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Escaping from the Straightjacket That Baffled Houdini: An Analysis of the Myths and Realities of Empowering Toronto Through a City Charter

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ESCAPING FROM THE STRAIGHTJACKET THAT BAFFLED HOUDINI

**AN ANALYSIS OF THE MYTHS AND REALITIES OF
EMPOWERING TORONTO THROUGH A CITY CHARTER**

MPA RESEARCH REPORT

SUBMITTED TO

**THE LOCAL GOVERNMENT PROGRAM
DEPARTMENT OF POLITICAL SCIENCE
THE UNIVERSITY OF WESTERN ONTARIO
LONDON, ONTARIO, CANADA**

JULY 30, 2005

WRITTEN BY

LUIS SILVA

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ABOUT THE AUTHOR

Luis Silva was an elected school trustee in the City of Toronto for the Metropolitan Separate School Board (MSSB) from 1994 to 1997, representing the area of MSSB Ward 4 in the former Toronto wards of 11 and 12. In 2004, he enrolled as a Master of Public Administration (MPA) student in the Local Government Program at the University of Western Ontario.

ABSTRACT

The purpose of this report is to investigate the belief that a Canadian city can be legally empowered through a legislative charter to defend its autonomy from the actions of the provincial government. In order to ensure a proper examination of this belief, the study explores not only the political relationships that Canadian municipalities have with their provinces, but the legal relationships as well. While some provinces may politically treat some of their municipalities differently from others, the research indicates that no legal differentiation exists between charter cities and other municipalities with regards to protecting local self-government despite the fact that charter cities have an exclusive relationship with the province in comparison to other municipalities.

In order to address this legal inadequacy, the report explores the feasibility of other possible methods of protecting municipal autonomy from the political actions of the provincial legislature. Since the Ontario government has indicated that it intends to introduce legislation by the end of 2005 that would effectively transform the City of Toronto into a charter city, this report will focus on the relationship Toronto has with the province of Ontario.

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“It’s a miracle [Toronto] has delivered prosperity for so long and to so many — despite living in a legislative and fiscal straightjacket that would baffle Houdini.”

— Ontario Premier Dalton McGuinty¹

INTRODUCTION

In a speech delivered to the Summit of Big City Mayors on September 17, 2004, Premier Dalton McGuinty explicitly captured the essence of the frustrated sentiment that has dominated the general thinking within the City of Toronto from 1997 to 2005 — that the city exists in a metaphorical straightjacket imposed upon it by the Ontario government. Even though the original text of the speech noted that a “modernized *City of Toronto Act* could be introduced” by the end of 2005 in the provincial legislature, the premier slightly deviated from the prepared script by substituting the word “could” with “will,” thereby solidifying his government’s support for such an initiative.²

By talking about a new relationship between the province and the city, and by publicly committing the provincial government to enact new legislation to that effect by the end of 2005, the premier has generated some excitement with his pledge. Some view this commitment as the manifestation of granting Toronto its own municipal charter, thereby placing the city in the same league as other classic charter cities in Canada, such as Montreal, Saint John, Vancouver, and Winnipeg.

Consequently, this leads to the following question: Can a municipal charter empower Toronto to a position where the city will be able to finally escape from its imposed straightjacket? While it could be pointed out that the premier’s comments mentioned a legislative and fiscal straightjacket, for the purposes of this research, the primary focus will be on the legislative relationship between the city and the province.

¹ Office of the Premier, Government of Ontario, News Release: “Notes for Remarks by Dalton McGuinty, Premier of Ontario: Address to the Big City Mayor’s Summit,” Toronto, Queen’s Printer for Ontario, September 17, 2004, p.8.

² Ian Urquhart, “Premier and Mayor on Same Path,” *Toronto Star*, September 25, 2004, p.H2.

With this in mind, the research will address the question by analyzing four major issues in four separate sections.

First of all, important concepts, such as the concept of a charter and empowerment, must be defined within the parameters of the legal framework that exists in Canada. This section will expose just how constitutionally vulnerable municipalities are in relation to other governments in Canada, especially since they are an administrative responsibility of the provinces. Even though municipalities are legally subordinate to the provincial government, it will be revealed that the link between a province and its municipalities is a sophisticated interaction involving not just a legal relationship between the two entities, but a political relationship as well. Without a general understanding of this association, it would be difficult to proceed with a meaningful analysis of how a municipal charter fits into the overall framework of provincial-municipal relations.

After a general understanding of provincial-municipal relations has been established, historical accounts of the political and legal relationships that charter cities have with their respective provincial governments must be acknowledged. This is the second major part of the overall investigation. After these historical examples have been examined, not only will they reveal the unique relationships that charter cities have with the provincial government, they will also uncover the weaknesses that are inherent in municipal charters.

The third major component of the investigation will cover the period from Toronto's incorporation as a city to its contemporary circumstances. If this analysis is not conducted, it would be difficult to understand the origins of Toronto's charter movement, and disclose the belief some in the movement possess that a charter is the solution to protecting the city's autonomy from the political actions of the Ontario legislature. At the same time, this examination will not only reveal the compelling reasons favouring a

charter for the city, it will also expose the convincing objections to it.

After the details of the Toronto charter movement have been analyzed, it is important to study some ideas that have been proposed by local government experts as possible solutions that could resolve the lack of legal power that Canadian municipalities inherently possess. This is the final part of the overall investigation, and it will involve a critical analysis of the viability of implementing each suggestion.

Once all four major issues have been properly analyzed in their separate parts, two final conclusions will be drawn. First of all, with or without a charter, the City of Toronto will still remain a creature of provincial statute, thereby leaving the city susceptible to the political decisions of the Ontario legislature. Secondly, the answer to empowering Toronto lies not necessarily in the city receiving a charter, but in the development of an explicit protocol on municipal autonomy between the city and the province that is easy to implement and legally difficult for the provincial legislature to unilaterally revoke. Only in this way will the City of Toronto be able to escape from its legislative straightjacket.

PART 1: LEGAL FRAMEWORK

1.1 What is the Law in Canada?

According to Section 52(1) of the *Constitution Act, 1982*, the supreme law in Canada is its constitution. This means that any legislation enacted by any government in the country must conform to the provisions established in the constitution. If any part of a statute is determined by the judicial system to be in violation of the terms of the constitution, the offending provision is declared unconstitutional and rendered void. At the same time, however, it should be pointed out that the Canadian Constitution not only includes a written part, but also an unwritten part as well.

After all, the preamble to the *Constitution Act, 1867* states that the Canadian Constitution is to be a constitution “similar in principle to that of the United Kingdom,” which — contrary to the popular notion of having an unwritten constitution — has an “uncodified constitution.”³ This means that the British Constitution, while not codified into a single document, exists through a mixed collection of written documents, such as the *Magna Carta* of 1215 and Parliamentary statutes, as well as unwritten conventions and precedents, such as the Common Law legal system. While the Canadian Constitution is not exactly an uncodified constitution, it is nevertheless a mixture of written and unwritten rules. As the Supreme Court of Canada put it:⁴

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

³ Wikipedia Administrators, Web Page: “Constitution of the United Kingdom,” *Wikipedia: The Free Encyclopedia*, St. Petersburg, Florida, Wikimedia Foundation, Inc., updated June 16, 2005, 19:44 UTC. Information retrieved through <http://en.wikipedia.org/wiki/Constitution_of_the_United_Kingdom> [Accessed June 16, 2005].

⁴ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, p.220.

An example of Canada's unwritten constitution exists with the institution of the Prime Minister. Other than a formal mention of this institution with respect to constitutional conferences under Section 37 of the *Constitution Act, 1982*, no other act explicitly creates the office, thereby demonstrating that the position of Prime Minister exists by virtue of an unwritten convention.⁵

In addition, the Supreme Court of Canada recognized the roles of the legal and political systems with regards to discharging and enforcing the Canadian Constitution. In its view, "a distinction [is] drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions."⁶ According to this ruling, it appears that unwritten conventions in Canada are enforced by the power of the political system, and not necessarily by the judiciary.

With respect to the explicit part of the Canadian Constitution, the preamble to the *Constitution Act, 1867* also states that the provinces express a "desire to be federally united into one Dominion under the Crown of the United Kingdom." This statement of a federal union implies that power is to be divided between the levels of government. In the interest of minimizing potential jurisdictional quarrels among the different tiers of government, it was recognized that the division of power had to be explicitly stated in a document for the purpose of determining which tier was responsible for what particular issue. This document is the written part of the Canadian Constitution.

The written constitution in Canada includes legal documents, such as the *Constitution Act, 1867* and its subsequent companion, the *Constitution Act, 1982*, which

⁵ William F. Maton, "Canadian Constitutional Documents: A Legal History," Ottawa, Solon Law Archive Project, November 27, 2001. Information retrieved through <<http://www.solon.org/Constitutions/Canada/English/>> [Accessed June 14, 2005].

⁶ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, p.270.

contains, among other things, the *Canadian Charter of Rights and Freedoms* and an amending formula for constitutional revisions. The basic division of power between the levels of government can be traced to Section 91 and Section 92 of the *Constitution Act, 1867*, where matters deemed to be in the national interest are located in Section 91, and matters deemed to be a provincial interest are located in Section 92. Since provincial legislatures had the ability to establish and organize human settlements situated within their territories into municipal entities by an unwritten convention prior to Canadian Confederation,⁷ this implicit practice became officially explicit under Section 92(8) of the *Constitution Act, 1867* when the provinces assumed exclusive authority over municipalities in Canada.

1.2 What is a Municipality in Canada?

Contrary to a common misconception, municipalities are not an order of government within Canada like the national or provincial orders of government. Even though municipalities behave like the other levels of government since they also include a governance structure comprised of elected officials with the ability to levy taxes, they are just one provincial responsibility among a list of other responsibilities assigned to provincial governments under the Canadian Constitution. This means that any Canadian municipality — whether it is a city, a county, a hamlet, a parish, a town, or a village — is a corporation established by the province. Municipal corporations, as the Supreme Court of Canada declared, “are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.”⁸ Since municipal powers are explicitly granted by the provincial government, this implies that a municipality does not legally possess any inherent authority. In a

⁷ Gerald M. Craig (Editor), *Lord Durham's Report*, Toronto, McClelland and Stewart, 1963, p.145.

⁸ *R. v. Greenbaum* [1993] 1 S.C.R. 674, p.687.

constitutional sense, as former Westmount mayor Peter Trent colloquially put it, municipal “councils are populated with the eunuchs of Canadian politics.”⁹

At the same time, it should be pointed out that a province cannot simply grant its municipalities any arbitrary authority. In fact, a province is limited in conferring to its municipalities only those powers it possesses under the constitution.¹⁰ This means that a province cannot, for example, give its municipalities the ability to regulate the postal service within their local boundaries since this service is a matter of exclusive federal jurisdiction under Section 91(5) of the *Constitution Act, 1867*. However, a province can, for instance, give its municipalities the power to regulate properties situated within their local boundaries since it has ability to do so under Section 92(13) of the *Constitution Act, 1867*.

Not only does a province have the ability to bestow a particular authority to its municipalities, it also has the ability to unilaterally modify or revoke any municipal authority that it has previously granted.¹¹ Since municipal powers can be conferred, modified, or revoked at the pleasure of the provincial government without any requirement of securing the consent of the affected community, it should not be surprising, as Engin Isin notes, that the municipal powers are not really local in nature insofar as the act of incorporating municipalities is not a covenant of the provincial legislature with the local inhabitants, but a provincially administrative matter.¹²

⁹ John Sewell, *A New City Agenda*, Toronto, Zephyr Press, 2004, p.73.

¹⁰ Office of the Chief Administrative Officer, City of Toronto, Strategic and Corporate Policy Division, “Powers of Canadian Cities: The Legal Framework,” *Towards A New Relationship With Ontario and Canada*, Background Report prepared by Corporate Services Department, Legal Division, June 2000, p.1.

¹¹ *Ibid.*

¹² Engin F. Isin, *Cities Without Citizens: The Modernity of the City as a Corporation*, Montreal, Black Rose Books, 1992, p.2.

In addition, since Canada has ten provinces, each with exclusive authority over its municipalities, it should not be surprising that municipal powers vary across the country. Like individual parents living in separate households within the same neighbourhood and responsible for their set of children, one province can allow its municipalities extensive independence while another allows little discretion, and one province can treat all its municipalities equally while another can treat one or some municipalities differently from the others. This means that the power of a municipality is really dependent on the political will of the provincial legislature concerned. Based on this information, it should not be a surprise to mention that while some Canadian cities were incorporated under the apparatus of a provincial statute generally applicable to all municipalities, others were incorporated with an exclusive charter.

1.3 What is a Charter?

According to the Encyclopædia Britannica, a charter is best described as a legal document “granting specified rights, powers, privileges, or functions from the sovereign power of the state to an individual, corporation, city, or other unit of local organization.”¹³ Since medieval times in Europe, monarchs officially incorporated various entities — cities, merchant associations, professional guilds, towns, and universities — by regularly issuing charters that specified their purposes and internal structures. Some of the earliest examples where a charter was used as a method of incorporating a city occurred in England when Hereford and Worcester were officially established as cities in 1189.¹⁴

¹³ Encyclopædia Britannica Online, Web Page: “Charter,” *Encyclopædia Britannica*, Chicago, Encyclopædia Britannica, Inc., 2005. Information retrieved through <<http://www.britannica.com/eb/article?tocId=9022649>> [Accessed June 14, 2005].

¹⁴ Wikipedia Administrators, Web Page: “City Status in the United Kingdom,” *Wikipedia: The Free Encyclopedia*, St. Petersburg, Florida, Wikimedia Foundation, Inc., updated June 5, 2005, 14:25 UTC. Information retrieved through <http://en.wikipedia.org/wiki/City_status_in_the_United_Kingdom> [Accessed June 14, 2005].

As the British Empire expanded into North America, virtually all of its colonies were established by charters of royal decree where land and some governing rights were conferred to the colonial authorities while the British Crown retained supreme sovereignty.¹⁵ The earliest Canadian example occurred in 1610, when King James I of England granted a royal charter to John Guy on behalf of Bristol's Society of Merchant Venturers in order to colonize the island of Newfoundland with the English settlement of Cuper's Cove.¹⁶ Since Canada was colonized by the British Empire and influenced by many of its customs, the convention of issuing charters for municipal settlements in Canada can be traced to this British tradition.

As provincial governments formally assumed jurisdiction over municipalities in Canada, the modern municipal charter currently involves a statute being enacted by the provincial legislature. The purpose of the legislation is to organize a specific human settlement into a municipal corporation, where some authority is given to the corporation with the intent of providing some element of local self-government.¹⁷ However, the authority conferred to a municipality incorporated with a charter is not necessarily the same powers available to other municipalities. In essence, this differential treatment by the provincial legislature is what separates a charter city from other municipalities.

1.4 What is a Charter City?

Within the Canadian context, a charter city is a city that is governed by a separate piece of provincial legislation which bestows upon the city certain powers and

¹⁵ Encyclopædia Britannica Online, Web Page: "Charter," *Encyclopædia Britannica*, Chicago, Encyclopædia Britannica, Inc., 2005. Information retrieved through <<http://www.britannica.com/eb/article?tocId=9022649>> [Accessed June 14, 2005].

¹⁶ Wikipedia Administrators, Web Page: "Cuper's Cove, Newfoundland and Labrador," *Wikipedia: The Free Encyclopedia*, St. Petersburg, Florida, Wikimedia Foundation, Inc., updated June 23, 2005, 02:41 UTC. Information retrieved through <http://en.wikipedia.org/wiki/Cuper%27s_Cove> [Accessed June 25, 2005].

¹⁷ Encyclopædia Britannica Online, Web Page: "Charter," *Encyclopædia Britannica*, Chicago, Encyclopædia Britannica, Inc., 2005. Information retrieved through <<http://www.britannica.com/eb/article?tocId=9022649>> [Accessed June 14, 2005].

responsibilities that are not given to other municipalities in the province, and, at the same time, the city is not subjected to the apparatus of a general municipal statute.¹⁸ Based on this information, Toronto should not be considered as a charter city.

Even though it could be pointed out that Toronto already has exclusive pieces of provincial legislation that are applicable to the city, specifically the *City of Toronto Act, 1997*, S.O. 1997, c.2 and the *City of Toronto Act, 1997 (No. 2)*, S.O. 1997, c.26, these statutes do not imply that Toronto is a charter city. After all, these two statutes were created to deal with the administrative details of municipal amalgamation when the old city of Toronto merged with the former borough of East York, the former cities of Etobicoke, North York, Scarborough, and York, and the former regional municipality of Metropolitan Toronto to become the current City of Toronto on January 1, 1998. In addition, Toronto is governed by the provisions of the *Municipal Act, 2001*, S.O. 2001, c.25, like any other municipality in Ontario, as well as over three hundred and fifty other provincial laws.¹⁹

As Premier Dalton McGuinty mentioned in his speech to the Summit of Big City Mayors, Toronto “can’t set the size of its own city council, or in many cases, its own speed limits. It lacks the power to establish a code of conduct, appoint an integrity commissioner, create a lobbyist registry or enhance the powers of its auditor general.”²⁰ For Toronto to be regarded as a genuine charter city, it would be necessary for the city to become independent of the province’s municipal laws, and have its relationship with

¹⁸ Office of the Chief Administrative Officer, City of Toronto, Strategic and Corporate Policy Division, “Powers of Canadian Cities: The Legal Framework,” *Towards A New Relationship With Ontario and Canada*, Background Report prepared by Corporate Services Department, Legal Division, June 2000, p.3.

¹⁹ Ministry of Municipal Affairs and Housing, Government of Ontario, Joint Ontario-City of Toronto Task Force to Review the *City of Toronto Act, 1997* and Other Private (Special) Legislation, *Staff Progress Report*, Toronto, Queen’s Printer for Ontario, May 2005, p.5.

²⁰ Office of the Premier, Government of Ontario, News Release: “Notes for Remarks by Dalton McGuinty, Premier of Ontario: Address to the Big City Mayor’s Summit,” Toronto, Queen’s Printer for Ontario, September 17, 2004, p.8.

the province rearranged asymmetrically in comparison to other municipalities in Ontario.

1.5 What is Asymmetry in Provincial-Municipal Relations?

According to Ronald Watts, asymmetry within a federal system is best described as a situation “where there is a differentiation in the degrees of autonomy and power among the constituent units.”²¹ In the case of provincial governments within the Canadian federal system, asymmetry exists when a province, or a group of provinces, enjoys a specific power that is not available to other provinces, and is able to exercise it accordingly. The use of English or French during legislative deliberations by any member of a legislature, for instance, illustrates asymmetry within the framework of federal-provincial relations. Even though the provincial legislatures of Manitoba, New Brunswick, and Quebec are constitutionally required to recognize either language in their legislative proceedings, other provincial legislatures are not obligated to do so.²²

Within the context of provincial-municipal relations, asymmetry exists when a municipality, or a group of municipalities, possesses a specific authority that has been granted by the province that is not available to other municipalities, and is able to act accordingly. For example, the institution of a board of control, which is a structure comprised of elected local officials responsible for some executive functions of a municipal council, such as preparing the municipal budget, appointing and dismissing senior administrators, and awarding municipal contracts, demonstrates asymmetrical provincial-municipal relations in Ontario. This structure, which was once prominent in Ontario insofar as it was a mandatory feature in all local councils representing

²¹ Ronald L. Watts, “A Comparative Perspective on Asymmetry in Federations,” Kingston, Queen’s University, Institute of Intergovernmental Relations, School of Policy Studies, Special Series on Asymmetric Federalism, Paper 4, 2005, p.2.

²² Section 133 of the *Constitution Act, 1867* recognizes the right of any member of the Quebec legislature to use English or French during legislative debates. Section 23 of the *Manitoba Act, 1870*, applies to the Manitoba legislature, and was further confirmed under Sections 5 and 6 of the *Constitution Act, 1871*. Section 17(2) of the *Constitution Act, 1982* applies to the New Brunswick legislature.

populations of 100 000 or more,²³ now exists only in the City of London.²⁴ This asymmetrical arrangement between Ontario and London means that if any other municipality wants to establish a local board of control, or if London wants to abolish its board of control, it would need permission from the provincial legislature to do so.

Since a charter city is a city that is independent of the municipal law which is applicable to other municipalities within the province, the association between a province and the charter city is an asymmetrical relationship. Whether this relationship inherently empowers a charter city depends on how empowerment is defined.

1.6 What is Municipal Empowerment?

Empowerment is best described as “a process of enhancing feelings of self-efficacy among organizational members through the identification of conditions that foster powerlessness and through their removal by both formal organizational practices and informal techniques.”²⁵ Not to be confused with delegation, which simply involves tasks being handed over to subordinates by their superiors with the understanding that subordinates are to carry out their duties in traditional ways by following prescribed methods and not incurring risks, empowerment allows subordinates to discharge their duties through innovative techniques by assuming greater responsibility and accountability for results in an environment that tolerates some risk-taking behaviour.²⁶ Based on this information, it cannot be said that municipalities are legally empowered.

²³ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.55.

²⁴ Section 468 of the *Municipal Act, 2001*, S.O. 2001, c.25.

²⁵ J.A. Conger and Rabindra N. Kanungo, “The Empowerment Process: Integrating Theory and Practice,” *Academy of Management Review*, Vol. 13, No. 3 (1988), p.474.

²⁶ Public Service 2000 Secretariat, Government of Canada, *Highlights of the White Paper on Public Service 2000: The Renewal of the Public Service in Canada*, Ottawa, Privy Council Office, 1990, pp.51-2.

After all, municipalities are creatures of provincial legislation. These statutes are usually exhaustive and prescriptive in nature by outlining exactly what municipalities can do, in what is often called a “laundry list” approach.²⁷ Consequently, if a municipality is not able to find any explicit authorization to proceed on a particular issue, then it is not able to act. This principle has been repeatedly reinforced by judicial decisions which have often taken the view that if a provincial legislature has specified certain matters in legislation for municipalities to act, it was presumed that anything else not explicitly stated was not intended for municipal action. As Warren Magnusson put it, the Supreme Court of Canada “is still in thrall to nineteenth century notions of sovereignty when it comes to issues of local political authority” that “the field of municipal law is still dominated by people who are afraid to question the constitutional mythology of the nineteenth century.”²⁸ Even though municipalities operate within a restrictive legal framework that often constrains their ability to act on behalf of their local citizens, there are some developments which suggest that municipalities have become politically empowered.

In 1994, Alberta introduced legislation that granted its municipalities the authority of a “natural person” as well as “spheres of jurisdiction.”²⁹ Natural person powers and spheres of jurisdiction can be described in the following manner:³⁰

Vesting municipalities with natural person powers gives them a general authority to do those things that a person can do — such as hiring and dismissing staff, contracting for services, purchasing land or buildings, or selling or otherwise disposing of assets. These are things that municipalities have always done, but they had to find express authority

²⁷ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.195.

²⁸ Warren Magnusson, “Urbanism, Cities and Local Self-Government,” *Canadian Public Administration*, Vol. 48, No. 1 (Spring 2005), pp.109-110.

²⁹ *Municipal Government Act*, S.A. 1994, c. M-26.1, (now R.S.A. 2000, c. M-26).

³⁰ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.198.

in statutes before taking such actions. While granting natural person powers gives municipalities greater flexibility, no additional powers are conveyed with this designation. Rather, the natural person powers are used as a tool for implementing the responsibilities otherwise assigned to municipalities.

Spheres of jurisdiction (or spheres of authority) authorize municipal action on the basis of broad and general categories. They provide an alternative to allocating powers to municipalities by itemizing specifically what they can do. ... Assigning broad spheres of jurisdiction is supposed to give municipalities greater flexibility and discretion.

Subsequently, other provinces have included in their municipal legislation either some degree of natural person powers or spheres of jurisdiction, or both of them, such as British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan.³¹ In addition, some provinces, such as Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, and Saskatchewan, have recognized the importance of their municipalities that they have established different protocols for the provincial government to consult with its municipalities before enacting legislation or policies that could affect local communities.³²

These developments suggest, as David Cameron notes, that the “legal pre-eminence of the province in matters of local government is limited by the political strength of local governments” insofar that it is important to “look beyond the narrowly legal dimension of provincial responsibility for municipal government and consider the political realities within which both provincial and municipal governments operate.”³³ Even the judicial system has recognized the importance of these political realities.

³¹ Donald Lidstone, “Assessment of the Municipal Acts of the Provinces and Territories,” Vancouver, Report prepared for the Federation of Canadian Municipalities, April 21, 2004, pp.31-37.

³² *Ibid*, pp.12-16.

³³ David M. Cameron, “Provincial Responsibilities for Municipal Government,” *Canadian Public Administration*, Vol. 23, No. 2 (Summer 1980), p.230.

In a landmark court case involving a legal challenge to a Quebec town's ability to regulate the use of pesticides within its boundaries,³⁴ the Supreme Court of Canada upheld the town's regulatory prerogative by reiterating the following statement from a previous decision:³⁵

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

Not only has the judicial system acknowledged the political importance of municipalities, the Canadian government has recognized these political realities as well. Even though it could be argued that the federal government does not have a direct legal relationship with municipalities, especially since they are a constitutional responsibility of provincial governments, as Richard Tindal and Susan Nobes Tindal put it, "nothing could be further from the truth."³⁶

For instance, the exclusive spending power of the national government has the ability to significantly impact the operations of municipalities.³⁷ Despite the fact that it is not explicitly stated in the constitution, according to Canadian constitutional lawyer Peter Hogg, the federal spending power is nevertheless implied under the *Constitution Act*,

³⁴ 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] 2 S.C.R. 241.

³⁵ *Shell Canada Products Ltd. v. Vancouver (City)* [1994] 1 S.C.R. 231, p.244.

³⁶ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.207.

³⁷ Office of the Chief Administrative Officer, City of Toronto, Strategic and Corporate Policy Division, "Powers of Canadian Cities: The Legal Framework," *Towards A New Relationship With Ontario and Canada*, Background Report prepared by Corporate Services Department, Legal Division, June 2000, p.1.

1867 with regards to the Canadian government's ability to regulate on matters of public property under Section 91(1A), its tax levying authority under Section 91(3), and its power to appropriate federal revenues under Section 106.³⁸

An example of the federal spending power having a direct impact on municipalities occurred on February 1, 2004, when the rebate for the national Goods and Services Tax (GST) and the federal portion of the national-provincial Harmonized Sales Tax (HST) in the provinces of New Brunswick, Newfoundland and Labrador, and Nova Scotia was increased from fifty-seven percent to one hundred percent.³⁹ In the 2004-2005 federal fiscal year, this rebate provided Canadian municipalities \$580 million in additional revenue, with an expectation that it will provide a total of \$7 billion in revenue for municipal governments over the following ten years.⁴⁰

At the same time, the federal government has to be sensitive to provincial jurisdiction over its municipalities. After all, if the national government misuses its authority by acting in matters of local concern, it runs the risk of being challenged by provincial governments which could assert their constitutional authority over municipalities. Based on this information, it should not be surprising that the Canadian government usually operates under the convention of consulting with provincial governments when dealing with municipalities.

Recognizing that the actions of one level of government have an impact on other governments, the federal government identified the importance of encouraging greater cooperation with provincial governments and municipalities through intergovernmental

³⁸ Peter W. Hogg, *Constitutional Law of Canada*, Second Edition, Toronto, Carswell, 1985, p.124.

³⁹ Department of Finance, Government of Canada, *New Agenda for Achievement: The Budget Plan 2004*, Ottawa, Minister of Public Works and Government Services Canada, March 2004 p.166.

⁴⁰ *Ibid.*

arrangements in order to address issues of social concern affecting local communities.⁴¹ One way to formalize this cooperation is through the establishment of a tripartite agreement between the federal government, the provincial government and a municipality that combines the resources and expertise of all governments for the purpose of building cohesive policies and programs that could benefit local communities. In fact, this type of arrangement is common in Canada.⁴²

The City of Winnipeg has had four separate tripartite Urban Development Agreements with the Manitoba and Canadian governments to promote urban revitalization and economic development since 1981.⁴³ In 1995, the City of Edmonton signed an Economic Development Initiative with the Alberta and federal governments to encourage greater economic development for the city for an indefinite period. In 2000, the five-year Vancouver Agreement brought together the governments of Canada and British Columbia with the City of Vancouver to address the social and economic problems in Vancouver's Downtown Eastside. In 2001, Halifax Regional Municipality signed the Tripartite Agreement of Emergency Preparedness with Nova Scotia and the federal government to coordinate emergency services for the region during times of disaster. Regina and Saskatoon have expressed their intentions of wanting tripartite

⁴¹ Prime Minister's Caucus Task Force on Urban Issues, (Judy Sgro, Chair), Final Report, *Canada's Urban Strategy: A Blueprint for Action*, Ottawa, November 2002, pp.6-7.

⁴² James Knight, Federation of Canadian Municipalities, "Creating Stronger Partnerships Among the Three Orders of Government," Vancouver, Presentation to the Institute of Public Administration of Canada Conference, August 30, 2004, p.3.

⁴³ The first Winnipeg tripartite agreement, then known as the Core Area Initiative, existed from 1981-1986. The second accord, labelled as the Core Area Initiative II, lasted from 1986-1991. The third incarnation, renamed as the Urban Development Agreement, occurred from 1995-2001. The fourth agreement, called the Partnership Agreement, has been in effect since 2004 and will continue until 2009.

accords with the Saskatchewan and Canadian governments in order to address matters of local economic development.⁴⁴

Even though these political developments seem to suggest that municipalities have acquired greater influence and recognition over the years, this does not mean that they have been legally empowered. As David Cameron put it, “Provincial governments *can* create, abolish or vastly alter the boundaries, structures or responsibilities of municipalities, and the fact that they seldom do any of these things, or that doing so would likely come at a substantial political cost, does not alter the fact that they could be done [original emphasis].”⁴⁵ In order to protect municipalities from this legal reality, it is necessary to empower them through legal means, not political means.

One suggestion that has been mentioned as a method for legally empowering municipalities in Canada — specifically cities — has been through a charter. After all, it is a statute that specifies the city’s individual autonomy, and separates the city from the provisions of other municipal legislation. However, the experiences of charter cities in Canada suggest that legal empowerment through a charter has been an elusive goal for those cities.

⁴⁴ James Knight, Federation of Canadian Municipalities, “Creating Stronger Partnerships Among the Three Orders of Government,” Vancouver, Presentation to the Institute of Public Administration of Canada Conference, August 30, 2004, p.5.

⁴⁵ David M. Cameron, “Provincial Responsibilities for Municipal Government,” *Canadian Public Administration*, Vol. 23, No. 2 (Summer 1980), p.234.

PART 2: CHARTER CITIES IN CANADA

2.1 City of Saint John

The City Saint John in New Brunswick not only holds the distinction of being the oldest incorporated Canadian city predating Canadian Confederation by eight-two years, it also holds the distinction of being the nation's oldest charter city through a royal charter that was granted by King George III in 1785. Unlike other New Brunswick municipalities that were subsequently incorporated by a statute of the provincial legislature, the fact that Saint John was incorporated by a royal charter means that the city received its original authority from the British Crown. On this basis, as Andrew Sancton put it, Saint John "was therefore not subject to the normal rule that municipalities can only perform such functions as are granted to them by the relevant legislature, in this case that of New Brunswick."⁴⁶

Some contemporary legal experts have gone as far as to suggest that the presumed permissive and Common Law natural person powers that are implied with the city's royal charter could enable Saint John, subject to any limitations in existing federal and provincial laws, to theoretically establish an airport.⁴⁷ Even though it seems that Saint John has an asymmetrical relationship with the New Brunswick legislature, the city is not legally immune from the political actions of the provincial government. As former Saint John mayor Shirley McAlary put it, "I don't think you're going to get anything (from a charter) that the province can't override."⁴⁸

⁴⁶ Andrew Sancton, "Affidavit," *East York (Borough) v. Ontario (Attorney General)* (1997) 34 O.R. (3d) 789. Affidavit dated May 7, 1997, para.17.

⁴⁷ Office of the Chief Administrative Officer, City of Toronto, Strategic and Corporate Policy Division, "Powers of Canadian Cities: The Legal Framework," *Towards A New Relationship With Ontario and Canada*, Background Report prepared by Corporate Services Department, Legal Division, June 2000, p.3.

⁴⁸ Thomas Walkom, "City Charter Could Be A Curse," *Toronto Star*, July 18, 2000, p.A17.

In 2000, the provincial government was in the process of introducing natural gas to households throughout New Brunswick. In order to deliver natural gas to the homes in Saint John through a network of pipelines, the city's roads had to be torn up. When the city demanded compensation from the provincial government by citing a clause in its charter that apparently gives the city jurisdiction over its streets, the province refused to compensate Saint John by declaring that the pipeline was a provincial matter.⁴⁹ According to the former mayor, "Our lawyers tell us that (regardless of the charter) the province can do what it wants."⁵⁰

Not surprisingly, this experience has made the former mayor of Saint John skeptical about the ability of a charter to protect a city from the political actions of the provincial government. As she put it, "It doesn't really do that much good."⁵¹

2.2 City of Montreal

Forty-seven years after the City of Saint John was incorporated with a royal charter, King William IV gave royal assent in 1832 to a legislative act incorporating Montreal as a city. In essence, this was the charter for Montreal. According to Engin Isin, the delay between the incorporation of the two cities through a charter reflected a caution and hesitancy of the British and colonial authorities about the use of this method.⁵² This apprehension might also explain why Montreal's original charter was limited to four years.

Despite the short lifespan of Montreal's original charter, the city was granted a new charter by the provincial legislature in 1840. As Montreal continued to grow, its charter was revised accordingly in 1852 and 1860. In the final decade of the nineteenth

⁴⁹ Thomas Walkom, "City Charter Could Be A Curse," *Toronto Star*, July 18, 2000, p.A17.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Engin F. Isin, *Cities Without Citizens: The Modernity of the City as a Corporation*, Montreal, Black Rose Books, 1992, p.142.

century, Montreal's charter was extensively and regularly amended that it is generally viewed that this decade is the period when Montreal received its original charter.⁵³ Even though the revision to Montreal's charter culminated by the end of the nineteenth century, there were subsequent comprehensive modifications made to it in 1959 and 1970.

When the government of Premier Bernard Landry implemented the consolidation of Montreal with its neighbouring municipalities in an initiative commonly called "fusion" in 2002, the charter was unable to prevent the city from undergoing a municipal merger despite the fact that many local residents had expressed objections to the provincial initiative beforehand.⁵⁴ Even though it could be pointed out that the government of Premier Jean Charest intends to allow some areas of the fused city to municipally secede on January 1, 2006 after some communities expressed support for the initiative of "de-fusion" in local plebiscites on June 20, 2004, it should be mentioned that the acceptance of de-fusion by the Quebec legislature was a political decision of the provincial government and not a legal matter.

Despite the fusion and de-fusion developments in Montreal, there should be no confusion that the charter was incapable of protecting the city from the actions of the Quebec legislature. On this basis, it cannot be said that the City of Montreal was legally empowered by its charter.

⁵³ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.205.

⁵⁴ Andrew Sancton, "Why Municipal Amalgamations? Halifax, Toronto, Montreal," Kingston, Queen's University, Institute of Intergovernmental Relations, School of Policy Studies, Canadian Network of Federalism Studies, Paper prepared for the Municipal-Provincial-Federal Relations Conference, May 9-10, 2003, pp.19-20.

2.3 City of Halifax

Nine years after Montreal received its original charter, Halifax was granted its legislative charter by the Nova Scotia legislature in 1841. Its charter was subsequently modified in 1864 with the last comprehensive revision occurring in 1963.

On April 1, 1996, the City of Halifax was transformed into the Halifax Regional Municipality by the Nova Scotia legislature when the city merged with the former city of Dartmouth, the former town of Bedford, and the unincorporated areas of Halifax County. Even though the Halifax charter briefly survived the municipal transformation, it was consequently extinguished on April 1, 1999 when the government of Premier Russell MacLellan placed all Nova Scotia municipalities under the provisions the province's municipal legislation.⁵⁵ Despite the fact that the Halifax Regional Municipality operates under the apparatus of a comprehensive municipal statute, it has expressed an interest in resurrecting a new legislative charter with the provincial government since it is of the opinion that a charter is an "appropriate framework for modern municipal governance."⁵⁶

Although a charter existed when Halifax experienced municipal amalgamation with its neighbouring communities, it was useless to prevent it. In addition, the Halifax Regional Municipality was powerless to thwart the provincial government's termination of Halifax's charter. Since these two events were enacted on a day commonly observed in North America as April Fool's Day, no one should be fooled into believing that Halifax was legally empowered by its charter to stop the actions of the Nova Scotia legislature.

2.4 City of Winnipeg

After Manitoba became Canada's fifth province on July 15, 1870, the provincial legislature incorporated Winnipeg as a city in 1873. While this statute would provide the

⁵⁵ Section 4 of the *Municipal Government Act*, S.N.S. 1998, c.18.

⁵⁶ Office of the Chief Administrative Officer, Halifax Regional Municipality, Legal Services Department, *2005/06 Proposed Business Plan and Budget*, Draft, February 28, 2005, p.228.

basis of Winnipeg's legislative charter, the life of its charter would end thirteen years later.

As Manitoba experienced rapid growth, the legislature decided that it was preferable to administer all the details of municipal development under the apparatus of general municipal legislation. In 1886, the government of Premier John Norquay repealed Winnipeg's charter.⁵⁷ For the next sixteen years, the City of Winnipeg was subjected to the provisions of general municipal legislation like any other municipality in Manitoba.

As Manitoba continued to develop further, the resulting social and economic challenges placed significant demands on the legislature. While the government of Premier Rodmond Roblin confronted these challenges by expanding the social and economic role of the provincial government, it also gave the City of Winnipeg a new legislative charter in 1902.⁵⁸ Although Winnipeg's charter would be revised and consolidated afterwards under the rigours of the provincial legislative process, the city's current charter can be traced to the merger of Winnipeg with its surrounding municipalities in 1972.⁵⁹

These events demonstrate that the City of Winnipeg, much like Halifax, was unable to prevent the termination of its charter or municipal amalgamation by the provincial government. With this in mind, it cannot be said that the City of Winnipeg was legally protected by its charter from the political actions of the Manitoba legislature.

⁵⁷ R. Murray Fisher, "Local Government Reorganization," *Transactions of the Historical and Scientific Society of Manitoba, Series III, Number 17, 1960-1961*, Winnipeg, Historical and Scientific Society of Manitoba, 1961. Information retrieved through the official website of the Manitoba Historical Society at <<http://www.mhs.mb.ca/docs/transactions/3/localgovernment.shtml>> [Accessed July 15, 2005].

⁵⁸ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.37.

⁵⁹ *Ibid*, p.205.

2.5 City of Vancouver

When British Columbia joined Canadian Confederation on July 1, 1871, one of the conditions for British Columbia's entry into Confederation was the construction of a transcontinental rail link joining the west coast province to the rest of Canada.⁶⁰ When the Canadian Pacific Railway decided to extend the western terminus of the rail line from Port Moody to Vancouver, Vancouver was incorporated as a city by an exclusive statutory charter to recognize the terminal area.⁶¹ Since the city received its charter in 1886, which was the same year that Winnipeg had its charter rescinded, Patrick Smith and Kennedy Stewart point out that Vancouver is arguably Canada's first continuous charter city since Confederation.⁶²

Since Vancouver was recognized differently from other municipalities by the British Columbia legislature due to its unique position in Canadian Confederation, Patrick Smith and Kennedy Stewart point out that "Vancouver came to be guided by delegated powers from the province — albeit rather permissive delegation."⁶³ They further note that it is this permissive delegation by the legislature that allowed the City of Vancouver "to act *despite constitutional and statutory inferiority* [original emphasis]."⁶⁴ To support this claim, they provide three examples.⁶⁵

In the first case, the City of Vancouver used its relationship with the provincial and federal governments through the tripartite accord of 2000 in order to pursue an

⁶⁰ Term 11 of the *British Columbia Terms of Union*.

⁶¹ Robert L. Bish, *Local Government in British Columbia*, First Edition, Richmond, Union of British Columbia Municipalities, 1987, p.16.

⁶² Patrick J. Smith and Kennedy Stewart, "Beavers and Cats Revisited; Creatures & Tenants vs. Municipal Charter(s) & Home Rule: Has the Intergovernmental Game Shifted?" Kingston, Queen's University, Institute of Intergovernmental Relations, School of Policy Studies, Canadian Network of Federalism Studies, Paper prepared for the Municipal-Provincial-Federal Relations Conference, May 9-10, 2003, p.11.

⁶³ *Ibid*, p.14.

⁶⁴ *Ibid*, p.19.

⁶⁵ *Ibid*, pp.19-25.

innovative and politically controversial approach to drug treatment in the city's Downtown Eastside. Despite the fact that the city had little jurisdiction to tackle the issue of drug abuse, Vancouver was able to obtain financial commitments and other resources from the national and provincial governments in order to implement the project.

In the second instance, Vancouver held a local referendum on the issue of hosting the 2010 Winter Olympics on February 22, 2003. Even though some officials from the provincial and federal governments expressed initial reservations about allowing the city to conduct a referendum on this issue, the resulting local public support for the Olympic Games enabled the city to politically leverage some concessions on land development from the senior governments.

The third example describes the achievements of Vancouver's international activities. In an area where the city has no legal jurisdiction, Vancouver was able to establish relations with the City of Odessa in the former Soviet Union in 1944 and with cities in other countries later on, and to declare the city as a "nuclear weapons free zone." While some of these actions were encouraged by senior government authorities, others were occasionally in conflict. Either way, this did not stop Vancouver from acting in the area of international affairs.

While it could be argued that the three examples seem to illustrate that Vancouver was empowered by its charter, it should be pointed out that Vancouver's empowerment was political in nature, not legal. In fact, the reason why Vancouver was able to behave the way that it did in those three cases was the result of the provincial legislature making a political decision not to impose its will upon the city, even though it had the legal authority to do so. On this basis, Vancouver cannot be viewed as being empowered by its charter in a legal sense.

2.6 City of Lloydminster

In 1905, when the provinces of Alberta and Saskatchewan were created by the Canadian government out of the lands that it had acquired thirty-five years earlier, the boundary that was to be used to divide the two provinces effectively split the settlement of Lloydminster which was located along the border since 1903. While Alberta incorporated its part as a village in 1906, Saskatchewan incorporated its portion as a town the following year.

This peculiarity resulted in a duplication of local services, such as two separate municipal councils, two municipal offices, and two fire departments. In 1930, Alberta and Saskatchewan enacted legislation to merge the two communities into a single town. Lloydminster was subsequently elevated to city status on January 1, 1958, when it was incorporated with a charter enacted by both legislatures.

When Lloydminster's charter was ratified, it was meant to address the administrative differences that exist between Alberta and Saskatchewan. For instance, Alberta is located in the Mountain Time Zone, observes Daylight Savings Time every year, and does not have a provincial sales tax. Saskatchewan, on the other hand, is situated in the Central Time Zone, does not observe Daylight Savings Time, and has a provincial sales tax. Since the two provinces operate differently, the charter was created so that the bi-provincial city could effectively serve its local citizens without confusion. Lloydminster's charter resolves these administrative issues by allowing the entire city to use the Mountain Time Zone and observe Daylight Savings Time,⁶⁶ while exempting it from Saskatchewan's provincial sales tax.⁶⁷

⁶⁶ Section 5(2) of *The Lloydminster Charter*, Alta. Reg. 43/1979, as enabled under Section 5 of the *City of Lloydminster Act*, S.A. 2005, c.C-13.5, and Section 5 of the *Time Act*, R.S.S. 1978, c.T-14.

⁶⁷ *Lloydminster Provincial Sales Tax Exemption Regulations*, R.R.S. c.F-13.4 Reg. 23, as enabled under Section 6(c) of the *City of Lloydminster Act*, S.S. 2004, c.C-11.2.

Since the City of Lloydminster is a creature of two provinces, this means that a revision to its charter entails the approval of both provincial legislatures. This procedure implies that timely cooperation on the part of both legislatures is essential for the city to function effectively. Should either province behave uncooperatively, this would leave Lloydminster in a vulnerable position. Based on this information, Lloydminster cannot be regarded as being legally empowered by its charter.

2.7 General Observations of Canadian Charter Cities

Even though it could be pointed out that there are other charter cities in Canada, such as Charlottetown and Summerside in Prince Edward Island, Corner Brook, Mount Pearl and St. John's in Newfoundland and Labrador, and Gatineau, Lévis, Longueuil and Quebec City in Quebec, their legal status are all the same. As municipal lawyer Donald Lidstone points out, these cities are susceptible to the political actions of the provincial legislature since there is no legal requirement for the provincial government to obtain the consent of these cities on modifications to their charters.⁶⁸ On this basis, charter cities, which exist in eight provinces, are like all Canadian municipalities insofar that they are all creatures of provincial statute.

This revelation discredits the belief that a charter has some sort of ability to legally protect a city from the political decisions of the provincial government. Despite this fact, many people in the City of Toronto still believe that a charter will magically empower the city by legally protecting it from the political actions of the Ontario legislature. In order to understand the persistence of this belief, it is important to examine the historical origins of the charter movement in Toronto.

⁶⁸ Donald Lidstone, "Assessment of the Municipal Acts of the Provinces and Territories," Vancouver, Report prepared for the Federation of Canadian Municipalities, April 21, 2004, p.17.

PART 3: TORONTO'S QUEST FOR A CHARTER

3.1 Toronto's Incorporation and the Baldwin Act

In 1834, Toronto was incorporated as a city with an elected municipal council by the legislature of Upper Canada. Even though urban areas throughout the province have been acquiring elected municipal councils in order to administer matters of local concern since 1832, the granted powers of local self-government were limited in nature.⁶⁹ This was due to a prevailing suspicion among colonial officials that municipalities encouraged dissent and disloyalty to the British Crown.⁷⁰

One year after Toronto's incorporation as a city, the British Parliament ratified the *Municipal Corporations Act, 1835*, 5-6 Wm IV, c.76 (U.K.). This legislation was an important development in British law since it provided the legal framework under which municipalities were expected to operate in the United Kingdom. As Bryan Keith-Lucas and Peter Richards note, "The constitutional structure which emerged from the struggle over the municipal corporations in 1835, and the subsequent adaptations of a century of experience has been not only universal in [the United Kingdom], but has been reproduced widely in the Empire and Commonwealth."⁷¹

It appears that this statute influenced the thinking of John George Lambton, the first Earl of Durham, when he wrote the Durham Report following the 1837-1838 rebellions in Upper Canada and Lower Canada.⁷² As Lord Durham put it, "The

⁶⁹ Engin F. Isin, *Cities Without Citizens: The Modernity of the City as a Corporation*, Montreal, Black Rose Books, 1992, pp.112-114.

⁷⁰ Engin F. Isin, "The Origins of Canadian Municipal Government," in James Lightbody (Editor), *Canadian Metropolitcs: Governing Our Cities*, Toronto, Copp Clark Ltd., 1995, pp.60-61.

⁷¹ Bryan Keith-Lucas and Peter G. Richards, *A History of Local Government in the Twentieth Century*, London, G. Allen and Unwin, 1978, p.18.

⁷² Andrew Sancton, "Affidavit," *East York (Borough) v. Ontario (Attorney General)* (1997) 34 O.R. (3d) 789. Affidavit dated May 7, 1997, para.21.

establishment of a good system of municipal institutions throughout the Provinces is a matter of vital importance.”⁷³

When the provinces of Upper Canada and Lower Canada were united to become the Province of Canada by the British Parliament in 1840, a comprehensive municipal statute modelled after the British municipal law was introduced in the legislative assembly by Robert Baldwin in 1843. In May of 1849, the *Municipal Corporations Act, 1849*, 12 Vict., c.81, which is commonly known as the *Baldwin Act*, was ratified by the assembly.

When the province was partitioned to become the provinces of Ontario and Quebec, and when these provinces joined New Brunswick and Nova Scotia to form the Canadian nation on July 1, 1867, the *Baldwin Act* survived. The impact of this law is significant since it provided the legal basis for descendant legislation on municipalities for all provinces. In Ontario, this consigned the City of Toronto to the apparatus of general municipal legislation like any other municipality in the province.

3.2 Origins of Toronto’s Charter Movement

According to Roger Keil and Douglas Young, the origins of Toronto’s quest for charter city status can be traced to the urban activism of local citizens who called for greater involvement in the affairs of municipal government since 1971.⁷⁴ This activism began after construction started in 1969 on a proposed north-south expressway which would have required the demolition of some homes along its path. The regular protests and lobbying efforts by local citizens persuaded the government of Premier Bill Davis to cancel the construction project on June 2, 1971. Buoyed by this success, the movement propelled many local political candidates with similar urban planning philosophies to

⁷³ Gerald M. Craig (Editor), *Lord Durham’s Report*, Toronto, McClelland and Stewart, 1963, p.145.

⁷⁴ Roger Keil and Douglas Young, “A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto,” *Urban Affairs Review*, Vol. 39, No. 1, September 2003, p.89.

victory in the 1972 municipal election. Among them was David Crombie, who served as Toronto mayor from 1972 to 1978, and John Sewell, who would later become the city's mayor from 1978 to 1980.

Acknowledging this political development, the Ontario legislature began to address Toronto's urban needs by regularly giving the city more statutory autonomy. As John Sewell put it:⁷⁵

Toronto's needs as a big city were dealt with by the province passing a private member's bill each year. City council would outline the new powers it wanted, and each spring the private members committee of the legislature would review the city's requests. That's how the city obtained the power to control the demolition of houses: it received private legislation to do so in 1974. ... But this excellent device for loosening the legislative [straight]jacket the city lives in ended with the election of Premier Mike Harris.

When the government of Premier Mike Harris implemented a municipal merger for Toronto in 1998, it also realigned provincial and local services, where the province absorbed the costs of education from local school boards in exchange for imposing the costs of other social services, such as social housing and welfare, onto municipalities. Despite protests to the provincial initiatives by local citizens beforehand,⁷⁶ the public desire for Toronto to obtain a charter intensified. When Toronto began to experience financial difficulties that resulted from the merger and from the service realignment initiative, which has been commonly called "downloading," one solution that was regularly suggested by local residents as a method to protect the city from the influence of the provincial government was a charter.⁷⁷

⁷⁵ John Sewell, "The Lack of Progress Report," *eye Weekly*, June 9, 2005.

⁷⁶ Andrew Sancton, "Why Municipal Amalgamations? Halifax, Toronto, Montreal," Kingston, Queen's University, Institute of Intergovernmental Relations, School of Policy Studies, Canadian Network of Federalism Studies, Paper prepared for the Municipal-Provincial-Federal Relations Conference, May 9-10, 2003, pp.12-15.

⁷⁷ Roger Keil and Douglas Young, "A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto," *Urban Affairs Review*, Vol. 39, No. 1, September 2003, pp.89-90.

Despite the fact that a charter does not legally empower a city to defend itself from the political actions of the provincial government, some believe that a charter has the ability to do so. “A chartered Toronto,” as Wiley Norvell declared, “could protect itself from downloading and would be entitled to a greater share of the taxes it collects and passes on to the province. Most importantly, it would establish our municipal government as independent of the province and not subject to provincial whims.”⁷⁸

Even though a charter does not protect a city’s autonomy from the political decisions of the provincial legislature, this does not mean that Toronto should necessarily abandon its quest of obtaining a charter especially since there are some convincing reasons for establishing Toronto as a charter city.

3.3 Toronto’s Case for Charter City Status

Supporters of charter city status for Toronto point out that the city, while a creature of provincial statute in Ontario, is a distinct creature with unique needs. As a city with unique needs, this requires the creation of some special arrangement between Toronto and the province that is not available to other Ontario municipalities. This asymmetrical relationship could therefore be accomplished through the establishment of a charter for the City of Toronto.

In the aftermath of municipal amalgamation, not only did Toronto become the largest city in the province, it also became the largest city in Canada. According to 2001 census figures, Toronto’s population is approximately 2.5 million people.⁷⁹ After Mexico City, New York City, Los Angeles, and Chicago, Toronto is the fifth largest city in North

⁷⁸ Wiley Norvell, “Charter, Anyone?” *eye Weekly*, October 16, 2003.

⁷⁹ Statistics Canada, “Population Counts for Census Divisions and Census Subdivisions (Municipalities), by Urban and Rural, 2001 Census — 100% Data,” *2001 Census of Canada*, Ottawa, March 12, 2002, Cat. No. 930050XCB01007.

America.⁸⁰ At the same time, the City of Toronto became the sixth largest government in Canada, after the federal government and the provincial governments of Ontario, Quebec, British Columbia, and Alberta, with a 2005 capital budget of \$1.1 billion and a 2005 operating budget of \$7 billion⁸¹ employing a staff of 47 000 people.⁸² As former Toronto chief planner Paul Bedford put it, Toronto “has the budget, needs and obligations of a major world city yet it retains the powers of a small Ontario town. This situation does not exist anywhere else in the world.”⁸³

In addition, it is predicted that the City of Toronto will grow to become the home of at least 3 million residents by 2031.⁸⁴ It is expected that immigration will fuel most of this growth. After all, Toronto has been the primary destination for more than forty-three percent of all Canadian newcomers annually since 1995.⁸⁵ Since the city itself absorbs approximately one-quarter of all Canadian immigrants per year, it should not be surprising that almost half of Toronto’s population is born outside of Canada with over

⁸⁰ According to Mexican census figures, Mexico City has a population of 8.6 million people. Information provided by the National Institute of Geography, Statistics and Informatics, “Total Population (Information by Locality),” *XII General Census of Population and Dwellings 2000*, Mexico City, November 7, 2000. According to American census numbers, New York City has a population of 8 million people, the City of Los Angeles has 3.7 million, and the City of Chicago has 2.9 million. Information provided by the U.S. Census Bureau, “Census 2000 Summary File 1 (SF 1) 100-Percent Data: United States and Puerto Rico — Metropolitan Area, in Central City, Not in Central City, County, and (in Selected States) County Subdivision,” *United States Census 2000*, Washington, DC, November 16, 2001.

⁸¹ Office of the City Manager, City of Toronto, *City Budget 2005: A Brief Profile of Toronto's Operating and Capital Budgets — The Challenges and the Solutions*, March 1, 2005, p.3.

⁸² Office of the Chief Administrative Officer, City of Toronto, *A Report to the Residents of Toronto on the City of Toronto's 2003 Performance: Summary of Toronto's 2003 Results for the Province of Ontario Municipal Performance Measurement Program (MPMP)*, September 30, 2004, p.12.

⁸³ Paul Bedford, “How to Get the City We Want,” in Alan Broadbent *et al*, *Towards a New City of Toronto Act*, Toronto, Zephyr Press, 2005, p.26.

⁸⁴ Office of the Chief Administrative Officer, City of Toronto, Urban Development Services, City Planning Division, *The Official Plan for the City of Toronto*, November 2002, p.9.

⁸⁵ Citizenship and Immigration Canada, *Facts and Figures 2003: Immigration Overview Permanent and Temporary Residents*, Ottawa, Minister of Public Works and Government Services Canada, 2004, p.39.

one hundred languages and dialects being spoken by the city's residents.⁸⁶ Based on this information, it seems obvious that any modification to existing immigration policies would have significant consequences for the City of Toronto. Since immigration is a shared responsibility between the federal and provincial governments under Section 95 of the *Constitution Act, 1867*, and since the provincial government is limited in granting its municipalities only the powers it constitutionally possesses, there exists an opportunity for Toronto to enter into a tripartite arrangement with Ontario and the national government, or, with Ontario's permission, a bilateral agreement with the federal government on immigration matters.

At the same time, it should be noted that Toronto is the only municipality in Ontario with a public transit system which includes a sophisticated network of buses, streetcars, and subways that carries about 1.4 million passengers per day.⁸⁷ Not only is Toronto's transit system the largest in Ontario since it transports ninety percent of all commuters in the Greater Toronto Area⁸⁸ and sixty-two percent of all transit riders in the province,⁸⁹ it is also the largest one in Canada. As Paul Bedford put it, "Transit in Toronto is not a luxury or an option. It is the very lifeblood of the city!"⁹⁰

Obviously, any change to the transportation policies in Ontario would have a significant impact on the City of Toronto. While it is not explicitly stated, local transit service seems to be an implied provincial responsibility according to Section 92(10) of the *Constitution Act, 1867*. On this basis, there exists a possibility for Toronto to enter

⁸⁶ Office of the Chief Administrative Officer, City of Toronto, Urban Planning and Development Services, City Planning Research Division, *Profile Toronto: Immigrants in Toronto*, Profile No. 2, June 1998, p.1.

⁸⁷ Toronto Transit Commission, City of Toronto, "Key Facts," *2004 Operating Statistics*, 2005, p.2.

⁸⁸ Toronto Transit Commission, City of Toronto, "Key Facts," *2003 Operating Statistics*, 2004.

⁸⁹ Kerry Gillespie and Bruce Campion-Smith, "Bulk of Gas Tax Cash Will Flow to Toronto," *Toronto Star*, June 15, 2005, p.A1.

⁹⁰ Paul Bedford, "How to Get the City We Want," in Alan Broadbent *et al*, *Towards a New City of Toronto Act*, Toronto, Zephyr Press, 2005, p.23.

into an exclusive arrangement with the provincial government on matters of public transit service.

In addition, it is important to point out that Toronto is a significant generator of wealth for the province and for the country. In 2004, the city's Gross Domestic Product (GDP) was estimated at \$109 billion, which makes it the single largest contribution to the national GDP by a city.⁹¹ Since Toronto accounts for one-tenth of Canada's GDP and one-quarter of Ontario's GDP, this economic activity in 2000 provided the federal government approximately \$7.6 billion more in tax revenue than it spent on the city while providing the province a net gain of \$1.4 billion.⁹² As Ontario Finance Minister Greg Sorbara put it, "No city plays a bigger role in our shared prosperity than Toronto."⁹³ In order to ensure that Toronto's economic prosperity continues, it would be in the interest of the city to enter into an exclusive tripartite agreement with the Canadian and provincial governments on matters of local economic development.

Despite the fact that Toronto possesses some unique characteristics, the city is nevertheless subjected to the provisions of general municipal legislation like every municipality in Ontario. In the view of Donald Lidstone, the Ontario statute "is inadequate to empower the City of Toronto to carry out the responsibilities that the province currently expects it to carry out."⁹⁴ As Paul Bedford put it, "Big cities are different. They need different financial tools and different powers and different governance structures to get things done. Toronto is no exception."⁹⁵

⁹¹ Toronto Economic Development Corporation, City of Toronto, *Economic Indicators*, April 2005, p.1.

⁹² Toronto Board of Trade, *Strong City, Strong Nation: Securing Toronto's Contribution to Canada*, Toronto, June 2002, pp.4-5.

⁹³ Royson James, "91 More Reasons Why," *Toronto Star*, March 12, 2005, p.B1.

⁹⁴ Bruce DeMara, "A Metropolis in Name Alone," *Toronto Star*, September 21, 2002, p.B1.

⁹⁵ Paul Bedford, "How to Get the City We Want," in Alan Broadbent *et al*, *Towards a New City of Toronto Act*, Toronto, Zephyr Press, 2005, p.23.

In some other instances, Toronto functions under more restrictive terms than other Ontario municipalities. For instance, almost all municipalities are capable of determining the size of their local councils,⁹⁶ but Toronto cannot determine the size of its own elected council without provincial permission.⁹⁷ In addition, while almost all other Ontario municipalities have greater flexibility in raising property taxes on local businesses for the purpose of financing municipal services, Toronto must seek provincial authorization to do so.⁹⁸ Not surprisingly, these asymmetrical legislative restraints could affect Toronto's ability to function as a city, especially since such additional issues could effectively congest the city's administrative agenda as well as the province's legislative agenda.

"The larger cities in Newfoundland will be able to compete in the international marketplace a lot more effectively than the City of Toronto," Donald Lidstone notes. "We're living in a world of globalization and international trade and international competition and Toronto is given less powers than the municipalities in Alberta, Manitoba, Nunavut, Yukon, B[ritish] C[olumbia] and Newfoundland."⁹⁹

Since the City of Toronto operates within a restrictive legislative framework that makes it arduous for the city to adequately respond to its local needs, it should not be surprising that a desire exists within the city to have an asymmetrical relationship with the provincial government through a charter. Even though there are compelling reasons for conferring a charter to the City of Toronto, there are valid objections to granting Toronto a municipal charter.

⁹⁶ Section 218(2) of the *Municipal Act, 2001*, S.O. 2001, c.25.

⁹⁷ Sections 3 and 5 of the *City of Toronto Act, 1997*, S.O. 1997, c.2.

⁹⁸ Royson James, "91 More Reasons Why," *Toronto Star*, March 12, 2005, p.B1.

⁹⁹ Bruce DeMara, "A Metropolis in Name Alone," *Toronto Star*, September 21, 2002, p.B1.

3.4 Objections to a Charter for Toronto

Even though critics to the transformation of Toronto into a charter city recognize that the city possesses some distinct characteristics, they also point out that other municipalities have individual identities as well. If Toronto is granted a charter to acknowledge its unique attributes, such a development could, as Tasha Kheiriddin of the Joint Ontario Business Sector put it, “open a Pandora’s box of potential power-sharing with other municipalities” making similar demands on the province.¹⁰⁰ As proof of this assertion, the City of Ottawa has already expressed its desire to the Ontario government of wanting a charter recognizing its distinct needs after Toronto has acquired its charter.¹⁰¹

Instead of rearranging provincial-municipal relations through apparent improvisation, critics believe that there should be a strategy “to establish a sensible blueprint for municipal reform.”¹⁰² Contrary to the belief that municipal reform is being conducted without an apparent plan, the realignment of municipal responsibilities is actually occurring under a general assessment of the *Municipal Act, 2001*, S.O. 2001, c.25.

According to Section 3(2) of the *Municipal Act, 2001*, S.O. 2001, c.25, the Ministry of Municipal Affairs and Housing is legally required to conduct a review of the legislation before the end of 2007, and every five years thereafter. On June 22, 2004, the ministry publicly announced that it would review the municipal statute with the intention of introducing new legislation in 2005.¹⁰³ In the words of John Gerretsen, Minister of Municipal Affairs and Housing, “The strength of Ontario depends on the

¹⁰⁰ Tasha Kheiriddin, “New Deal’ Needs Closer Scrutiny,” *Toronto Star*, June 28, 2005, p.A15.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Ministry of Municipal Affairs and Housing, Government of Ontario, News Release: “Government Launches Municipal Act Review,” Toronto, Queen’s Printer for Ontario, June 22, 2004.

strength of our cities, towns, and rural communities. Our review is intended to identify the legislative amendments that can provide local governments with more tools and greater flexibility to creatively serve their residents.”¹⁰⁴ Based on this information, it should be pointed out that the process of granting Toronto a legislative charter occurred within the context of the ministry’s initiative. Consequently, if any other municipality wants to have a charter, it is expected that such a request would have to conform to the parameters of the review.

Another complexity to converting Toronto into a charter city is the fact that the city has an interdependent relationship with its neighbouring municipalities in a region commonly known as the Greater Toronto Area (GTA). After all, the region is integrated on an economic, environmental, and social basis that it is sometimes difficult to separate Toronto from the rest of the GTA without considering the impact that this separation would have on other GTA municipalities. Since the cost of some of the downloaded local services are spread throughout the GTA, notably social housing and welfare,¹⁰⁵ and since the suburban municipalities in the region are legally required to pay for these costs through their local taxes for services which are disproportionately located in Toronto, Roger Keil and Douglas Young note that some people are of the opinion “that charter status should therefore be granted to the GTA and not just to the city of Toronto.”¹⁰⁶

¹⁰⁴ Ministry of Municipal Affairs and Housing, Government of Ontario, News Release: “Government Launches Municipal Act Review,” Toronto, Queen’s Printer for Ontario, June 22, 2004.

¹⁰⁵ Sections 135 to 138 of the *Social Housing Reform Act, 2000*, S.O. 2000, c.27, and Section 7 of the *Administration and Cost Sharing*, O. Reg. 135/98 (Amended to O. Reg. 140/05) as enabled under Sections 37 and 38 of the *Ontario Works Act, 1997*, S.O. 1997, c.25, Sch. A.

¹⁰⁶ Roger Keil and Douglas Young, “A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto,” *Urban Affairs Review*, Vol. 39, No. 1, September 2003, p.96.

Despite the fact that a municipal governance structure was recommended for the entire area in 1996,¹⁰⁷ the difficulty in applying a charter for the GTA is that no regional government currently exists. On this basis, it would be difficult for some issues to be addressed on a regional basis if Toronto and its neighbouring municipalities are unable to politically coordinate their actions in the absence of a regional government.

At the same time, it should be pointed out that the City of Toronto faces a different set of local issues than other GTA municipalities. While Toronto comprises less than half of the region's population,¹⁰⁸ the city has seventy-one percent of the region's low income families, two-thirds of the single parents, children and seniors living in poverty, eighty percent of the homeless, and three-quarters of the tenants.¹⁰⁹ Even if a regional charter was capable of adequately addressing these issues for Toronto in the absence of a regional government, the lack of political coordination among GTA municipalities could potentially undermine the usefulness of a regional charter for the city.

In addition, critics of Toronto's quest for a charter express skepticism that the city is capable of assuming new responsibilities in light of Toronto's chronic fiscal problems. After all, public stories of Toronto's financial difficulties since amalgamation have led some to the conclusion that the city must demonstrate fiscal responsibility before acquiring more autonomy. Since Toronto "has trouble balancing its books," as Tasha Kheiriddin put it, "how will giving powers to regulate in more areas help the situation?"¹¹⁰

¹⁰⁷ Ministry of Municipal Affairs and Housing, Government of Ontario, Report of the GTA Task Force, (Anne Golden, Chair), *Greater Toronto*, Toronto, Queen's Printer for Ontario, January 1996, pp.13-14.

¹⁰⁸ Statistics Canada, "Population Counts for Census Divisions and Census Subdivisions (Municipalities), by Urban and Rural, 2001 Census — 100% Data," *2001 Census of Canada*, Ottawa, March 12, 2002, Cat. No. 930050XCB01007.

¹⁰⁹ Office of the Chief Administrative Officer, City of Toronto, Community and Neighbourhood Services, *The Toronto Report Card on Housing and Homelessness 2003*, September 2003, pp.4-15.

¹¹⁰ Tasha Kheiriddin, "'New Deal' Needs Closer Scrutiny," *Toronto Star*, June 28, 2005, p.A15.

This concern seems to overlook the fact that Toronto's financial problems are the result of its revenues having difficulty meeting its expenditures. Although it could be suggested that Toronto could close the fiscal gap by simply reducing its costs, raising its taxes, or a combination of both, these solutions neglect the fact that many city services are provincially mandated and the revenue sources permitted by the province produce limited earnings.

To illustrate the magnitude of Toronto's financial situation, the Toronto Board of Trade notes that the cost of downloaded social services for the city has increased one hundred and eighty-five percent from \$130 million in 1998 to more than \$370 million in 2005.¹¹¹ While federal revenues increased by forty-five percent and provincial revenues increased by fifty-three percent between 1992 and 2001 since they have access to a wide assortment of taxes, Toronto's earnings, which predominantly comes from property taxes, increased by only six percent during the same period.¹¹² Although it could be pointed out that the two sets of figures do not exactly coincide within the same time period, they nevertheless demonstrate the nature of the financial mismatch. In order to mitigate this fiscal gap, the Toronto Board of Trade suggested that the province should either absorb some of the services that were previously downloaded to the city, or give the city access to a wider array of revenue sources.¹¹³

Unless Toronto is provided with adequate assistance in addressing its fiscal challenges, this problem will likely persist. Since Toronto's current legislative arrangement obviously has not solved the issue, denying the city a new arrangement on the basis that it must address its financial troubles beforehand will not allow the problem

¹¹¹ Toronto Board of Trade, *Recommendations for a New City of Toronto Act: Setting the Course for a Strong Toronto*, Toronto, July 2005, p.14.

¹¹² *Ibid*, p.16.

¹¹³ *Ibid*, p.15.

to be resolved. As Anne Golden, Chair of the Conference Board of Canada, put it, “The *City of Toronto Act* is *not* about solving fiscal imbalance as its main goal. The *City of Toronto Act* is about unfettering the city so that it can do a better job [original emphasis].”¹¹⁴

3.5 Developments on Toronto’s Charter

According to a joint interim report issued by the provincial government and the City of Toronto on May 18, 2005, there is a common consensus that the city should be granted “broad permissive powers” to address matters of local concern as long as the city’s actions do not conflict with specific issues that have been explicitly declared by the province as a matter of provincial interest.¹¹⁵ This means that Toronto, unlike the present arrangement where it can only act on issues if permitted by the province to do so, will be allowed to act on any matter unless the provincial government expressly forbids it.

The concept of granting Toronto broad permissive powers represents a significant shift in provincial-municipal relations for Ontario. “It is huge,” says Toronto Mayor David Miller. “It turns the idea of municipal government on its head.”¹¹⁶ As Municipal Affairs and Housing Minister John Gerretsen put it, “There are way too many things a city like Toronto has to go to the province to get permission for, everything from changing ward boundaries ... to many parking regulations, stops signs, traffic lights and speed humps on residential streets. It is high time we give municipalities much greater permissive legislation.”¹¹⁷

¹¹⁴ Alan Broadbent *et al*, *Towards a New City of Toronto Act*, Toronto, Zephyr Press, 2005, p.35.

¹¹⁵ Ministry of Municipal Affairs and Housing, Government of Ontario, Joint Ontario-City of Toronto Task Force to Review the *City of Toronto Act, 1997* and Other Private (Special) Legislation, *Staff Progress Report*, Toronto, Queen’s Printer for Ontario, May 2005, p.5.

¹¹⁶ Kerry Gillespie, “T.O. Set for a Power Surge,” *Toronto Star*, April 5, 2005, p.B1.

¹¹⁷ *Ibid.*

As a demonstration of its commitment to the concept broad permissive powers for its municipalities, the provincial government allowed the City of Toronto and the Association of Municipalities of Ontario — an organization representing Ontario's municipalities — to negotiate directly with the federal government on the details of allocating federal gas tax revenues for Ontario's municipalities.¹¹⁸ Traditionally, Ontario would have negotiated the details directly with the Canadian government, collected the funds, and then distributed the money to its municipalities. As Municipal Affairs and Housing Minister John Gerretsen notes, "The McGuinty government has taken [a] historic approach in this agreement by enabling municipalities and the federal government to work together directly to decide the best way to share federal gas tax revenues."¹¹⁹

3.6 Inherent Threats to Toronto's Charter

According to the joint interim report issued by the city and the province, Toronto's charter is scheduled to be introduced in the 2005 autumn session of the legislature.¹²⁰ When the provincial legislature ultimately ratifies the charter, it will undoubtedly change the city's legal status in relation to other Ontario municipalities since Toronto will no longer operate under the apparatus of general municipal legislation. However, Toronto's legal status in relation to the provincial government will remain unchanged since it will still be a creature of provincial statute. This means that Toronto's charter is vulnerable to the political actions of the legislature.

¹¹⁸ Ministry of Municipal Affairs and Housing, Government of Ontario, News Release: "Ontario Builds Better Relationship with Municipalities," Toronto, Queen's Printer for Ontario, February 2, 2005.

¹¹⁹ Ministry of Municipal Affairs and Housing, Government of Ontario, News Release: "Gas Tax Funds to Flow Directly to Ontario Municipalities," Toronto, Queen's Printer for Ontario, June 17, 2005.

¹²⁰ Ministry of Municipal Affairs and Housing, Government of Ontario, Joint Ontario-City of Toronto Task Force to Review the *City of Toronto Act, 1997* and Other Private (Special) Legislation, *Staff Progress Report*, Toronto, Queen's Printer for Ontario, May 2005, p.3.

After all, provincial elections occur periodically, and the next one is scheduled to occur on October 4, 2007.¹²¹ Since the province has absolute authority over its municipalities, it is possible that a future provincial government could undermine the efforts of the government of Premier Dalton McGuinty.

For instance, the legislature could circumvent Toronto's broad permissive powers by unilaterally declaring more issues as matters of provincial interest, which would effectively confine the city's jurisdiction to only a small number of issues. In addition, the provincial government could exclusively amend Toronto's charter by substituting the city's broad permissive powers with a prescribed list of explicit responsibilities, which would effectively compel the city to seek provincial permission on matters that are not on the list. As the experiences of Halifax and Winnipeg demonstrate, the province could also repeal Toronto's charter, and place the city under the provisions of general municipal legislation. In order to avoid these possibilities, it is necessary to protect Toronto's charter from such actions. As David Cameron put it:¹²²

What is lacking in the present arrangements is a special process for changing the provincial-municipal division of power which recognizes the importance of these arrangements. The process ought to be special in at least two respects. First, it should be more difficult to change the provincial-municipal division of power than to enact provincial laws. Secondly, there should be provision for the direct expression of preferences by residents of local communities when it comes to decisions about how they are to be governed.

Four possible solutions have been identified by experts on local government issues as plausible methods that could legally empower Toronto. Without prejudging the viability of each of these ideas in advance, the four suggestions include: transforming Toronto into a province, converting the city into a sovereign city, amending the national

¹²¹ Section 9(2)(a) of Bill 176, *Election Statute Law Amendment Act, 2005*, Office of the Legislative Assembly of Ontario, Government of Ontario, Legislative Library, Bill 176 (Government Bill), 38th Legislature, 1st Session, Toronto, Queen's Printer for Ontario, Second Reading, May 9, 2005.

¹²² David M. Cameron, "Provincial Responsibilities for Municipal Government," *Canadian Public Administration*, Vol. 23, No. 2 (Summer 1980), p.234.

constitution to recognize municipalities as a separate order of government, and the entrenchment Toronto's powers within an arrangement known as "home rule." In order to see which of these ideas provides the most effective solution in protecting Toronto's autonomy, it is necessary to conduct an analysis on the feasibility of each option.

PART 4: SUGGESTED METHODS OF EMPOWERING TORONTO

4.1 Toronto as a Province

While attending the Mayors' Summit of the Americas in Miami on November 19, 1999, Toronto Mayor Mel Lastman expressed frustration in regards to the city's relationship with the provincial government by quipping that Toronto's interests would be properly protected if the city separated from Ontario and became a province.¹²³ While the mayor did not actively pursue urban secession from the province while in office, it seems that his comments were a political tactic with the province in order to acquire more legislative autonomy for Toronto.¹²⁴

At the same time, it should be pointed out that the concept of a city simultaneously functioning as a subnational unit is not exactly a novel idea. After all, Austria is a country subdivided into nine separate states with the capital city of Vienna concurrently operating as an Austrian state. Germany consists of sixteen subnational states with the cities of Berlin, Bremen, and Hamburg functioning as German states. In Russia, which comprises a total of eighty-nine individual federal subjects, the cities of Moscow and Saint Petersburg also exist as federal subjects. Since Canada is a federal nation like Austria, Germany, and Russia, it seems possible that the City of Toronto could simultaneously exist as a Canadian province.

However, it should be mentioned that there is no historical precedent of a Canadian municipality separating from a province in order to become a province. The closest analogy to a part of Canada separating from a constituent unit, and attaining the same legal status as the constituent unit from which it seceded, is the area of Nunavut

¹²³ Leslie Papp, "Mayor's Province of Toronto 'Just Not Possible,' Experts Say," *Toronto Star*, November 21, 1999, p.A1.

¹²⁴ Roger Keil and Douglas Young, "A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto," *Urban Affairs Review*, Vol. 39, No. 1, September 2003, p.91.

when it separated from the Northwest Territories to become a territory itself on April 1, 1999. However, this analogy is limited since neither territory became a province.

Although it could be pointed out that the national government created provinces out of the territories it possessed after Canadian Confederation, such as Alberta, Manitoba, and Saskatchewan, it is important to mention that the relationship that the federal government has with its territories is legally akin to the provincial government's relationship with its municipalities since the territories are creatures of federal statute.¹²⁵ Based on this information, the creation of Nunavut as a territory by the federal government is comparable to Ontario, for instance, transforming Brant County minus the City of Brantford in southern Ontario into the City of Brant in 1999. For the City of Toronto to become a province, it would have to observe the constitutional procedures of establishing provinces in Canada.

According to the prevailing legal opinion on creating Canadian provinces, Section 42(1)(f) of the *Constitution Act, 1982* states that the creation of a new province would entail a constitutional amendment requiring the consent of Parliament and at least seven provincial legislatures representing at least half the total Canadian population. Given this requirement, it is politically remote that other provincial governments would support the transformation of Toronto into a province at the expense of Ontario since it would create a legal precedent where provincial governments could lose their municipalities in other jurisdictions.

On the unlikely chance that there was adequate provincial support outside Ontario for establishing Toronto as a province, under Section 38(3) of the *Constitution Act, 1982*, Ontario could legally exercise its constitutional rights by opting out of the amendment if it declares that the creation of Toronto as a province derogates its

¹²⁵ Robert J. Jackson and Doreen Jackson, *Politics in Canada: Culture, Institutions, Behaviour and Public Policy*, Second Edition, Scarborough, Prentice-Hall, 1990, p.41.

legislative powers or privileges. In addition, the federal government enacted a self-imposed statutory requirement in 1996 that Parliament's consent to a general constitutional amendment is contingent on the approval of British Columbia, Ontario, Quebec, at least two Atlantic provinces, and at least two Prairie provinces.¹²⁶ On this basis, it seems that Toronto's chances of achieving provincial status are improbable.

However, according to Toronto lawyer Paul Lewin, the prevailing legal view on creating provinces in Canada appears to be based on an erroneous interpretation of the Canadian Constitution. As he notes, "It has been argued by eminent constitutional scholars in Canada that the effect of Section 42(1)(f) of the *Constitution Act, 1982* is not to devise a new formula for creating provinces but rather protect the current method of creating new provinces. In other words you need to satisfy the 7-50 formula, not to create a province, but to change the method for creating new provinces."¹²⁷ He points out that Canada's traditional process for establishing new provinces can be traced to the provisions outlined in the *Constitution Act, 1871*.¹²⁸ Based on this legal opinion, he suggests that the process of making Toronto a province could occur through this constitutional procedure.

Instead of involving other provincial governments on the matter of establishing Toronto as a province, the process under the *Constitution Act, 1871* would involve negotiations only between Ontario and the federal government. According to Section 3 of the *Constitution Act, 1871*, any alteration to the boundaries of an existing province would require the consent of the affected province. The likelihood of Ontario approving the transformation of one of its municipalities into a province at the expense of its

¹²⁶ *An Act Respecting Constitutional Amendments, 1996*, c.1 (Bill C-110).

¹²⁷ Paul Lewin, "The Province of Toronto," *Local Government Bulletin No. 55*, March 2005. Information retrieved through the official website of Local Government, Toronto, by John Sewell and Alan Broadbent at <http://www.localgovernment.ca/show_library.cfm?id=147> [Accessed July 11, 2005].

¹²⁸ *Ibid.*

existing territory is remote. With this in mind, it appears that the idea of elevating Toronto to provincial status is just a fanciful dream that ignores political realities.

4.2 Toronto as a Sovereign City

While the idea of making the City of Toronto an independent country has not been advocated by any expert on local government issues, it was identified as a policy option by the city's legal division in 2000 after Toronto Mayor Mel Lastman uttered his comment on urban secession.¹²⁹ Examples of cities presently operating as sovereign nation-states include Monaco, Singapore, and Vatican City. For the City of Toronto to become a sovereign city, it would have to separate not just from Ontario, but from Canada as well.

While it was already noted that no historical examples exist of a Canadian municipality seceding from a province in order to become a province, there is equally no precedent of a municipality separating from Canada to become an independent nation. The only time that the issue of separation was legally recognized was when the Supreme Court of Canada ruled on the constitutionality of provincial secession in 1998.¹³⁰

In this case, the court decided that a province cannot unilaterally separate from Canada without the consent of the rest of the country.¹³¹ The judgement further stipulated that provincial separation would require a constitutional amendment, which would involve Parliament and other provincial governments.¹³² If a referendum was to be used as a basis for the political expression in favour of secession, a "clear majority" on a

¹²⁹ Office of the Chief Administrative Officer, City of Toronto, Strategic and Corporate Policy Division, "Powers of Canadian Cities: The Legal Framework," *Towards A New Relationship With Ontario and Canada*, Background Report prepared by Corporate Services Department, Legal Division, June 2000, p.9.

¹³⁰ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

¹³¹ *Ibid*, p.273.

¹³² *Ibid*, p.270.

“clear question” would be required before any negotiations on the terms of separation could begin.¹³³ In response to the ruling, the federal government enacted legislation in order to explicitly state its expectations on any actions taken by a provincial government to secede from Canada.¹³⁴

Since the judicial decision specifically dealt with the issue of provincial secession, its findings may not necessarily be applicable to the separation of a municipality from Canada. For Toronto to become a sovereign city, it seems that it would be necessary for the city to achieve provincial status first, and then, as a province, separate from Canada. Since it was demonstrated how arduous it would be for the City of Toronto to be converted into province, transforming the city into a sovereign city would be further difficult.

4.3 Constitutional Recognition of Municipal Governments

Since municipalities are mentioned as a provincial responsibility in the Canadian Constitution, there exists the suggestion that entrenching municipalities as a separate government in the constitution could protect municipal interests from the political decisions of provincial legislatures. After all, recognizing municipalities as a government in the national constitution is not an unusual idea especially since countries such as Brazil, Holland, and Sweden have granted constitutional status for their municipalities. The idea of entrenching the autonomy of local governments in the national constitution is not exactly an unusual concept for Canada.

As far back as 1838, Lord Durham recommended that municipal authority should be constitutionally entrenched when he wrote his report.¹³⁵ In addition, it should be noted

¹³³ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, p.267.

¹³⁴ *Clarity Act*, [2000, c.26].

¹³⁵ Gerald M. Craig (Editor), *Lord Durham's Report*, Toronto, McClelland and Stewart, 1963, p.145.

that school boards are the only local governments in Canada which have some constitutional safeguards.¹³⁶ Based on this information, it does not seem that there is a legitimate reason for denying municipalities the same legal protection that school boards enjoy. Despite the fact that school boards are legally recognized in the Canadian Constitution, this does not imply that their authority is necessarily protected from the political decisions of provincial legislatures.

According to Section 93 of the *Constitution Act, 1867*, education is an exclusive provincial responsibility just as much as municipalities are an exclusive provincial responsibility. This means that provincial governments can make any decision on education matters as long as they observe the constitutional rights of linguistic and denominational communities to receive educational instruction according to their linguistic needs or religious beliefs. Even though this stipulation seems to mitigate the ability of provincial legislatures in making political decisions on education matters, there have been instances when a province amended the constitution bilaterally with the federal government in accordance with the provisions outlined under Section 43 of the *Constitution Act, 1982* to curtail the authority of school boards.

In Newfoundland and Labrador, Term 17 of the *Newfoundland Act* was amended in 1987, 1997, and 1998 by the provincial legislature and the federal government which ultimately allowed the system of local denominational school boards to be replaced by a network of secular school boards with the ability of providing religious instruction to their constituents. In Quebec, the *Constitution Act, 1867* was amended by the federal government and the provincial legislature through the insertion of Section 93A which rendered the restrictions outlined in Section 93 as inoperative to the province, thereby

¹³⁶ Section 93 of the *Constitution Act, 1867*, Section 22 of the *Manitoba Act, 1870*, Section 17 of the *Alberta Act*, Section 17 of the *Saskatchewan Act*, Term 17 of the *Newfoundland Act*, and Sections 23 and 29 of the *Constitution Act, 1982*.

allowing the provincial government to reform its network of denominational school boards with a system of secular school boards characterized along linguistic lines.

In addition, the Canadian judiciary has reinforced the authority that provincial governments have over school boards. According to a court ruling in Ontario:¹³⁷

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.

This statement was reiterated by the Supreme Court of Canada in a subsequent legal decision.¹³⁸ Based on this information, it appears that the protection of municipal autonomy through constitutional entrenchment would require not just simple recognition of municipalities as a provincial corporation, especially since it seems that the municipal autonomy in a province could be rescinded bilaterally by the provincial legislature and Parliament, but as an order of government in the same league as the national and provincial tiers of government. In order to entrench municipalities as a level of government, it would be necessary to alter the Canadian Constitution.

However, it should be pointed out that all previous attempts to constitutionally recognize municipalities have failed. When the Canadian Federation of Municipalities requested to have municipal autonomy embedded into the Canadian Constitution during the successful repatriation process in 1982, the demand was rejected by Parliament and the provincial legislatures.¹³⁹ Even unsuccessful constitutional proposals, such as the Victoria Charter in 1971, the Meech Lake Accord in 1987, and the Charlottetown Accord in 1992, ignored the idea of entrenching municipal authority into the Canadian

¹³⁷ *Ontario Public School Boards' Assn v. Ontario (Attorney General)*, (1997) 151 D.L.R. (4th) 346, p.361.

¹³⁸ *Ontario English Catholic Teachers' Assn v. Ontario (Attorney General)* (2001) 196 D.L.R. (4th) 577, p.610.

¹³⁹ Warren Magnusson, "Urbanism, Cities and Local Self-Government," *Canadian Public Administration*, Vol. 48, No. 1 (Spring 2005), p.109.

Constitution. Obviously, it appears that there is a lack of interest by the federal and provincial governments to alter the constitution in a comprehensive manner, especially with regards to acknowledging municipal autonomy.

In the unlikely event that a political consensus emerged that municipalities should be constitutionally recognized, it would require a formal amendment. According to the general amending procedure outlined in Section 38 of the *Constitution Act, 1982*, altering the constitution to include municipalities as an order of government would require the approval of Parliament and at least seven provincial legislatures representing no less than half the total Canadian population. Modifying the constitution to acknowledge municipalities as a government tier would undoubtedly represent a significant shift in the distribution of power between the provinces and their municipalities insofar that any gain in municipal autonomy would presumably come at the expense of existing provincial authority, especially since provincial legislatures have exclusive authority over all local matters under Section 92(16) of the *Constitution Act, 1867*. On this basis, the chances obtaining sufficient provincial support for such an initiative seem remote.

On the outside chance that there was adequate provincial support to embed municipal autonomy over local issues into the constitution, it is possible that any provincial legislature which did not originally agree with the initiative could exercise its rights under Section 38(3) of the *Constitution Act, 1982* by opting out of a constitutional amendment it perceived as an infringement of its legislative rights and privileges. On this basis, if all provinces except Ontario approved a constitutional amendment that recognized municipalities as an order of government with authority over local matters, Ontario could opt out of the amendment and deny all its municipalities this legal power. However, since Parliamentary approval for an amendment operates under the provisions of the self-imposed federal statute that requires the consent of British

Columbia, Ontario, and Quebec, it is possible that any one of these three legislatures could exercise its veto under this law in order to deny all Canadian municipalities constitutional autonomy.

Obviously, it appears that the complexities of entrenching municipal authority into the Canadian Constitution makes it difficult to legally empower the City of Toronto from the actions of the Ontario legislature. As David Cameron put it, “Municipalities have no place in a federal constitution, at least not beyond the present references which [consign] them to provincial jurisdiction. ... The constitutional place of municipalities is within the province, but it is a place in need of much greater recognition and much greater security.”¹⁴⁰

4.4 Toronto as a Home Rule City

Home rule is best defined as “the transfer of power from the state to units of local government for the purpose of implementing local self-government.”¹⁴¹ The origin of municipal home rule can be traced to the American state of Missouri, when the legislature amended the state constitution in 1875 to recognize the autonomy of its municipalities in order to counter the influence of an Iowa court decision made in 1868. This decision is commonly known as Dillon’s Rule, after Iowa Supreme Court Judge John F. Dillon whose influential ruling determined the narrow view of municipal authority. In the judge’s words:¹⁴²

A municipal corporation possesses and can exercise the following powers and no others; first, those granted in express words; second, those necessarily implied or necessarily incident to the power expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation — not simply convenient but indispensable;

¹⁴⁰ David M. Cameron, “Provincial Responsibilities for Municipal Government,” *Canadian Public Administration*, Vol. 23, No. 2 (Summer 1980), p.235.

¹⁴¹ Diane Lang, “Dillon’s Rule and the Birth of Home Rule,” *The Municipal Reporter*, December 1991, p.3.

¹⁴² *Merriam v. Moody’s Executors*, 25 Iowa 163 (1868), p.170.

and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation.

Shortly after Dillon's Rule was made, the Michigan Supreme Court issued a different decision on municipal autonomy in 1871. This ruling is called the Cooley Doctrine, after Michigan Supreme Court Judge Thomas M. Cooley. In his view:¹⁴³

The state may [mold] local institutions according to its views on policy or expediency; but local government is [a] matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

In response to the influence of Dillon's Rule, Missouri embraced the Cooley Doctrine by entrenching municipal authority through home rule. Subsequently, other states established home rule provisions. While municipal home rule arrangements differ from state to state, they can be classified into one of two general types of home rule models.¹⁴⁴ The first model is known as constitutional home rule, where cities are granted the right by the state constitution to form their own charters and to exercise local matters listed in their charters without interference from the legislature. The other model is known as legislative home rule, where cities are given the right by a statute of the state legislature to acquire local autonomy through a prescribed method.

While the concept of municipal home rule exists in the United States of America, it is possible for home rule to exist in Canada. After all, both nations were colonized by the British Empire which embedded the tenets of British Common Law into their respective legal systems. In addition, both countries are federal systems which do not recognize municipalities as a level of government in their national constitutions, yet allow

¹⁴³ *People ex rel. Leroy v. Hurlburt*, 24 Mich. 44 (1871), p.108.

¹⁴⁴ Diane Lang, "Dillon's Rule and the Birth of Home Rule," *The Municipal Reporter*, December 1991, pp.3-4.

some of their respective cities to be governed by a charter at the subnational level. In fact, it should be pointed out that some elements of home rule already exist in Canada.

In Saskatchewan, the provincial legislature enacted legislation in 2002 specifically for its cities.¹⁴⁵ Since the City of Lloydminster has its own charter, it was excluded from the provisions of the law. In essence, all twelve cities were given the opportunity to be excluded from the apparatus of general municipal legislation, and be exclusively governed by the provisions of the statute. Unlike the general municipal legislation, however, the law does not automatically apply to all twelve cities. If a city wanted to be governed by the provisions of the statute, its council would be required to ratify a resolution to that effect. Currently, all twelve cities operate under the jurisdiction of the 2002 law.¹⁴⁶ While the Saskatchewan legislation does not contain any broad permissive powers for its cities, it nevertheless provides an example of legislative home rule in Canada.

Legislative home rule exists in British Columbia as well, especially since the provincial government enacted legislation in 2003 that granted all its municipalities broad permissive powers to act on local matters.¹⁴⁷ Since it seems that the City of Toronto will receive permissive authority to act in areas of local concern through its charter, it appears that legislative home rule will exist in Ontario. Even though it appears that some elements of home rule exist in Canada, this does not imply that the influence of Dillon's Rule, which seems to dominate provincial-municipal relations in Canada, will be rendered obsolete.

¹⁴⁵ *Cities Act*, S.S. 2002, c.C-11.1.

¹⁴⁶ Karin Treff and David B. Perry, *Finances of the Nation: A Review of Expenditures and Revenues of the Federal, Provincial, and Local Governments of Canada*, Toronto, Canadian Tax Foundation, 2004, p.1:11.

¹⁴⁷ Section 4 of the *Community Charter*, [SBC 2003] c.26.

While some form of home rule exists in forty-eight of the fifty American states,¹⁴⁸ forty states still apply some form of Dillon's Rule in state-local relations.¹⁴⁹ This means that a significant majority of home rule states use Dillon's Rule. The reason why many home rule states use Dillon's Rule in their relations with their municipalities is due to a difference of opinion as to what constitutes a purely local matter. As American legal scholar Gerald Frug put it:¹⁵⁰

Local self-determination has been thought appropriate only for local matters, and state courts have therefore had to decide whether issues are "statewide concern" or are purely local in nature. Given the fact that virtually every city action affects people who live in nearby cities, as well as non-resident visitors, any of them can easily be seen as frustrating state objectives.

In addition, American constitutional scholar Ellis Katz notes that "state courts are called upon to interpret home rule charters and often fall back on Dillon's Rule to take a narrow view of local authority."¹⁵¹ The reason for the American judicial system adopting a narrow view on local authority can be traced to a United States Supreme Court decision in 1903 which upheld Dillon's Rule by declaring that municipalities "are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers."¹⁵² Based on this information, it seems obvious that even if Ontario implemented a home rule arrangement for Toronto, the provincial legislature would still have the ability to meddle in the local affairs of the city by declaring any matter as a

¹⁴⁸ David R. Berman, "State-Local Relations: Authority, Finance, and Regional Cooperation," *The Municipal Yearbook*, Washington, DC, International City/County Management Association, 1999, p.49.

¹⁴⁹ Patrick J. Smith and Kennedy Stewart, *Beavers and Cats Revisited; Creatures & Tenants vs. Municipal Charter(s) & Home Rule: Has the Intergovernmental Game Shifted?* Kingston, Queen's University, Institute of Intergovernmental Relations, School of Policy Studies, Canadian Network of Federalism Studies, Paper prepared for the Municipal-Provincial-Federal Relations Conference, May 9-10, 2003, p.4.

¹⁵⁰ Gerald E. Frug, *City Making: Building Communities Without Building Walls*, Princeton, Princeton University Press, 1999, p.51.

¹⁵¹ Ellis Katz, "Local Self-Government in the United States," *Issues of Democracy: Democratic Local Government*, Vol. 4, No. 1 (April 1999), p.10.

¹⁵² *Atkin v. Kansas*, 191 U.S. 207 [1903], p.220.

provincial concern, and have the Canadian judicial system reinforce its authority over the city.

While it could be argued that home rule in Canada is legislative in nature, constitutional home rule would not be able to mitigate the actions of the provincial legislature either. In order to include municipal autonomy in a provincial constitution, it should be pointed out that a provincial legislature has the exclusive authority to amend its constitution according to Section 45 of the *Constitution Act, 1982*. This means that the Ontario government could insert home rule provisions into its constitution, which is located under the Fifth Part of the *Constitution Act, 1867*, but it also means that a future Ontario legislature could unilaterally repeal these constitutional home rule provisions.

At the same time, it should be mentioned that constitutional home rule could also be accomplished through a bilateral amendment to Section 92 of the *Constitution Act, 1867* by a province and the federal government under the provisions of Section 43 of the *Constitution Act, 1982* in order to make the amendment exclusive that particular province. This would effectively mitigate any unilateral actions by a provincial legislature to revoke any home rule provisions that have been entrenched bilaterally. At the same time, it should be noted that the federal government may not want to get actively involved on a matter that it views as a purely local issue. If the experiences of denominational school boards in Quebec as well as those in Newfoundland and Labrador are any indication, the federal government could potentially collaborate with the provincial government to undermine any constitutional home rule measures.

While it seems that the prospect of legally empowering Toronto from the political decisions of the Ontario legislature appears bleak, there exists another overlooked alternative.

4.5 Protocol for Protecting Municipal Autonomy

The problem that was inherent in each of the four suggestions was that they focused too much attention on limiting the authority of the provincial government over its municipalities while ignoring the need of municipalities to express their preferences over how they are to be governed. If an effective protocol for municipal empowerment is to be established, it should not only address the political and legal feasibility of restraining provincial actions over municipalities, it should also allow the provincial government an opportunity to politically and legally consult with its local governments over how they are to be governed. In essence, this protocol should involve a concept known as municipal consent.¹⁵³

In Toronto's case, municipal consent would involve its charter having a legal stipulation that any alteration to the legislative charter — including its repeal — requires the explicit approval of the city's council. While this stipulation would prevent the legislature from unilaterally modifying Toronto's charter, it would also include the city in the process of any changes to its charter. Even though such a protocol would be unprecedented for provincial-municipal relations in Ontario, it is not a radical departure from other conventions that exist within Canada.

According to Donald Lidstone, the provinces of British Columbia and Nova Scotia are legally required through statutory clauses in municipal legislation to consult with their respective municipalities on any amendments to local government legislation.¹⁵⁴ While it could be pointed out that Section 3 of the *Memorandum of Understanding Between Ontario and the Association of Municipalities of Ontario* explicitly states the province's commitment to consulting with its municipalities prior to any legislative or regulatory

¹⁵³ Bryan Schwartz, "Making the Case for Urban Autonomy: The Legal Framework," *Ideas That Matter*, Vol. 3, No. 1, November 2003, p. 17.

¹⁵⁴ Donald Lidstone, "Assessment of the Municipal Acts of the Provinces and Territories," Vancouver, Report prepared for the Federation of Canadian Municipalities, April 21, 2004, p.16.

changes that could have an impact on municipalities, it is important to note that Section 10 of the memorandum indicates that the accord expires in 2007 with the possibility that either party could unilaterally terminate the agreement at any time beforehand.¹⁵⁵

At the same time, it should be mentioned that consultation does not necessarily imply obtaining consent. It is possible that the provincial government could inform its municipalities that it intends to act against their interests and still declare that it legally consulted with its municipalities. In order to avoid this possibility, it is necessary that municipal empowerment includes a legal requirement that the provincial government must acquire explicit municipal consent before any legislative changes to relevant statutes are made.

Of course, whether the Ontario legislature enacts such a legislative protocol to protect municipal autonomy depends on its political desire to self-impose such a restriction. After all, Ontario already has other self-imposed laws that limit the power of the provincial government, such as the *Members' Integrity Act, 1994*, S.O. 1994, c.38 which outlines the expected proper behaviour of elected officials of the legislature in order to avoid potential conflicts of interest. On this basis, the idea of self-imposed restrictions by the Ontario government is not an unusual concept.

While it could be pointed out that self-imposed legislative restrictions could easily be repealed by the provincial legislature, an effective protocol on municipal autonomy would have to contain statutory provisions that the law cannot be amended without the explicit consent of a local council, thereby hindering the unilateral impulses of the legislature and legally empowering the municipality at the same time.

¹⁵⁵ According to the provisions of the *Municipal Amendment Act, 2005*, S.O. 2005, c.8, which came into effect on June 13, 2005, Section 3(1) of the *Municipal Act, 2001*, S.O. 2001, c.25 has been amended to recognize the *Memorandum of Understanding Between Ontario and the Association of Municipalities of Ontario* dated August 23, 2004.

CONCLUSION

When Premier Dalton McGuinty first announced his government's commitment to introduce new legislation by the end of 2005 that would effectively make Toronto a charter city, he generated renewed excitement with the city's local citizens who had become resigned to the idea that Toronto was no longer as politically influential as it was prior to municipal amalgamation. While it has been demonstrated that charter cities in Canada are not legally immune from the political decisions of the provincial legislature, no one in Toronto should be left with the impression that a legislative charter will necessarily protect the city from the actions of the Ontario government. After all, what a province gives to its municipalities, it can easily take away. This includes charter cities as well.

In order to effectively protect municipal autonomy from the impulses of the legislature, a protocol on provincial-municipal relations must be established. Not only must this protocol have the ability to restrain the legislature's authority over its municipalities, it must also allow municipalities an opportunity to express how they prefer to be governed. In essence, genuine local autonomy includes municipal consent, and it could be easily accomplished without having to go through the rigours of intricate legal or political procedures. Municipal consent could be established by simply inserting statutory clauses into municipal legislation which would legally compel the provincial legislature to obtain explicit approval of a local council prior to any alterations to the law. In the case of Toronto, this means that its charter must include an amending procedure which requires the joint approval of Toronto's council and the Ontario legislature.

Since the development of Toronto's charter is occurring under the framework of reforms to the *Municipal Act, 2001*, S.O. 2001, c.25, it is possible that other cities could receive a legislative charter. Under these circumstances, the protocol of municipal consent should also be applied to their charters.

In addition, the apparatus of general municipal legislation which governs all other municipalities should have the protocol as well. Since there are currently less than four hundred and fifty municipalities in Ontario,¹⁵⁶ it could be difficult for the provincial government to obtain the consent of all its municipalities on a timely basis in order to modify the statute. In this situation, a legally entrenched amending formula would have to be developed between the legislature and the Association of Municipalities of Ontario in order to determine what constitutes adequate municipal consent.

Of course, the Ontario legislature could politically decide not to implement the protocol on municipal autonomy, thereby leaving Toronto and other municipalities in a legally vulnerable position of having their authorities being usurped by the province at any time. Not only would such an action undermine the efforts of the government of Premier Dalton McGuinty, it would effectively prevent the City of Toronto from escaping the legislative straightjacket that baffled Houdini.

¹⁵⁶ C. Richard Tindal and Susan Nobes Tindal, *Local Government in Canada*, Sixth Edition, Toronto, Thomson Nelson, 2004, p.2.

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