or all of the municipalities of seven of the provinces—British Columbia, Alberta, Saskatchewan, Manitoba (Winnipeg only), Ontario, New Brunswick, and Prince Edward Island—however, the extent of natural person power differs across the provinces. Alberta was the first province to extend natural person power to all its municipalities in its 1994 *Municipal Government Act*. Section 8(1) of British Columbia’s *Community Charter* extends natural person power to most incorporated municipalities in the province. Natural person power is not, however, available to the province’s 47 regional districts, which are principally governed by a different statute, the *Local Government Act*.

**Table 3.3: Natural person power**

	Included	Not included
BC	<i>Community Charter</i> (Sec. 8(1), subject to Sec. 8(10))	<i>Local Government Act</i> (for regional districts) <i>Vancouver Charter</i>
AB	<i>Municipal Government Act</i> (Secs. 6, 11(1)) Also Calgary and Edmonton Charters, by reference	

Table 3.3, continued

	Included	Not included
<b>SK</b>	<i>Cities Act</i> Municipalities Act (Secs. 4(3), 4(4))	
<b>MB</b>	<i>City of Winnipeg Charter Act</i> (Sec. 7(1), subject to 7(2))	<i>The Municipal Act</i>
<b>ON</b>	<i>Municipal Act, 2001</i> (Sec. 9) <i>City of Toronto Act</i> (Sec. 7)	
<b>QC</b>	<i>Montréal Charter</i> (Sec. 2)	<i>Cities and Towns Act</i> <i>Municipal Powers Act</i> <i>Municipal Code of Québec</i>
<b>NB</b>	<i>Local Governance Act</i> (Secs. 6(1), 6(2)) Saint John (by Royal Charter)	
<b>NS</b>		<i>Municipal Government Act</i> <i>Halifax Regional Municipality Charter</i>
<b>PE</b>	<i>Municipal Government Act</i> (Sec. 4(2))	
<b>NL</b>		<i>Municipalities Act, 1999</i>

Ontario restricts the application of the natural person power. As amended in 2001, the Ontario *Municipal Act* grants natural person power to all municipalities “for the purpose of exercising its authority under this or any other Act” (s. 9).<sup>7</sup> The provincial government has interpreted this to mean that the natural person power is not an independent source of authority for a municipality to act in a particular area, but applies only to help a municipality achieve its purposes within a properly authorized sphere, matter, or power (Ontario 2014, 33). Moreover, section 17 of the *Municipal Act, 2001* sets limits on financial transactions. For example, the municipal power to impose taxes is prohibited unless otherwise authorized by the *Municipal Act, 2001*, or another statute.

### 3.2.2 Judicial interpretation

The courts have both upheld and limited municipal exercise of natural person power. In 2006, the Alberta Court of Appeal approved a municipal council’s application for an injunction against a property owner based on the natural person power in section 6 of the *Municipal Government Act* (*St. Paul (County) No. 19*).

In contrast, the British Columbia Court of Appeal in 2019 issued a decision that may limit the scope of a municipality’s natural person power in that province. In the *Canadian Plastic Bag Association* case, the Court quashed a bylaw passed by the City of Victoria because it was not approved in advance by the provincial Minister of

7. This provision is mirrored in section 7 of the *City of Toronto Act, 2006*.

the Environment. As of this writing, Victoria is seeking leave to appeal this decision to the Supreme Court of Canada. In essence, the BCCA decided that the bylaw’s purpose was “the protection of the natural environment,” which required ministerial approval prior to enactment under section 8(3)(j) of the *Community Charter*. In this decision, the Court did not consider whether the bylaw would also have fallen under one or more of the “municipal purposes” in section 7, or the natural person power.<sup>8</sup>

Unfortunately for Victoria, the bylaw text did not reference its statutory basis and the city’s legal counsel did not argue before the Court that the broader scope of the City’s natural person power obviated the need for ministerial approval. This interpretation could have referred to the 2005 decision of the B.C. Supreme Court in *Kitimat (District of) v Alcan Inc.*, in which the Court decided that the exercise of the natural person power under the *Community Charter* was not narrowed by the fact that more detailed corporate powers are set out expressly elsewhere in the Charter, and that the natural person power supplements the enumerated spheres and powers in the statute (Lidstone 2007, 415–416).

### 3.3 Expropriation of property

Expropriation—the compulsory purchase of private property—is an important tool to achieve public purposes. All general municipal statutes, as well as several city-specific empowering statutes, give municipalities the power to expropriate land. In all instances, expropriation is an express power outside the general list of spheres or areas of municipal power. In Saskatchewan and Newfoundland and Labrador, the power of municipalities to expropriate is found in a separate statute. Laws authorizing expropriation are summarized in **Table 3.4**. In all provinces, municipalities cannot expropriate property owned or occupied by the federal or a provincial government or any of their agencies.

**Table 3.4: Expropriation of property**

	Can expropriate for economic development purposes	Cannot expropriate for economic development purposes	Ministerial approval required
BC		<i>Local Government Act</i> (Sec. 289, re: regional districts) <i>Community Charter</i> (Sec. 31)	
AB	<i>Municipal Government Act</i> (Sec. 14) (also Calgary and Edmonton Charters, by reference)		
SK	<i>Municipal Expropriation Act</i>		

8. Section 8(1) of the *Community Charter* provides that ministerial pre-approval does *not* apply to actions taken under the natural person power.

Table 3.4, continued

	Can expropriate for economic development purposes	Cannot expropriate for economic development purposes	Ministerial approval required
MB	<i>Municipal Act</i> (Sec. 254)		
ON	<i>Municipal Act</i> , 2001 (Sec. 6)		
QC		<i>Municipal Code of Québec</i> (Sec. 1097) <i>Cities and Towns Act</i> (Sec. 570)	Partial (see text)
NB	<i>Local Governance Act</i> (Sec. 184)		
NS	<i>Municipal Government Act</i> (Sec. 52)		
PE		<i>Municipal Government Act</i> (Sec. 180, 188)	
NL		<i>Urban and Rural Planning Act</i> (Sec. 50)	Yes

### 3.3.1 Economic development purposes

As Table 3.4 shows, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, and New Brunswick allow municipal expropriation for economic development purposes—that is, the compulsory purchase of private land for development by third parties. Municipalities may exercise this power to attract employment or regenerate blighted areas. The other provinces restrict expropriation to *public* undertakings, including the construction of public facilities and infrastructure.

### 3.3.2 Ministerial approval

Some provinces impose additional conditions on a municipality's power to expropriate. A municipality in Newfoundland and Labrador may expropriate property, or an interest in land, only with the approval of the provincial Minister (*Urban and Rural Planning Act*, s. 50). In Québec, municipalities governed by the *Cities and Towns Act* must have the approval of the provincial government to expropriate property held or occupied by railway companies or by religious, charitable or educational institutions or corporations, or to expropriate cemeteries, bishops' palaces, parsonages, and their dependencies, or a wind farm, or hydroelectric power plant (s. 571). A similar provision, requiring provincial consent, appears in the *Municipal Code of Québec* (s. 1104).

### 3.3.3 Process requirements

In most provinces, municipal expropriation is initiated by a bylaw or resolution of council, and the process is set out in the applicable statute. Prince Edward Island has established a more rigorous expropriation process; a municipality may expropriate an interest in land only by a vote of two-thirds of the municipal councillors present at

a regular open public meeting of council held *following* a regular open public meeting of council called upon prior notice of the proposed expropriation—in other words, two meetings are required (s. 189).

### **3.3.4 Judicial interpretation**

The acceptability of government expropriation for potential private benefit is controversial in the United States, especially following the U.S. Supreme Court's 2005 decision in *Kelo v City of New London*. In that decision, the Court accepted the municipality's broad characterization of a "public use" to justify the expropriation of single-family homes to develop an office park with parking and retail services (Malloy 2008, 9).

In Canada, the Courts of Appeal in two provinces that permit municipal expropriation for economic development purposes (Manitoba and Ontario) have allowed municipalities to expropriate private property for the benefit of, at least in part, other private third parties (*Fouillard v Ellice (Rural Municipality); Vincorp Financial Ltd. v Oxford (County)*). The Supreme Court of Canada refused to entertain appeals of these cases, but it is possible that, in future, the Supreme Court may reconsider the issue if an example of unreasonable municipal expropriation for private benefit reaches the Court.

### **3.4 Asserting the provincial interest**

Some general and special laws include provisions that enable a province to override municipal authority in order to assert a provincial interest. In 2006, the Ontario government added new subsections to the *Municipal Act* (s. 451.1), mirrored in the *City of Toronto Act* (s. 25), which authorize the Lieutenant Governor in Council to pass regulations restricting the authority of a municipality to exercise the powers otherwise granted by legislation. These provisions may be exercised retroactively. Regulations made under the applicable provincial statute expire after 18 months and cannot be renewed.

Similarly, section 281(1) of British Columbia's *Community Charter* empowers the provincial government to act by regulations to:

- (b) provide an exception to or a modification of a requirement or condition established by an enactment;
- (c) establish any terms and conditions the Lieutenant Governor in Council considers appropriate regarding a power, modification or exception under this section;
- (d) authorize a minister to establish any terms and conditions the minister considers appropriate regarding a power, modification or exception under this section.

This language is less explicit than that of the override sections in the Ontario statutes. However, since the *Community Charter* characterizes a municipal bylaw as an "enactment," it appears that this section authorizes the Lieutenant Governor in Council, or a minister, acting by regulation, to retroactively modify the terms of a municipal bylaw.

There are no similar statutory override provisions in other provinces' general municipal laws.

### **3.5 Summary**

Municipalities derive all their authority from provincial legislation, so we must look to provincial law to assess the scope of delegated authority and the autonomy with which it can be exercised. Our review suggests that both have expanded over the past 25 years.

Despite significant variation across the country, Canadian municipalities now have broad general and specific powers to accomplish public purposes without provincial oversight. With the exception of Newfoundland and Labrador, all provinces establish a general welfare power, all specify express powers, and all but two establish spheres of jurisdiction. Most municipalities in most provinces enjoy natural person power. In six of the 10 provinces, municipalities may expropriate property for economic development purposes.

Lower courts have followed the Supreme Court of Canada's lead in generously interpreting the scope of municipal authority. Nevertheless, the outer limit of municipalities' legal authority, especially that stemming from the general welfare power and the grant of authority, remains ill defined. As with all legal concepts in a common law system, the true scope of municipal authority can be defined only through judicial interpretation.

## **4. Institutions**

Conflicts pitting individual communities' desire for self-determination against provinces' desire to increase the efficiency and equity of municipal service delivery and the fiscal viability and administrative capacity of the local government system have occurred since Confederation. These conflicts often involve how—and who decides how—municipal institutions should be organized.

On the one hand, local autonomy advocates argue that local control promotes democratic accountability and innovation; on the other, provincial governments have a legitimate interest in local affairs insofar as province-wide standards are desirable and municipal actions may generate negative externalities.

This section is concerned with municipalities' independent ability to:

- regulate their territorial boundaries;
- determine the organization of their representative institutions, including the selection and prerogatives of the head of council;
- determine the organization of their administrative structures, including those by which services are delivered;
- regulate the conduct of public officials, including ethical oversight and protections for municipal politicians.

### **4.1 Provincial oversight of municipal boundary changes**

Unilateral provincial changes to municipal boundaries, including imposed annexations and amalgamations, have been notable battlegrounds in provincial-

municipal relations. Six provinces have imposed comprehensive municipal amalgamations since the 1980s: Manitoba, New Brunswick, Nova Scotia, Ontario, Québec, and Prince Edward Island (Dollery, Garcea, and LeSage 2008, 158–160; Sancton 2000). In 2015, Manitoba completed a round of provincially mandated amalgamations that consolidated 107 of its rural communities into 47 municipalities (Ashton, Kelly, and Bollman 2015). In legal terms, these changes have been imposed through special legislation on an ad hoc basis.

While these extraordinary actions have received considerable attention, most provinces’ general municipal laws contain procedures for the initiation and approval of amalgamations and annexations by municipal councils, the minister, or the public.<sup>9</sup> **Table 4.1** presents an overview of statutory provisions regarding the initiation of and consent for municipal restructuring.

*Table 4.1: Boundary change procedures*

	Process	Initiator			Approval required from		
		Municipality	Minister	Public	Municipality	Public	Minister/ Lieu. Gov. in Council
<b>BC</b>	Amalgamation & annexation	Yes	Yes	No	Yes	Yes	Yes
<b>AB</b>	Amalgamation	Yes	Yes	No	Yes, if municipally initiated. No, if initiated by minister.	Yes, if municipally initiated. Optional, if initiated by minister.	Yes

9. In Québec, municipal restructuring procedures for most municipalities are set out in a dedicated statute, the *Act Respecting Municipal Territorial Organization*, rather than in the *Municipal Code* or the *Cities and Towns Act*.



Table 4.1, continued

	Process	Initiator			Approval required from		
		Municipality	Minister	Public	Municipality	Public	Minister/ Lieut. Gov. in Council
	Annexation	Yes	Yes	No	Negotiations mandatory if municipally initiated. No, if initiated by minister.	Yes, if municipally initiated. No, if initiated by minister.	Yes
SK	Amalgamation (merger)	Yes	Yes	Yes, by petition of 15% of pop.	Yes (applicant municipalities only). No, if initiated by minister.	Petition may require public vote. No, if initiated by minister.	Yes
	Annexation	Yes	Yes	Yes, by petition of 15% of pop.	No	Petition may require public vote. No, if initiated by minister.	Yes

Table 4.1, continued

	Process	Initiator			Approval required from		
		Municipality	Minister	Public	Municipality	Public	Minister/ Lieu. Gov. in Council
<b>MB</b>	Amalgamation & annexation	Yes	Yes		Yes (applicant municipalities only). No, if initiated by minister.	Yes. Manitoba Municipal Board may require vote.	Yes
<b>ON</b>	Amalgamation & annexation	Yes			Yes	Yes	Yes
<b>QC</b>	Amalgamation	Yes	Yes for regional county municipalities		Yes, if municipally initiated. No, if initiated by minister.	Optional if municipally initiated.	Yes
	Annexation	Yes			No	Yes, in annexed municipalities.	Yes
<b>NB</b>	Amalgamation & annexation	Yes	Yes		Yes (applicant municipalities only). No, if initiated by minister.	No	Yes

Table 4.1, continued

	Process	Initiator			Approval required from		
		Municipality	Minister	Public	Municipality	Public	Minister/ Lieu. Gov. in Council
NS	Amalgamation & annexation	Yes	Yes	Yes, by petition of 10% of electors	No	No	No (Nova Scotia Utility and Review Board rules)
PE	Amalgamation & annexation	Yes	Yes		No	No	Yes, following report of Island Regulatory and Appeals Commission
NL	Amalgamation		Yes		No (but municipal rep. shall offer recommendations).	Yes, unless no submissions are received.	Yes

#### 4.1.1 Initiation

In all provinces except Newfoundland and Labrador, statutes set out a procedure whereby municipalities can initiate annexations and amalgamations themselves.<sup>10</sup> Curiously, Ontario's *Municipal Act* is the only statute that does not specify a procedure for the minister to initiate municipal restructuring; Ontario has restructured municipalities through special legislation. This anomaly may reflect the Ontario government's postwar

10. The restructuring process set forth in the Ontario's *Municipal Act* is not available to the cities of Toronto, Hamilton, Ottawa, and Greater Sudbury; nor to the counties of Haldimand and Norfolk; nor to regional municipalities and their lower-tier municipalities, except for minor restructuring proposals (see s. 171(2)).

history of ad hoc unilateral action (Downey and Williams 1998, 235). The provincial government in 2019 completed a study of restructuring options for eight regional municipalities, as well as Simcoe County, but chose not to proceed (Ontario 2019). Had it done so, it would likely have imposed restructuring via special statute.

In addition to the procedures summarized in **Table 4.1**, Part XVII of Nova Scotia's *Municipal Government Act* includes a procedure for the formation of new, single-tier regional municipalities. On request to the Nova Scotia Utility and Review Board (NSUARB) from all councils in a single county, a study is undertaken of the proposal's advisability. If the study finds that consolidation is in the public interest, and a majority of the county electors approves in a plebiscite, the Lieutenant Governor in Council may proceed to dissolve the county and its municipalities and replace them with a new, single-tier regional government.

Only in Saskatchewan and Nova Scotia can municipal restructuring be initiated by a petition from residents.

#### **4.1.2 Approval**

In all provinces, amalgamations and annexations must be approved by the minister responsible for municipal affairs or, in Nova Scotia, the provincially appointed Utility and Review Board. Manitoba's *Municipal Act* now requires that the Manitoba Municipal Board be involved in any future amalgamations or annexations, except for minor annexations about which there is no dispute (sections 34(2), 48).

In most provinces, restructuring initiated by the minister cannot be blocked by affected municipalities. For example, under the new Prince Edward Island *Municipal Government Act* (effective 2017), the Lieutenant Governor in Council may restructure municipalities as the minister proposes, even if the affected municipalities do not consent to the proposal or the Island Regulatory and Appeals Commission (IRAC) does not recommend the Minister's proposal (s. 21). British Columbia is the principal exception; it requires that affected municipalities consent to amalgamations or annexations, whether proposed by a municipal council or the minister.

If a municipality initiates a restructuring in Saskatchewan or Prince Edward Island, the applicable provincial statutes mandate a mediation process if another affected municipality does not consent to amalgamation or to being annexed. If no agreement is reached in Saskatchewan, the Saskatchewan Municipal Board rules (*Cities Act*, s. 43.1; *Municipalities Act*, s. 60). In Prince Edward Island, failed mediation leads to a public hearing before the IRAC (*Municipal Government Act*, s. 17).

Unlike many American states, few provinces require an affirmative vote of residents in affected areas, except for British Columbia (regardless of who initiated the proposal), Alberta (if municipally initiated), and in Québec (in cases of annexation).

Most provincial legislation requires that municipalities notify First Nations bands or communities affected by a proposed restructuring. Even if provincial legislation is silent on the point, municipal and provincial governments likely have a duty to consult indigenous groups about municipal restructuring proposals that

may affect them (although the formal duty to consult is emphasized more strongly in the federal field).

#### 4.2 Power to reorganize representative institutions

The question of control over the structure of the municipality's representations was thrown into sharp relief by the Ontario government's unilateral reorganizations of Toronto's ward system in 2000 and 2018. In the United States, home rule (see **Box 4.1**) and greater reliance on special legislation to incorporate municipalities ensure more variation in representative forms among municipalities. Distinctions between council-manager, mayor-council, and commission government systems are well known and accepted there, as well as considerable variation in the independent scope of mayoral authority, the role of parties, and the territorial basis of representation. Canada's use of general legislation to constitute most municipalities and to limit local control over institutional structures has had a homogenizing effect.

##### *Box 4.1: Home Rule: An American Doctrine*

*Home rule*, an American legal concept, refers to the entrenchment in state law or constitutions of provisions that either prohibit state special legislation regarding municipal affairs, or delegate to municipalities authority to amend their own charters respecting the structure of their representative and administrative institutions, revenue raising, service provision, and labour relations (Local Law Center 2015).

Late 19th-century good-government reformers advocated home rule to decongest state legislative business, which was overwhelmed by local special legislation, and eliminate incentives to partisan patronage, whereby state legislative leaders would manipulate local offices and contracts to reward their friends (Taylor 2019, 54–57). Home rule is distinct from, but related to, the greater reliance on special laws rather than general legislation to constitute local governments in many American states compared with the process in Canadian provinces.

Canadian observers tend to overestimate the scope of American home rule. Even where it is in effect, states retain their original constitutional authority to intervene unilaterally in municipal affairs. Home rule has proven easy to circumvent, as evidenced by a growing American literature on states' *preemption* of local policymaking in a wide range of policy areas (DuPuis et al. 2017, Riverstone-Newell 2017). While the constitutional entrenchment of an inalienable sphere of municipal jurisdiction is theoretically possible in Canada through amendments to the *Constitution Act, 1867*, it is unlikely to occur, given the political complexity of "opening up" the Constitution.<sup>11</sup>

11. Unlike American states, Canadian provinces do not have self-standing, unilaterally amendable written constitutions distinct from ordinary legislation. Rather, provinces are constituted in a variety of ways—not only by the various *Constitution Acts*, but also by other documents customarily considered constitutional, such as Newfoundland and Labrador's *Terms of Union*. Indeed, the

#### 4.2.1 Head of council: Selection, authority, and duties

In most provinces, the *head of council*—variously called the mayor, reeve, warden, or chair—is the individual who presides over the activities of a municipality’s council. Nine provinces provide for the head of council to be selected by an at-large vote of the municipality’s electors. The exception is Newfoundland and Labrador, where the default procedure follows the historical British model of selection by a majority of council following an election<sup>12</sup>; municipalities may also directly elect the head of council by an affirmative vote of two-thirds of the council. In Alberta, where the default is direct election at large, the reverse is possible: prior to a municipal election, a council may pass a bylaw authorizing the selection of the head of council from among the councillors by vote of the council. **Table 4.2** lists the various ways in which municipal heads of council are selected.

**Table 4.2: How municipal heads of council are selected**

	Default selection method	Exceptions
BC	Direct election at large	
AB	Direct election at large	Council may pass bylaw to select head of council by vote of council
SK	Direct election at large	
MB	Direct election at large	
ON	Direct election at large	County wardens and the chairs of several regional municipalities are selected by vote of council
QC	Direct election at large	Some regional county municipality wardens are selected by vote of council
NB	Direct election at large	

content and scope of Canadian provincial constitutions remains unsettled (Price 2017). While this arrangement is untested, we believe that the provincial legislature and the federal Parliament would have to approve the constitutional entrenchment of an autonomous sphere of jurisdiction for municipalities within a single province (s. 43). This mechanism was used to abolish religion-based education rights in Québec and Newfoundland and Labrador, in the former case replacing them with language-based schools. To add a municipal schedule to the federal-provincial division of powers in the *Constitution Act*, 1982, would require the approval of seven provinces representing 50 percent of the Canadian population (s. 38). Good (2019) points to alternative ways of thinking about the constitutionality of local governments. Municipal laws can be considered organic laws (that is, subject to a higher standard of amendment than regular legislation due to their foundational nature) or enacted using “manner and form” provisions that explicitly recognize their constitutionality in the provincial context. No province has used such approaches and their effect is untested in the courts.

12. Similarly, the chairperson of a regional council is selected by the council itself.

Table 4.2, continued

	Default selection method	Exceptions
NS	Direct election at large	County and district municipality wardens may be chosen from among the councillors
PE	Direct election at large	
NL	Selection by vote of council	Council may pass bylaw with two-thirds majority to enable municipality-wide direct election

In Ontario, heads of council of single- and lower-tier general-purpose local governments—cities, towns, townships, and villages—are directly elected at large. There is variation, however, among upper-tier units. All county councils select their heads of council from among their own number. This is also true of the chairs in most regional municipal councils; however, some are directly elected. These variations are codified in special legislation.

In Québec, the *Act Respecting Municipal Territorial Organization* sets out the procedures for selection of the warden of a regional county municipality (RCM). Ordinarily under the Act, “the warden shall be elected by the members of the council, from among those members who are mayors” of the constituent local municipalities (s. 210.26). Alternatively, RCMs outside the Montréal Metropolitan Community may choose to elect their warden at large (s. 210.29.1).

There are no “strong mayors” in Canada insofar as heads of council are considered members of the council, participate in council votes, and have few statutory prerogatives greater than those exercised by other councillors. Section 225 of the Ontario *Municipal Act* codifies the “standard package” of authority and duties of heads of council found in most general municipal laws:

to act as chief executive officer of the municipality; to preside over council meetings so that its business can be carried out efficiently and effectively; to provide leadership to the council; to provide information and recommendations to the council with respect to the role of council; to represent the municipality at official functions; and to carry out the duties of the head of council under this or any other Act (s. 225; see also Rust-D’Eye, Bar-Moshe, and James 2015, 21–22).

Three provinces—British Columbia, Prince Edward Island, and Québec—grant extra powers to the head of council in their respective municipalities. Drawing on Graham (2018) and a review of general municipal legislation, we have summarized the duties and authority of mayors in **Table 4.3**. British Columbia represents the greatest deviation from the national norm: mayors can hire and fire employees, appoint standing committees of council, and require reconsideration of council decisions (*Community Charter*, ss. 131, 141, 151). This authority is mirrored in the

Local Government Act provisions pertaining to regional district chairs (ss. 217–218, 239–241).

**Table 4.3: Authority and duties of the head of council**

Power	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
CEO	X	X	X	X	X	X	X	X	X	X
Preside over council	X	X	X	X	X	X	X	X	X	X
Lead council	X	X	X	X	X	X	X	X	X	X
Represent municipality	X	X	X	X	X	X	X	X	X	X
May fire employees	X									
Appoint standing committees	X									
May require reconsideration of council decision	X									
Staff reports to head of council						X				
Casts vote to break tie									X	
Appoints deputy mayor									X	



#### 4.2.2 Establishing and altering wards and ward boundaries

Canadian municipal councils are generally organized in one of two ways.<sup>13</sup> In most provinces, the norm is a ward-based system in which councillors represent territorially defined districts. In British Columbia, the norm is election at large, whereby all electors vote for all candidates and the council is populated by those who receive the most votes. As **Table 4.4** shows, the level of control municipalities have in determining the form of representation varies between provinces.

**Table 4.4: Municipality’s power to organize council without provincial approval**

	Establish wards	Set ward boundaries	Define committees	Create community councils
<b>BC</b>	No (only with approval of Lieut. Gov. in Council, unless in original letters patent; called “neighbourhood constituencies”)	No (only with approval of Lieut. Gov. in Council)	Yes	NA
<b>AB</b>	Yes	Yes	Yes	NA
<b>SK</b>	No (not in rural municipalities; in non-rural municipalities, determined by municipal wards commission, following public hearings)	No (not in rural municipalities; in non-rural municipalities, determined by municipal wards commission, following public hearings)	Yes	NA
<b>MB</b>	Yes (25 voters may require Manitoba Municipal Board to review bylaw, with hearing; the Board may reject bylaw)	Yes (25 voters may require Manitoba Municipal Board to review bylaw, with hearing; the Board may reject bylaw)	Yes	NA

13. The once-common *board of control*—an executive body separate from the council with special financial and administrative authority, usually separately elected at large—no longer exists in any Canadian municipality (Tindal et al. 2017, 248–249).

Table 4.4, continued

	Establish wards	Set ward boundaries	Define committees	Create community councils
<b>ON</b>	Yes (may be sought by petition of 1% of electors; bylaw subject to appeal to Local Planning Appeal Tribunal; the Tribunal may reject bylaw)	Yes (may be sought by petition of 1% of electors; bylaw subject to appeal to Local Planning Appeal Tribunal; the Tribunal may reject bylaw)	Yes	Yes
<b>QC</b>	Yes (by 2/3 vote of council; within prescribed population range; upon public notice; if objections, public meeting may be held; after public meeting, Rep. Commission may amend bylaw; called “electoral districts”; not applicable to regional county municipalities)	Yes (by 2/3 vote of council; within prescribed population range; upon public notice; if objections, public meeting may be held; after public meeting, Rep. Commission may amend bylaw; not applicable to regional county municipalities)	Yes	NA
<b>NB</b>	Yes (with public notice)	Yes (with public notice)	Yes	NA
<b>NS</b>	No (requires consent of Nova Scotia Utility and Review Board, after hearing)	No (requires consent of Nova Scotia Utility and Review Board, after hearing)	Yes	Yes (Community Committee)
<b>PE</b>	Yes (within population range)	Yes (within population range)	Yes	NA

Table 4.4, continued

	Establish wards	Set ward boundaries	Define committees	Create community councils
NL	Towns: by 2/3 vote of councillors; with limitation on number of councillors Regions: by Lieut. Gov. in Council	Towns: by 2/3 vote of councillors; with limitation on number of councillors Regions: by Lieut. Gov. in Council	Yes	NA

NA = Not specifically addressed.

Only three provinces—Alberta, New Brunswick, and Prince Edward Island—delegate broad autonomy to establish ward systems and determine ward boundaries. Alberta places no constraints. Prince Edward Island’s *Municipal Government Act* requires only that the number of electors not vary by greater than 10 percent among all the wards (s. 39(4)).<sup>14</sup> In New Brunswick, the *Local Governance Act* requires that a council publish or broadcast notice of its intention to pass a ward division bylaw within 10 days before the bylaw is first considered by council (s. 45(1)).

Conversely, British Columbia, Saskatchewan, and Nova Scotia grant municipalities no independent authority to divide or re-divide themselves into wards for council elections. British Columbia’s *Local Government Act* prescribes a process for creating a municipal ward system in incorporated municipalities. Unless the municipality was originally divided into wards (referred to as “neighbourhood constituencies”) in the letters patent incorporating it, its council may establish wards only with the approval of the Lieutenant Governor in Council.

Saskatchewan has a unique approach to third-party oversight of a municipality’s authority to divide into wards for council elections. Under both the *Municipal Act* and the *Cities Act*, bylaws that create or alter municipal wards must be approved by an independent municipal wards commission appointed by the municipal council.<sup>15</sup> Only the municipality’s clerk, and no council members, may sit on this commission. The commission must hold public hearings before reaching its decision.

In Nova Scotia, any municipal bylaw to divide or re-divide a municipality into wards must be approved by the Nova Scotia Utility and Review Board after a public hearing on the issue.

14. This may set an important precedent as there is no constitutional or legal requirement for equal representation by population at the local level. Supreme Court decisions regarding justifiable deviations from equal representation apply only at the federal and provincial levels (Sancton 1992).

15. These provisions do not apply to rural municipalities.

Municipalities in the other provinces are subject to other forms of constraint or review. In Newfoundland and Labrador, the *Municipalities Act*, 1999, prescribes that wards may be established in regional municipalities only by the Lieutenant Governor in Council. In towns, the bylaw establishing or altering municipal wards must be passed by at least two-thirds of the municipal councillors in office. In the remaining three provinces—Manitoba, Ontario, and Québec—municipal bylaws to create or alter municipal wards are subject to appeal to an agency of the provincial government. In each case, the provincial agency has authority to reject, amend, or approve a municipality’s wards bylaw.

#### **4.2.3 Establishing council committees and community councils**

In all provinces, municipalities have the power to create committees of council without conditions or constraints. At the same time, few provinces provide for community councils or committees to assist municipal councils in addressing issues of local importance. Some observers consider this a shortcoming in provincial legislation, arguing that community councils serve an important democratic function, especially in large cities (Flynn 2017, 96). Nevertheless, only two provinces, Ontario and Nova Scotia, specifically authorize the formation of municipal committees akin to community councils. Spicer (2016, 129) has found that few Ontario municipalities have chosen to exercise this authority.

#### **4.3 Power to determine modes of service delivery**

In most provinces, general municipal legislation implicitly or explicitly gives municipalities wide latitude in how they provide services under their assigned jurisdiction, including:

- in-house delivery by municipal departments or divisions;
- contracting out, through agreements with private contractors;
- joint-power arrangements with other municipalities;
- through special-purpose bodies such as public utility corporations.

Even if municipalities participate in their decision-making processes, special-purpose bodies may operate at arm’s length insofar as they are separately constituted by provincial legislation. In some provinces, legislation specifically prescribes that certain services be provided through special-purpose bodies or corporations with varying degrees of municipal policy and budgetary oversight. Ontario, for example, prescribes specific institutional structures for police services, electric utilities, library services, and watershed management.

Across Canada, all primary and secondary education systems are delivered by freestanding, often directly elected school boards and not by municipalities. Other service-providing entities may be separately constituted as public corporations, but the municipal council may control their budgets and priorities through its power to appoint each board, which may be composed of citizens, elected councillors, or both. In determining how to provide municipal services, municipalities must weigh issues of cost, efficiency, control and accountability, and governance structure (Lyons 2014, 88–90).

### 4.3.1 Power to create corporations

The power to create public corporations without provincial approval is a potentially useful extension of a municipality’s ability to reorganize its internal structures. For example, municipalities may create corporations for tourism, economic development, land management, or other purposes.

Provincial statutes vary in their provisions authorizing municipalities to establish corporations. As **Table 4.5** indicates, most do, with Québec and Prince Edward Island being the most permissive. In six provinces, a municipality’s power to incorporate a corporation is constrained to some extent, usually by provincial oversight or approval. In all provinces except Newfoundland and Labrador, a municipality can establish corporations to undertake only such activities and exercise such powers as the municipality is authorized to undertake itself. In other words, the act of incorporating a separate legal entity cannot extend the authorized jurisdiction of the municipality (Lidstone 2004, 28).

It can be argued that, where it exists, the natural person power renders a separate authorization to establish corporations redundant (Lidstone 2004, 28). This opens up an as-yet untested legal question: are limited authorizations superseded by the more expansive natural person power? In the six provinces that grant municipalities restricted authority to incorporate a separate corporation, the restrictions include non-profit corporations only (New Brunswick), for specifically limited purposes (New Brunswick), and only after a public hearing (Alberta).

In two provinces, Nova Scotia and Newfoundland and Labrador, provincial law does not permit municipalities to incorporate separate corporations (nor do they grant municipalities natural person powers). However, Nova Scotia municipalities may enter into agreements with other municipalities, villages,<sup>16</sup> service commissions, the provincial and federal governments or their agencies, and band councils to provide or administer municipal or village services, and may further delegate this responsibility to a separate body corporate (*Municipal Government Act*, s. 60).

**Table 4.5: Power to create corporations**

	Enabled	Restrictions
BC	Yes	Approval of Inspector of Municipalities
AB	Yes	After a public hearing; may be restricted by Minister’s Regulations
SK	Yes	Annual financial statements of “controlled corporations” must be audited
MB	Yes	Approval of Minister
ON	Yes	May be restricted by Minister’s Regulations

16. In Nova Scotia, “villages” are unincorporated communities that may receive services from a larger county or municipality in which they are situated, or through an unelected commission.

Table 4.5, continued

	Enabled	Restrictions
QC	Yes	None
NB	Yes	For limited described purposes; must be non-profit
NS	Yes	May delegate some service delivery responsibilities to corporations established by intergovernmental agreement
PE	Yes	None
NL	No	

#### 4.4 Ethics, accountability, and transparency

Greater municipal empowerment has been accompanied by concerns about the accountability, ethical behaviour, and transparency of local institutions and activities. All provinces mandate ethical standards or provide for oversight mechanisms for municipal elected officials and staff. As **Table 4.6** shows, however, they differ in whether they are locally or provincially administered.

Table 4.6: Ethical oversight and councillors' protection

	Mandatory code of conduct for councillors	Integrity Commissioner	Ombudsman	Auditor General	Protection for councillors
BC	No (but some conduct rules in the <i>Community Charter</i> )	No (role may be filled by Inspector of Municipalities)	Provincial Ombudsman	No	Yes (if not grossly negligent)
AB	Yes	No	Provincial Ombudsman	No (Provincial Minister may intervene)	Yes
SK	Yes	No	Provincial Ombudsman	No	Yes
MB	Yes	No	Provincial Ombudsman	Provincial Auditor General	Yes

Table 4.6, continued

	Mandato-ry code of conduct for councillors	Integrity Commis-sioner	Ombudsperson	Auditor General	Protection for council-lors
ON	Yes	Yes (of the municipal-ity, or from another mu-nicipality)	Optional (or Provincial Ombuds-man)	Optional	Yes
QC	Yes	No	Optional (needs 2/3 vote of municipal council)	Optional (but can be com-pelled upon ratepayers' request)	No (but municipality will provide defence to claims)
NB	No (but includes conflict-of-interest rules)	No	Provincial Ombudsman	No	No (council may indem-nify)
NS	No	No	Provincial Ombudsman	No	No (but notice required and limita-tion period reduced)
PE	Yes	No (but Provincial Minister may act)	No	No	Yes (if not negligent)
NL	No (but includes conflict-of-interest rules)	No	No	No	Yes

In this section, we examine several common institutional devices: the *code of conduct for councillors*, which provides a standard for councillor behaviour intended to prevent ethical conflicts; the *integrity commissioner*, who independently investigates possible ethical breaches at the request of the council; the *ombudsperson*, who independently investigates municipal actions at the request of members of the

public; and the *auditor general*, who independently conducts value-for-money audits of municipal activities.<sup>17</sup>

#### **4.4.1 Code of conduct for councillors**

In the early 2000s, the United Kingdom Parliament required all municipalities to draw up codes of conduct and stipulated that each municipality's code mirror the model code of conduct developed by Parliament (Dollery, Garcea, and LeSage 2008, 83). Canadian provinces have been less directive. The most stringent province is Québec. The 2010 *Municipal Ethics and Good Conduct Act* mandated municipal adoption of binding codes of ethics and conduct and prescribed the rules to be covered by the codes. Each municipality's code must be updated every four years, after a municipal election. Municipalities must publish a notice of the draft bylaw for the proposed code of ethics and conduct. The same statute also requires municipalities to adopt a separate code of conduct for employees.

In Alberta, Saskatchewan, and Ontario, the general statute requires that all municipalities have a councillors' code of conduct; the accompanying regulations contain guidelines for the content of the code. For example, section 1 of Ontario Regulation 55/18 lists mandatory code of conduct subjects:

1. Gifts, benefits and hospitality;
2. Respectful conduct, including conduct toward officers and employees of the municipality or the local board;
3. Confidential information;
4. Use of property of the municipality or of the local board.

British Columbia, New Brunswick, Nova Scotia, and Newfoundland and Labrador do not impose a statutory obligation on their municipalities to adopt a councillor code of conduct. With the exception of Nova Scotia, these provinces include conflict-of-interest rules for councillors in their general municipal laws.<sup>18</sup> Regardless of provincial mandates, all municipalities likely have the authority to adopt binding councillors' codes of conduct under their general welfare or natural person powers. In doing so, a municipality may establish rules and procedures that complement—and in some cases exceed—those in provincial law (Cunningham 2011, 160–162).

#### **4.4.2 Integrity commissioner**

To date, Ontario is the only province that provides for integrity commissioners in its municipal legislation. The City of Toronto was the first Canadian municipality to

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17. Other institutions and offices exist in some provinces, but due to limited space we do not discuss them here. These include lobbyist registrars and closed meeting investigators. We also do not discuss municipal conflict of interest legislation, freedom of information rules and requirements, and laws and regulations that govern election campaign. The “ethical infrastructure” of local government deserves investigation in its own right.

18. As an alternative to a legislated approach, the Union of Nova Scotia Municipalities recommended in 2008 that its member municipalities adopt codes of conduct modelled on the Union's Code of Conduct for Municipal Elected Officials (see Halifax Regional Council 2009).



appoint an Integrity Commissioner in 2004 (Cunningham 2011, 164) in response to scandals involving lapses of judgment and ethical conflicts among councillors and senior officials that led to judicial inquiries in Toronto and Mississauga (see Bellamy 2005).

Section 223.3 of the Ontario *Municipal Act* requires that all municipalities either have their own Integrity Commissioner or use the services of another municipality's Integrity Commissioner. The *Municipal Act* prescribes that the commissioner is responsible for applying a municipality's rules of ethical behaviour and code of conduct, enforcing certain provisions of the *Municipal Conflict of Interest Act*, and providing education and advice regarding these rules, codes, and statutes.

#### **4.4.3 Ombudsperson**

Six provinces—British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia—empower a provincial ombudsperson to investigate complaints about administrative shortcomings by municipal governments in the province.

In Ontario, a municipality may appoint its own ombudsperson; if it does not, the provincial Ombudsman fulfils the role.

In Québec, a municipal council may appoint an ombudsperson by a two-thirds majority vote. Unlike other provinces, however, the Québec office of the Ombudsperson does not have jurisdiction to investigate or act on complaints against municipalities. Similarly, Newfoundland and Labrador's Citizens' Representative (which is akin to a provincial ombudsperson), is not empowered to deal with citizens' complaints against municipalities, and its *Municipalities Act*, 1999 does not provide for municipalities to appoint their own.

Prince Edward Island has no ombudsperson offices at either the provincial or municipal level.

#### **4.5 Protection of councillors from liability**

While seemingly a technical question, the potential for municipal councillors or employees to be held liable for actions made in the course of their work may have far-reaching effects. Liability may discourage individuals from running for office or stifle necessary risk-taking by officeholders.

Seven provinces' general municipal laws offer some protection to councillors for claims arising from their actions (see **Table 4.6**). Ontario's *Municipal Act* is the most stringent, providing that:

No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority. (s. 448(1))

Several important limitations are related to statutory protection provisions. While Ontario has the broadest “bar to action” protection in that it covers municipal councillors, employees, and agents, the councillor or employee must have been acting in good faith. Similarly, some provinces, such as British Columbia, do not afford protection for dishonesty, gross negligence, malicious or wilful misconduct, or defamation. Prince Edward Island does not offer protection for negligent actions, but may indemnify well-meaning but negligent councillors.

Some provinces also provide for municipalities to indemnify council members sued for actions or inaction in the good-faith performance of their roles. This falls short of the “bar to action” protection because it applies only after a councillor has been sued and may require councillors to retain their own legal counsel pending indemnification. Québec goes somewhat further than indemnification in that a municipality shall provide a defence for employees or councillors sued for acting in their roles, unless acting with intentional or gross fault, or illegally.

Nova Scotia does not provide specific statutory protections for municipal councillors. Instead, it leaves it to the common law to determine whether councillors may be liable for actions or inactions taken in their roles as council members. However, the *Municipal Government Act* requires that actions against a councillor may be commenced only after one month’s notice and within a one-year limitation period (s. 512).

#### **4.6 Summary**

Local control over the internal structure and territorial boundaries of municipal institutions is portrayed as an important criterion of community autonomy and self-determination. Nevertheless, this value must be balanced against the province’s interest in ensuring effective local governance and equitable access to services, the application of consistent standards where appropriate, and the avoidance of negative externalities.

Our review suggests that Canadian municipal legislation elevates the latter set of priorities over the former in many respects. Despite variation across the country, most legislation provides for a provincial role in initiating and approving boundary changes and is highly prescriptive in defining permissible forms of representation and modes of service delivery. Most provinces also enable or prescribe an “ethical infrastructure” (Cunningham 2011) governing local conduct, sometimes giving the provincial agencies a direct role.

Would greater local control over institutional forms—and therefore greater variation and customization—improve the quality of local governance? Local control over whether representation is on a ward basis or by election at large, or how many members a council should have, may be benign. Permitting individual municipalities wide latitude in, for example, the governance and delivery of local policing, or defining ethical standards for public officials, is less desirable. Leaving the definition of ethical standards to those who must obey them is unwise. How much variation in forms of organization and levels of service delivery is tolerable in any given society is a matter of values.

## 5. Finance

The adequacy of municipal revenues to meet municipalities' operating and capital needs is the subject of ongoing debate (see **Box 5.1** for the distinction between operating and capital budgets). We do not address the question of adequacy here. Our focus in this section is on identifying variation between provinces in the legal availability of revenue sources to municipalities. For detailed discussions of municipal public finance and the merits and use of various taxes and fees, see Althaus and Tedds (2016), Bird, Slack, and Tassonyi (2012), Kitchen and Slack (2016), Slack (1996), Slack and Tassonyi (2017), and Vander Ploeg (2002). We also do not deal with the significant proportion of municipal spending (19 percent) funded by transfers from other levels of government as opposed to *own-source revenues*—funds municipalities raise themselves (Johal 2019).

### *Box 5.1: Operating versus Capital Budgets*

A distinction must be made between operating and capital expenditures and the types of revenues that fund them. Municipalities in all provinces maintain and fund separate operating and capital budgets, the former for annual expenditures, the latter for the construction of public assets.

All provinces require the operating budget to be balanced annually (although some provinces permit deficits with ministerial permission). As the servicing of debt for capital purposes is an operating expense, there is a practical limit on the size of capital expenditures. All provincial governments limit or regulate borrowing to preserve municipal solvency.

### 5.1 Revenues for operating purposes

#### 5.1.1 Property taxes, fees, and fines

In all provinces, the standard menu of municipal own-source revenues for operating purposes are taxes on real property (both residential and non-residential), user fees, licence and permit fees, and fines (See **Table 5.1**). Due to their relatively universal application, we will not go into detail on these revenue sources here.

**Table 5.1: Sources of revenue enabled for operating purposes in provincial law**

Source	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
<b>Tax on real property</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>User fees</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Table 5.1, continued

Source	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
Licence, franchise, and permit fees	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Fines and penalties	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Business tax		Yes		Yes		Yes				Yes
Accommodation levies and fees*				Yes	Yes			Hali-fax	Yes	St. John's
Land transfer tax				Yes	To-ron-to	Yes		Yes		
Vehicle registration tax					To-ron-to					
Bill-board tax				Win-ni-peg	To-ron-to					
Electricity & natural gas consumption				Win-ni-peg						
Poll tax										Yes

\* Collected by municipalities directly.

All provinces enable municipalities to levy citywide taxes on different categories of real property. However, there is significant variation across provinces, and sometimes among municipalities within a province, in the frequency and method of property value assessment, the classification of properties for tax purposes,

whether provincial or municipal government is responsible for conducting property assessment, and whether municipalities are permitted to use tax abatements as economic development incentives.<sup>19</sup> While municipalities can set rates of property taxation, some provinces have imposed limits on how much they can be increased each year (Kitchen, Slack, and Hachard 2019).

In provinces with remote regions in which property values are not assessed, or regions with sufficiently low demand for property that valuation is difficult, other revenue sources must be found. In Newfoundland and Labrador, for example, local service districts levy user fees in unincorporated areas for water and sewer services, fire protection, solid waste management, street lighting, animal control, and road clearing and maintenance (*Municipalities Act*, 1999, Pt. XIII). In addition, municipalities may levy a poll tax on residents who do not pay property tax (*Municipalities Act*, 1999, s. 126). Other provinces, including Ontario under the *Provincial Land Tax Act*, and also British Columbia under the *Taxation (Rural Area) Act*, directly levy land taxes in unincorporated areas.

Given broad municipal discretion to design fee regimes for services, licences, and permits, and to impose fines, it is difficult to generalize regarding their application. Even within municipalities, there is no doubt considerable variation in the degree to which user fees are intended to achieve full-cost recovery. Nevertheless, many Canadian municipalities have in recent decades shifted an increasing share of the funding of private goods from the property tax to user fees, principally for the provision of water and sewer services and solid waste collection. As Althaus and Tedds (2016, ch. 3) report, there is extensive but sometimes inconsistent case law regarding the legal distinction between user fees, taxes, and licence fees.

### **5.1.2 Business occupancy taxes**

Municipalities can levy property taxes on non-residential properties in all provinces. Four provinces, however, also permit municipalities to levy separate business occupancy taxes: Alberta, Manitoba, Quebec, and Newfoundland and Labrador. Sometimes business occupancy taxes are levied in relation to property values; in other cases they are levied in relation to revenues, rental value, or other measures.

The Newfoundland and Labrador *Municipalities Act* enables municipalities to assess a “business tax” as a percentage of the gross revenue of a business if the “property tax is not applicable to a business because it has no fixed place of business or a place of business cannot be assessed” (s. 121(1)), or, if business property has been assessed but the municipality does not levy a property tax, it may assess a business tax as a percentage of the assessed value of business property (s. 121(2)). Manitoba also enables a municipal “business tax,” although the *Municipal Act* and the

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19. Alberta, for example, has amended the *Municipal Government Act* to enable municipalities to rebate property taxes over multi-year periods in order to attract and retain businesses. See Bill 7, the *Municipal Government (Property Tax Incentives) Amendment Act*, 2019, which received royal assent on June 28, 2019.

*Municipal Assessment Act* are silent on the process of assessing business properties for the purposes of these taxes.

Under Alberta's *Municipal Government Act* (sections 371–380), municipalities may assess business tax as a percentage of the gross or net annual rental value of the premises, the storage capacity of the premises, floor area, or assessed property value. Similarly, section 232 of Québec's *Act Respecting Municipal Taxation* enables local municipalities to impose a business tax “on the basis of its rental value.”

In most provinces, business occupancy taxes have been eliminated to improve business competitiveness. For example, Ontario limited the business occupancy tax in 1998 and Nova Scotia in 2006. The City of Calgary voted to consolidate its business tax with its non-residential property tax in 2011.

### **5.1.3 Other taxes and fees**

Other revenue streams, including accommodation levies, land-transfer taxes, and energy taxes, are used in various cities and provinces on a piecemeal basis. Unlike some American jurisdictions, no Canadian municipality may levy a retail sales or payroll tax.

Hotel and motel accommodation levies and destination marketing fees are increasingly common (see Yukon Tourism 2017). As **Table 5.1** shows, municipalities collect them directly in Manitoba, Ontario (as of 2019), Nova Scotia (Halifax only), Prince Edward Island, Newfoundland and Labrador (St. John's only). In Alberta, Saskatchewan, New Brunswick they are collected by third-party tourism organizations, while in British Columbia and Québec they are collected by the province directly or a provincial organization.

Several provinces permit municipalities to tax land transfers. Ontario allows the City of Toronto to piggyback on its Land Transfer Tax, but this arrangement is not available to other municipalities. Tassonyi and Conger (2015, 25) report that Manitoba, Nova Scotia, and Québec also permit municipal land or deed transfer taxes, but no Manitoba municipality levies it.

Winnipeg may be the only municipality that directly imposes taxes on residential and commercial electricity and natural gas consumption (*Winnipeg Charter*, sections 441–450). Winnipeg also imposes a tax on amusements (the Entertainment Funding Tax), levied on admissions to large venues. Toronto and Winnipeg are permitted to tax billboards and signs, and Toronto may tax motor vehicle registrations, but does not do so at present.

## **5.2 Revenues for capital purposes**

Municipalities rely on a variety of sources for capital expenditures. In addition to intergovernmental transfers, they:

- levy special assessments;
- borrow funds and issue bonds and debentures;
- levy development charges (also known as development cost charges or impact fees);
- capture land value uplift using tools such as density bonusing to secure public benefits in exchange for development rights above what regulation permits.

Tax-increment financing is used to direct incremental property tax revenues to repay debt incurred for investments that raise land values, typically within a defined district. User fees are also commonly used to fund maintenance and expansion of infrastructure that delivers private goods, such as water. The availability of these revenue sources is summarized in **Table 5.2**. For more detailed discussion, see Slack and Tassonyi (2017).

### 5.2.1 Special assessments and local improvement districts

A straightforward way for municipalities to raise funds for new or improved capital facilities is to levy a property surtax or frontage fee on properties that benefit from the new facilities.<sup>20</sup> Most provinces provide for some form or another of special assessment over and above property taxes to cover incremental capital costs. This logic may be taken further by establishing local improvement districts, which are also authorized to issue debt.

In Western Canada especially, local improvement districts have been used as a substitute for general-purpose municipal corporations in sparsely populated areas. The terminology differs from one province to the next. The Newfoundland and Labrador *Municipalities Act* authorizes “special assessments” (s. 149(1)) and Alberta’s *Municipal Government Act* provides for a “local improvement tax” (s. 391).

**Table 5.2: Sources of revenue for capital expenditures**

Source	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
Borrowing	X	X	X	X	X	X	X	X	X	X
Special assessments	X	X	X	X	X	X	X*	X		X
Local improvement districts	X	X	X	X	X	X	X	X	X	X
Development levies/charges	X	X	X	X	X		X	X		X
Density bonusing	X	X	X	X	X		X	X	X**	
Tax increment financing		X	X	X	X***					

\* The province may levy a business improvement area levy on behalf of BIA corporations.

\*\* Charlottetown only.

20. A frontage fee is a fee levied in proportion to the relative length of the front of a lot; that is, the side of the lot that runs along a street.

\*\*\* While Ontario has authorized TIFs in statute, it has not passed enabling regulations.

### 5.2.2 Borrowing

All provinces permit (and limit) borrowing for local capital purposes.<sup>21</sup> In British Columbia, New Brunswick, and Nova Scotia, provincial agencies issue debt on behalf of municipalities.<sup>22</sup>

Provinces limit municipal borrowing in different ways. The summary below and in **Table 5.3** is based on Tassonyi and Conger (2015, 15–17), supplemented by a review of legislation and regulation (see also Amborski 1998).

**Table 5.3: Limitations on borrowing**

Source	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL
Prior provincial approval of bond issues	X		X	X		X	X	X*		X
Elector approval	X							X**		
Cap on debt-servicing costs	X	X		X	X***			X	X	
Cap on total debt/liabilities	X	X	X	X			X		X	

\* Approval required only above a dollar threshold.

\*\* Villages and local service districts only.

\*\*\* Toronto has no provincially imposed borrowing limit but sets its own.

21. In this brief discussion, we do not distinguish between short-term and long-term borrowing, or between bank loans, bonds, and debentures.

22. British Columbia's Municipal Finance Authority is the most sophisticated of these bodies. In addition, the Newfoundland and Labrador Municipal Financing Corporation borrowed on behalf of municipalities between 1964 and 2006, but is in the process of being wound down. The Ontario Infrastructure and Lands Corporation assists municipalities with public-private partnerships, but does not comprehensively issue municipal debt. Financement-Québec and the Saskatchewan Municipal Financing Corporation lend money to municipalities and other public entities, but their use is not mandatory.



Six provinces require prior approval of all debt by the Minister or a delegated authority. British Columbia, for example, requires approval by the Inspector of Municipalities, while Manitoba requires all capital bylaws to be approved by the Manitoba Municipal Board. British Columbia and Nova Scotia are the only provinces that require some form of direct public approval before debt may be issued. British Columbia provides for some categories of long-term capital borrowing subject to an electors' referendum (*Community Charter*, sections 179–180), while Nova Scotia requires that all borrowing by villages and service commissions be approved at a public meeting of electors (*Municipal Government Act*, s. 90).

Most provinces impose limits on debt-servicing costs, or on the total value of debt outstanding, or both, through regulation:

- Alberta, British Columbia, Manitoba, Ontario, Nova Scotia, and Prince Edward Island set regulatory limits on the proportion of own-source revenues (in effect, the operating budget) accounted for by debt-servicing costs.
- Alberta caps limits on total outstanding debt as a proportion of annual revenue excluding capital transfers; Saskatchewan as a proportion of the previous year's revenues; British Columbia relative to population; and Manitoba, New Brunswick, and Prince Edward Island relative to the total assessed value of property in the municipality.

### **5.2.3 Development charges, levies, and impact fees**

One-time fees levied on new development to finance growth-related infrastructure—sometimes referred to as “lot levies”—are called “development charges” in Ontario and New Brunswick, “development cost charges” in British Columbia, “development levies” in Saskatchewan, “capital cost charges” in Nova Scotia, “service levies” in Newfoundland and Labrador, and “off-site levies” in Alberta. In the United States they are commonly referred to as impact fees.

For administrative convenience, fees are most often levied at the same rate across the municipality (average cost pricing) rather than reflecting the specific cost of service provision at the subdivision or parcel scale (marginal cost pricing). Québec is an exception; the *Act Respecting Land Use Planning and Development* provides for “municipal works agreements” between developers and municipalities (sections 145.21–30). Typically, these fees are passed onto the property purchaser by the developer.

There is variation across the country in what these charges or fees may fund (see also Baumeister 2012). Some frameworks, including Alberta's, limit expenditure to hard services, such as piped infrastructure and roads. Others allow funds to be spent on parks and recreation facilities (British Columbia and Saskatchewan). Ontario's regime, which has traditionally been the most permissive, is becoming more restrictive: Bill 108 (now known as the *More Homes, More Choice Act*, 2019) reduces the breadth of services that can be covered by development charges and shifts the costs for some of those services to a new community benefit charges regime.

#### 5.2.4 Density bonusing

Incremental property tax revenues flowing from land-value uplift are the most basic form of land-value capture. Another form is density bonusing (see also Moore 2013). In exchange for permitting a rezoning of land to a higher use, thereby increasing its value, the property developer agrees to construct facilities or infrastructure, or to contribute cash in lieu of finance off-site benefits. Density bonusing is available in Nova Scotia (*Municipal Government Act*, s. 220(5)(k) and *Halifax Regional Municipality Charter*, s. 31A), in British Columbia (*Local Government Act*, sections 482 and 904), and several other provinces.

Historically, density bonusing was most widely used in Ontario under the *Planning Act* (s. 37). Bill 108 (*More Homes, More Choice Act*, 2019) has replaced density bonusing with community benefit charges imposed by municipal bylaws. Ontario is currently issuing regulations respecting what can be covered by these charges, but the benefit charges cannot include costs recoverable under development charges.

#### 5.2.5 Tax increment financing

With tax increment financing, a municipality borrows money to make a localized improvement that is expected to increase land values. The property continues to be taxed at its prior rate; however, revenues are collected from the increment in land value to pay for the investment that increased the land value. Tax increment financing is widely used—and controversial—in the United States.

Tax increment financing is authorized in Manitoba, both generally (*Municipal Act*, s. 261.3) and in the *Winnipeg Charter* (s. 222), as well as in Alberta and Ontario. Alberta permits a “community revitalization levy,” subject to ministerial approval, whereby a council may “impose a levy in respect of the incremental assessed value of property in a community revitalization levy area to raise revenue to be used toward the payment of infrastructure and other costs associated with the redevelopment of property in the community revitalization levy area” (*Municipal Government Act*, s. 381.2(2)).

While Ontario has enabled TIFs in statute, it has never enacted enabling regulations. While not the same as a TIF, Ontario municipalities may issue subsidies called tax increment equivalent grants (TIEGs) to property owners as part of community improvement plans (*Planning Act*, s. 28).

### 5.3 Summary

The revenue sources available to municipalities for operating and capital purposes are broadly similar across Canada. All municipalities are empowered to levy property taxes and user fees for services, to charge fees for licences and permits, and to impose fines and penalties. These sources, along with intergovernmental transfers, fund virtually the entirety of municipal operating budgets. Municipalities have broad discretion to set tax rates and establish levels of user fees. Additional sources are available in some provinces, but these account for a relatively small proportion of the overall operating budget. Unlike the United States and some other countries,

no province permits municipalities to raise their own retail sales or income taxes.<sup>23</sup> Excise and business payroll taxes are rare.

For capital expenditures, all provinces enable municipalities to issue bonds for general or specific purposes (sometimes through a provincial borrowing agent), and to levy special assessments. Eight provinces provide for development charges and permit some form of density bonusing. A few provinces also permit tax-increment financing.

Debates surrounding the adequacy of municipal revenues have focused on opening up new tax fields to local governments—including value-added taxes (an HST surtax, for example), retail sales and excise taxes, and land-transfer taxes—or removing prohibitions on particular user fees, such as road and bridge tolls. It is commonly argued that diversifying local revenue sources away from the property tax for operating expenditures would make local finances more stable while tapping sources more directly tied to economic and population growth. Moreover, access to new own-source revenues is also viewed as a solution to the unpredictability of, or limitations on, intergovernmental transfers for capital investments.

Greater local revenue-raising autonomy and the enabling of a greater diversity of revenues are often portrayed as ways to make local governments more nimble, accountable to their residents, and insulated from arbitrary provincial action (Slack 2017). Nevertheless, observers have found that municipalities have not fully exploited the revenue sources they already possess (Bird, Slack, and Tassonyi 2012, ch. 8; Tassonyi and Conger 2015) and that provincial constraints have had the positive effect of maintaining municipal solvency (Hanniman 2015).

## **6. Asymmetrical Arrangements**

The focus to this point has been on general municipal legislation; that is, legislation that applies to all municipalities, or specific categories of municipalities, within a province. The use of general enabling frameworks rather than special acts to authorize municipal authority has long been the norm in Canada, one that was consolidated earlier even than in Great Britain (Taylor 2019, 47–51). In the United States, by contrast, one-off, idiosyncratic laws emerged as typical means of establishing and empowering local governments in the 19th century, a practice that continues to this day. For this reason, there is much greater institutional variation among American local governments than there is in Canada.

From the provincial perspective, a symmetric treatment of municipalities through a permissive general framework offers the potential for administering local government as a system. From the municipal perspective, however, asymmetrical provisions through special legislation permit the tailoring of institutions and jurisdiction to local conditions. (For example, some provinces have granted natural person power to specific municipalities. See **Box 6.1**) Both impulses are at work in

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23. Municipalities in some provinces levied income and other taxes as recently as the 1930s, but these powers did not survive the Depression.

Canada today, the former driving the shift toward the more permissive exercise of municipal authority described above, the latter spurring demands for *city charters*. We define such charters as the detaching of the enabling legislation for a specific municipality from the general statute so that a municipality draws most or all of its authority from a freestanding special law. The term “charter” is borrowed from corporate law. The historical precursors of today’s private and public corporations, such as the Hudson’s Bay Company, were “chartered” through the passage of a special act. As public corporations, early municipalities were chartered using the same legal mechanism.

***Box 6.1: Natural Person Power in City Charters***

Some provinces have granted natural person power to individual municipalities using special legislation. Winnipeg is the only Manitoba municipality to have been granted natural person power under the *City of Winnipeg Charter Act*. Although the *City of Montréal Charter* does not grant specific natural person powers to the City, it does dictate that the City is a “legal person,” endowed with full civil rights by the Québec Civil Code. Québec’s *Act Respecting Municipal Territorial Organization* also provides that each regional county municipality in the province is a “legal person in the public interest” (s. 210.5).

In 2017 in Nova Scotia, the Halifax Regional Council lobbied for the province to extend to it natural person powers (and peace, order, and good government power), but this request has not been taken up by the province (Halifax Regional Council 2017). The reverse is true in British Columbia, where most general-purpose municipalities possess natural person power under general municipal legislation, but the City of Vancouver does not.

Some special-act charters limit the use of natural person powers. Sections 13 and 82(2) of the *City of Toronto Act, 2006*, impose limits on the City’s authority to act under its natural person power in respect of certain financial matters. Similarly, section 213 of the *City of Winnipeg Charter Act* provides that the City’s natural person power does not authorize the City to (a) incorporate a corporation or nominate or authorize a person to act as an incorporator of a corporation, (b) acquire any interest in, or guarantee or exercise any power as a holder of, a security of a corporation, or (c) indemnify or guarantee the liability of another person.

Whether empowering all local governments through a permissive and flexible general framework would deliver better practical outcomes than the separate empowerment of individual municipalities is a matter of public debate in Canada and elsewhere. Much hinges on the degree to which the chosen legal structure is enabling and permissive as opposed to restrictive and directive. There is no legal reason for charters to be more permissive than general municipal laws, as is sometimes implied in public discourse. Politics determines the substance of the law, not the law itself.

This section discusses asymmetrical legal arrangements for specific municipalities in some provinces, with a focus on how they differ from the general municipal law operative in their provinces. We have grouped them into two models: *detachment* and *layering*.

### **6.1 Detachment**

The first model is *detachment*: the enactment of a special law, customarily called a “charter,” from which a single municipality derives its primary jurisdiction and powers. This does not mean that the municipality derives *all* powers from the special law. Rather, its defining feature is that the municipality is excluded from the effect of general law empowering municipal government elsewhere in the province.

For example, although the City of Toronto is incorporated and empowered by the *City of Toronto Act, 2006*, it, like all other Ontario municipalities, remains subject to many other laws concerned with public health, land-use planning, building standards, and so on. The *City of Toronto Act* simply means that the City of Toronto is not subject to the general *Municipal Act*.

In some cases, including Vancouver, Saint John, and Montréal, municipalities were initially incorporated by a special law and have remained so throughout their history. These incorporations occurred either in parallel to general municipal legislation (from which the cities were exempt), or prior to its passage. In other cases, such as the City of Toronto, a municipality long governed by general municipal law has been legally detached from it by the legislature.

The goal of detaching a single municipality from the general framework is to grant it powers that other municipalities do not, and should not, have, since if all municipalities were to exercise such powers, the legislature could simply amend the general law. The analytic question, then, is to identify how the content of special legislation differs from the general legal framework. To assess this, we briefly examine the special statutes for three municipalities—Vancouver, Toronto, and Winnipeg—drawing on Kitchen (2016) and other sources.

#### **6.1.1 The Vancouver Charter, 1953**

British Columbia enacted a rudimentary general law regulating municipal incorporation before joining Canada in 1871 (Bish and Clemens 2008, 22–23). The City of Vancouver, however, was established by special legislation—the *Vancouver Incorporation Act, 1886*—the current iteration of which is the *Vancouver Charter, 1953*. British Columbia’s *Community Charter, 2003*, and *Local Government Act, 1996*, do not apply to Vancouver. The *Vancouver Charter* also established Canada’s only directly elected special-purpose body, the Vancouver Parks Board.

The *Vancouver Charter* and the general law governing the province’s other municipalities differ in several important respects. In particular, the *Vancouver Charter* exemplifies the express powers doctrine in that it itemizes services, whereas the *Community Charter* grants a permissive sphere of authority. At the same time, Vancouver’s charter confers authority not available to other municipalities, including:

- the ability to borrow on its own authority without approval by the Municipal Finance Authority, a provincial agency that issues debt on behalf of all other municipalities in the province;
- the power to establish its own building code and impose requirements without provincial oversight;
- the power to prohibit businesses or business activities;
- the ability to impose specialized development cost levies (City of Surrey 2007).

In 2018, the *Charter* was amended to permit the City to impose a tax on vacant housing, distinct from the Speculation and Vacancy Tax levied by the British Columbia government directly in designated regions, including the City of Vancouver.

The *Vancouver Charter* has also enabled the evolution of a distinct land-use planning regime, which follows the British practice of development control through permits that need not be consistent with an adopted zoning bylaw. Vancouver's council is also authorized to delegate development permission to the Director of Planning, whereas the *Community Charter* requires municipal councils to approve all development permits and requires that this permission be consistent with approved zoning. Another idiosyncratic feature of Vancouver's charter is that it has enabled the city to adopt its own building code that supplements the provincial code.

### **6.1.2 The City of Toronto Act, 2006**

Toronto was chartered by special act in 1834, but in 1849 was brought under the general municipal law commonly known as the *Baldwin Act*. It, along with all other Ontario municipalities, remained under the jurisdiction of the *Municipal Act* until 2006, when the *City of Toronto Act* detached the city's incorporation and grant of authority from the general law.

At the time of its enactment, the *City of Toronto Act* differed from the *Municipal Act* in several respects, but some Toronto-only powers were later added to the general act. The explanatory note at the beginning of Bill 130, which amended the *Municipal Act*, states, “[T]he amendments to the *Municipal Act*, 2001, would give municipalities most of the powers and duties that were given to the City of Toronto under the *City of Toronto Act*, 2006.” The grant of authority, including spheres of jurisdiction, statement of purpose, and natural person powers provisions are worded almost identically in the two acts (Sancton 2016).

Despite this high degree of symmetry between the two acts, the City of Toronto does have some unique powers, including the ability to levy taxes not available to other municipalities. Section 267(1) authorizes the City to levy any direct tax, but this permissive authority is limited by a list of exclusions. In effect, the City is not permitted to tax income, payrolls, wealth, inputs to economic production (e.g., machinery and natural resources), energy consumption, or sales of goods and services, and may not impose tolls on roads. A tax on people by virtue of residence in the city (a poll tax) is also prohibited.

Experts have determined that scope for new taxes remains after these exclusions, including taxes on motor-vehicle registration, on land transfers, on billboards,<sup>24</sup> and, following a 2017 amendment, on temporary lodging, including hotel occupancy. The City currently levies the Municipal Land Transfer Tax collected on its behalf by the provincial government, the Third Party Sign Tax on billboards, and the Municipal Accommodation Tax. Toronto also taxed motor vehicle registrations between 2008 and 2011.

The City of Toronto can also set its own limitations on borrowing, although sections 256–257 of the *City of Toronto Act* permit the Lieutenant Governor in Council to enact regulations regarding any aspect of the municipality's financial activities.

### **6.1.3 The City of Winnipeg Charter Act, 2002**

As in British Columbia, general municipal legislation was adopted soon after Manitoba joined Confederation and continues as the *Municipal Act*, 1996. After an unsuccessful attempt by local citizens to incorporate Winnipeg under the general municipal law, the City of Winnipeg was chartered by special law in 1873, and it has remained governed by special legislation ever since. Winnipeg's governance has undergone considerable reform since the Second World War, with comprehensive institutional restructurings in 1960 and 1972.

The purposes in Winnipeg's charter (s. 5(1)) reflect but differ slightly from those in the *Municipal Act* (s. 3). Both laws state that the purposes of the municipality are to provide good government, to provide services the council deems necessary or desirable, and to promote and maintain a "safe" and "viable" community. To this the Winnipeg act adds "to promote the health, safety, and welfare of the inhabitants." The Winnipeg charter contains additional clauses, not paralleled in the general law, which recognize the city as "a responsible and accountable government" (s. 5(2)) whose authority is to be broadly interpreted (s. 6). The charter also confers natural person power (s. 7(1)). Although the general law does not grant natural person power, it allows Manitoba municipalities to engage in a wide range of activities, including agreements and contracts with private entities and other governments.

Both Winnipeg's charter and the *Municipal Act* contain broadly permissive grants of authority. The *Winnipeg Charter* is more detailed in its enumeration of spheres of jurisdiction (Pt. 5) than is the *Municipal Act* (Pt. 8), although Kitchen (2016, 4) finds that the spheres of jurisdiction and mandated services are broadly similar in both laws. However, unlike all other Manitoba municipalities, Winnipeg may borrow without seeking approval from the Manitoba Municipal Board.

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24. The Ontario Court of Appeal upheld the City's third-party signs tax, enacted in 2010, in *Out-of-Home Marketing Association of Canada v Toronto (City)*, 2012 ONCA 212. The court rejected the appellant's arguments that the tax was not a direct tax and that it was discriminatory. Moreover, the court overruled the initial ruling that the tax could apply only to billboards erected after the tax's introduction, stating that such grandfathering was counter to the spirit of the City of Toronto Act's broad grant of authority.

The 2003 *Winnipeg Charter* gave the city unique authority to establish tax increment financing districts and offer certain types of grants and tax credits, but these provisions were later incorporated into the general *Municipal Act*. Nevertheless, Winnipeg remains uniquely capable of levying taxes on gas and electricity consumption, as well as business improvement taxes within designated zones.

## **6.2 Layering**

The second model is *layering*. In this approach, the municipality remains subject to general municipal law but its authority is augmented by special laws or regulations. In principle, layering enables the best of both worlds: harmonized provisions that apply to all municipalities combined with customization where appropriate.

### **6.2.1 Montréal**

The City of Montréal derives its powers from the *Cities and Towns Act* and the *Municipal Powers Act*, but supplementary legislation augments its authority: *The Charter of the Ville de Montréal, Metropolis of Québec Act, 2017*. The charter states that unless it, or an order of the provincial government, provides otherwise, “the city is a municipality governed by the *Cities and Towns Act*” (s. 4).

A substantial proportion of Montréal’s charter is devoted to defining the organization of its distinct institutions, including the powers of the city and borough councils, as well as provisions relating to the dissolution of the former Montréal Urban Community and the mergers and demergers that occurred in the early 2000s. Section 84 states that the “city has jurisdiction in all matters within the jurisdiction of a local municipality” as defined in the *Municipal Powers Act*. These are supplemented by enumerated fields of jurisdiction for the city council, such as land use planning and development and economic promotion (Ch. III, Div. II) and borough councils, such as urban planning, fire safety, and civil protection (Ch. III, Div. III). The charter also mandates the city to “adopt a Montréal charter of rights and responsibilities” (s. 86.1), which it did in 2006.

### **6.2.2 Calgary and Edmonton**

The Alberta government amended the *Municipal Government Act* in 2015 to enable the Lieutenant Governor in Council to establish “city charters” by regulation (s. 141.1). The provision is sweeping, stating that the charter regulation may exempt the municipality to which it applies from any law, confer authority not currently in law, and allow the city, by bylaw, to “modify or replace...a provision of this Act or any other enactment” (s. 141.5(3)). Moreover, s. 141.6 states that any inconsistencies between the charter regulation and provincial law are resolved in favour of the former.

The Calgary and Edmonton regulations purport to amend statutes. An interpretive clause states that the charter sections “modify” the provisions of the *Municipal Government Act*, “as it is to be read for the purposes of being applied to the City” (s. 4(1)). The regulation renumbers sections and subsections of the statute, inserts new clauses, and amends existing ones. Other statutes, including the *Traffic Safety Act*, are similarly modified.



The charters are broadly enabling. Section 4(4) reads an expansive enabling clause into the *Municipal Government Act*:

**8.1** Without restricting the generality of sections 7 and 8 [of the *Municipal Government Act*, which establish municipal spheres of jurisdiction and bylaw authority], the council may pass a bylaw for any municipal purpose set out in section 3 [of the *Municipal Government Act*].

As the “purposes” in Section 3 of the *Municipal Government Act* are broadly encompassing, the charters grant the cities a permissive and open-ended scope of authority.

The charters also establish new powers and areas of jurisdiction that Calgary and Edmonton may exploit by bylaw. Specifically, the cities now have the authority to enact new forms of statutory land-use regulation (s. 4(33)), define their own subdivision approval standards (s. 4(35)), levy supplementary assessments on property that has changed from farm to another use (s. 4(17)), and impose stricter building code standards to meet environmental and energy code objectives (e.g., s. 7(2)). Calgary, but not Edmonton, can establish its own debt-servicing policies, including a debt limit, run operating deficits for up to three years (s. 4(7)), and impose off-site infrastructure levies (s. 4(35)(1)). Both cities are required to establish Climate Change Mitigation and Adaptation Plans (s. 4(30)).

Finally—perhaps to address concerns about accountability, since the charters bypass the scrutiny they would have received had they been enacted as statutes by the legislature—the charter regulations provide for public scrutiny of bylaws made under their authority (s. 9(1)). However, bylaws made under section 4(4), the blanket authority clause described above, are exempted from the public hearing requirement (s. 9(2)).

Although the charter regulations remain in effect, Alberta’s *Fiscal Measures and Taxation Act*, 2019 (Bill 20), repeals and replaces the *City Charters Fiscal Framework Act*, 2018, which legislated fiscal arrangements that accompanied their creation. It remains to be seen whether the provincial government will choose to alter or rescind the charter regulations themselves.

### **6.3 Summary**

Two general conclusions emerge from the brief examination of the stand-alone, special-act charters in Vancouver, Winnipeg, and Toronto. First, the separate legal establishment of large cities has not conferred significant additional powers on them. “Charter” cities do not do fundamentally different things from municipalities that fall under general municipal legislation. Even if the laws differ in their legal construction and organization (as with the *Vancouver Charter*), the grant of authority and scope of jurisdiction are broadly similar. While there is variation in access to specific, and mostly minor, tax fields, the property tax and user fees remain the primary sources of municipal revenue. Second, a long-run trend toward legal harmonization

is evident, as many or all of the additional powers eventually find their way into general municipal legislation.

Both these conclusions call into question the substantive (as opposed to symbolic) purpose of detaching particular cities from the general municipal law in the first place, thereby adding complexity to an already complex body of law. Many, if not most, of the provisions in the general municipal law are generally applicable and therefore mirrored in special act charters. This complexity increases the burden on the legislature, which must maintain two parallel bodies of functionally similar law, including their dependencies on and cross-references to other legislation. As we discuss below, supplementary powers could be granted to specific municipalities by other means while leaving the generally applicable provisions of the general municipal act intact.

In the layering model, we find that Québec's special law for Montréal and the Alberta city charters are functionally equivalent insofar as they layer additional authority on top of an established general statute. They use different legal mechanisms, however.

The Québec National Assembly used the traditional method: a special law that parallels and supplements general legislation. The primary effect of Montréal's charter is to define its idiosyncratic institutions and decision-making processes, which differ from those of other municipalities in the province. While the city's scope of jurisdiction is modified from the general law, the charter legislation retains the basic structure of detailed enumerated powers and spheres of jurisdiction and does not expand the general welfare power found in the *Municipal Powers Act*.

Alberta has taken an unorthodox approach: proclaiming regulations that effectively rewrite general legislation as it applies to specific municipalities. Whether this approach is consistent with common-law legal traditions is open to question. As Homersham (2018) notes, Canadian parliamentary committees and courts have cautioned against the use of regulation to modify primary legislation, because regulations are not subject to parliamentary scrutiny and approval, and because subdelegating the authority to effectively amend provincial laws to municipal councils is offensive to parliamentary supremacy.<sup>25</sup> Nevertheless, due to their relatively open-ended construction, Alberta's reforms may create the broadest potential scope of local authority in any Canadian municipality, although full exploitation of this authority will depend on the creativity of municipal policymakers and its limits will likely be tested in the courts.

Ultimately, separate incorporation of individual municipalities by special act and the layering of special provisions onto the general legal framework have had only a modest effect, legally speaking, on the provincial-municipal relationship. To be sure, these charters delegate more permissive authority, may contain statements recognizing the democratic character of local government and the desirability of

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25. Such regulations are called "Henry VIII clauses"; essentially, the king undermined Parliament in the 16th century by pressuring it to delegate to him the power to rewrite legislation by proclamation.

a provincial-municipal partnership, and increase the scope of decision-making autonomy by exempting their cities from specific requirements for provincial approval.

The political and symbolic effects of separate legal arrangements for large cities should not be underestimated. They may encourage provincial forbearance and spur more aggressive and innovative local political leadership. Nevertheless, provincial legislatures remain constitutionally unfettered in their ability to unilaterally amend charters and make regulations. In this sense, these asymmetrical legal arrangements are no different from parallel general municipal laws.

## **7. Conclusion**

This overview suggests that general municipal laws in Canadian provinces bear strong similarities to one another, in part due to the diffusion of legal ideas across provincial boundaries. Where once the 1849 *Baldwin Act* was the template for general municipal law across the country (with historical exceptions in the Maritime provinces and Newfoundland and Labrador), the Western provinces led a national wave of legal reform starting in the 1990s.

Most provinces have shifted from a restrictive, express-powers framework that narrowly construed municipalities as service delivery corporations to one that recognizes municipalities as accountable and responsible democratic governments and grants them permissive authority through the general welfare power, broad spheres of jurisdiction, and the natural person power. The courts have supported this trend with a generous interpretation of municipal authority. Some provinces have also developed special arrangements for the core municipalities of their largest metropolitan areas.

Yet within this trend toward more permissive and variegated municipal legal frameworks, however, there are significant variations both between and within provinces in the scope of powers, institutional structures, and (to some degree) revenues available to municipalities.

### **7.1 Trends**

While often criticized for being static, Canadian municipal law is in a period of significant transition. Much has changed in recent years, and the extent and pace of change is increasing. Several trends are evident:

1. *Provinces increasingly recognize municipalities as accountable, democratic governments.* Several provincial legal frameworks now recognize municipalities as “responsible and accountable” governments and require the province to consult with municipalities on actions that affect them. British Columbia and Nova Scotia go so far as to recognize municipalities as an “order of government,” a term usually reserved to the federal and provincial governments, and sometimes Indigenous governments established through treaties. Some provinces have signed memoranda of understanding with individual municipalities or municipal associations. While perhaps merely symbolic, these agreements indicate an important shift from municipalities’ historical origins as corporations that delivered services to their

shareholders: property owners and businesses. We expect such provisions to diffuse across the country as provinces continue to modernize their municipal legislation.

2. *Municipal grants of authority are increasingly expansive and permissive.* Compared to the 1940s, and even the 1980s, municipalities in most provinces operate within a permissive enabling legal framework the boundaries of which have not yet been fully tested. The supplementing of narrow express powers with more encompassing spheres of jurisdiction, natural person power, and an expansive general welfare power enable a broad scope of municipal action that has been generously interpreted by the courts. While the pace of change has been uneven across the country, the trend has been toward greater empowerment and permissive application. Nova Scotia and Newfoundland and Labrador are conspicuous in having neither established spheres of jurisdiction nor conferred natural person powers.
3. *The courts have increasingly demonstrated a generous interpretation of municipal authority.* The courts have not only tested the limits of local authority, but also expanded the legal meaning of grants of authority. While sustaining the constitutional construction of municipalities as “creatures of the provinces,” the judicial interpretation of local bylaws has become more generous and deferential since the dissent by Justice McLachlin in the Supreme Court of Canada’s 1994 Shell decision, in which she stated that “Courts should not be quick to substitute their views for those of elected council members on what will best serve the welfare of the city’s citizens.” The current and potential effect of more expansive judicial interpretation is not fully known, but, as we note later, worthy of systematic study.
4. *Big cities increasingly operate under bespoke legal arrangements, but their long-term impact remains unclear.* Much energy has been expended over the past 25 years on the idea of “city charters,” or what we characterize as asymmetrical arrangements for large cities. While the legal instruments differ, Toronto, Halifax, Calgary, and Edmonton have joined Vancouver, Winnipeg, Montréal, and other urban municipalities in deriving some or all of their authority from separate statutes relative to other cities. The constitutional relationship of municipalities to the province remains unchanged, however, and the powers available in special laws largely mirror those in general legislation. The modern wave of charter experimentation in Toronto and in the Alberta cities may represent a tentative first step toward greater asymmetry. Comfort with bespoke arrangements may lead to greater differences between charters and general municipal laws. Alternatively, as seen in Ontario, general municipal law is often subsequently amended to incorporate the provisions in city charters. The adoption of charters may fuel a generalized thrust toward more expansive and permissive delegation of authority to municipalities in a ratchet effect.
5. *Fiscal empowerment lags legal empowerment.* The broad transformation in local government law we have described has not been accompanied by equally far-reaching changes in municipal access to own-source revenues. Few municipalities

have access to revenues beyond property taxes, fees, and penalties for operating purposes, and borrowing for capital purposes. Most provinces also enable development charges and density bonusing to offset localized capital costs associated with development. Researchers have questioned whether the available revenue source mix is appropriate in a postindustrial economy and for large cities, and also whether municipalities have fully exploited their existing revenue sources.

We have not discussed intergovernmental fiscal transfers because they are not a matter of municipal law. Two notable exceptions are the Federal Gas Tax Fund block grant established in 2005 (Dupuis 2016) and Alberta's 2018 City Charters Fiscal Framework Act, which establishes an ongoing statutory funding formula for Calgary and Edmonton. (The latter will be repealed and replaced with a less generous formula when Bill 20 comes fully into force.) Nevertheless, all local governments receive some combination of conditional and unconditional grants from the provincial governments by annual appropriation. The future will no doubt bring vigorous debate over whether and how much municipal fiscal stress should be addressed by:

- more intensive use of existing local revenue sources;
- enabling greater discretion in setting rates and how revenues can be spent (see, for example, Found 2019);
- increased unconditional support from the provincial and federal governments, perhaps through transferring a share of the federal GST;
- “uploading” responsibilities to provinces; or
- opening up new tax fields to municipalities, such as excise and payroll taxes.

Regarding the last possibility, both theory and practice suggest that while revenue diversification is beneficial, strong political and competitive forces constrain any given municipality from imposing higher taxes than its neighbours (McMillan and Dahlby 2014; Tiebout 1956). Some have called for such taxes to be levied at the regional scale to minimize negative effects, and have noted significant variations in municipal tax bases: rich municipalities can raise more local revenue than poor ones.

## 7.2 Observations

What have we learned from this review of municipal legislation?

1. *We do not yet know the limits of existing municipal powers.* The shift to more permissive grants of authority and the enactment of asymmetrical arrangements for large cities are recent. The full effect of these trends remains unknown and will be revealed only as local politicians and administrators devise initiatives that fully exploit their potential and statutes are interpreted by the courts.
2. *While local self-government is a cornerstone of our political tradition, municipalities cannot be nation-states in miniature.* Municipalities cannot go it alone because they are subject to larger economic, social, and environmental forces and are

embedded in complex, historically evolved constitutional, legal, administrative, and fiscal systems. Municipalities need empowering legal and fiscal frameworks that reward creative problem-solving and democratic accountability without generating new inequalities and negative spillover effects. In establishing these frameworks, provinces must be constructive partners with municipalities. There is a risk, however, that greater municipal empowerment will reduce the incentive for provinces to maintain and support legal and fiscal frameworks—much as home rule, both as a legal instrument and governing idea, has led American state governments to neglect the fiscal and other needs of their cities.

3. Insofar as provinces are engaged in local affairs, much depends on their wisdom and forbearance. Throughout this paper, we have emphasized the constitutional foundations of the provincial-municipal relationship. As constitutionally entrenched sovereign governments, provinces can alter laws, regulations, and policies affecting municipalities as they see fit. Whether they will do so wisely and strategically is a political question, not a legal one.
4. *Greater institutional autonomy may be the next frontier.* Compared with the United States, the internal organization of Canadian municipal representative and administrative institutions is highly uniform, because of prescriptive provincial legislation. It is an open question whether a more permissive legal approach—for example, enabling municipalities to adopt “strong” mayors, partisan elections, or other variations—would spur more innovative policymaking, more accountability and transparency, or greater operational efficiency. For example, Ontario’s enabling of alternative electoral systems (see *Municipal Elections Act*, s. 41.1, which enables ranked-choice ballots) indicates the potential for municipalities to make such important institutional decisions on their own.

### 7.3 Suggestions for further research

This paper has provided a general overview of provincial legal frameworks that constitute, empower, and constrain municipalities. The intricacies of general and special municipal laws and their legal interpretation in the 10 provinces require additional focused investigation. In particular, further research would be beneficial on three fronts:

1. *Municipal survey on legal constraints.* This overview shows that municipal law is both enabling and constraining, and has become more permissive over time. What we do not fully understand, however, is exactly how constraints are experienced in everyday municipal governance. We recommend a survey of all Canadian municipalities, large and small and in all provinces, to identify what specific legal provisions (as opposed to fiscal limitations) prevent them from accomplishing important objectives. The results of such a survey would enable the focusing of reform advocacy on matters of everyday significance.
2. *Case studies of municipal innovation using new legal tools.* Municipalities have more powers than ever before, yet we know little about how they are being used. We

recommend a research program to discover how municipalities are working at the limits of their legal authority to pursue policy objectives. In particular, we recommend focusing attention on bylaws and undertakings adopted on the basis of the general welfare power, broad grants of authority, and the natural person power.

3. *Monitoring litigation and judicial interpretation.* The meaning of statutes is fleshed out through legal challenges and judicial interpretations. We recommend the ongoing monitoring of court challenges to boundary-pushing municipal initiatives, as is performed by the FCM's Legal Defence Fund. Again, a key focus should be on initiatives grounded in the general welfare power, the grant of authority, and the natural person power. This would not only reveal how the courts are interpreting the expanded powers and grants of authority in reformed municipal laws, it would also provide municipalities with insights on how to frame such bylaws.

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