UNIVERSITY OF TORONTO | SCHOOL OF CITIES

BETWEEN EXPANSION AND PREEMPTION: CANADIAN MUNICIPAL POWERS IN AN AGE OF INFRASTRUCTURE DEFICIT

Benoît Frate and David Robitaille

Preliminary publication (December 4, 2024)

This article is a chapter from the School of Cities report
Canada's Urban Infrastructure Deficit: Toward democracy and equitable prosperity

⋆ *This text is part of a research project entitled "Ces villes pionnières: comprendre l'innovation réglementaire municipale au Canada" ["These pioneering cities: Understanding municipal regulatory innovation in Canada"], conducted by the authors and supported by the Social Sciences and Humanities Research Council of Canada. The authors wish to thank Corey Azimov, Nickolas Eburne, Jack M. Little, Béatrice Monat, Roxanne Munger, and Jordan Trudel for their research assistance. They also wish to thank the anonymous reviewers for their generous and instructive comments. All errors and omissions remain the authors' own.*

ABSTRACT

This text explores the status of municipal powers in Canada amidst ongoing and complex legislative and judicial changes. It examines this issue from a legal perspective, focusing on the infrastructure deficit and highlighting two conflicting trends: expansion and preemption. Over the past thirty years, provinces and courts have significantly expanded municipal powers. However, municipalities still frequently encounter reminders of their subordination to provincial control, under a concept similar to what is referred to as "preemption" in the United States that is also relevant north of the border. As Canada faces unprecedented challenges, including an infrastructure deficit, effective solutions will often involve municipalities. A deeper understanding of their powers and the trends shaping them can help identify the best ways forward.

AUTHOR BIOGRAPHIES

Benoît Frate, PhD, is an associate professor in the Department of Urban Studies and Tourism of the Université du Québec à Montréal and a member of the Barreau du Québec. His research and publications focus on the evolution and exercise of municipal powers in Canada, on the internationalization of cities, and on the legal aspects of tourism. He also serves as Counsel with DHC Avocats.

David Robitaille, PhD, is a full professor and Associate Dean, Academic, in the Civil Law Section, Faculty of Law, at the University of Ottawa and a member of the Barreau du Québec. His recent publications focus on the federal-provincial-municipal division of powers regarding land use planning, the environment, transportation, and human rights. He also serves as Counsel with DHC Avocats.

INTRODUCTION

As we try to address the Canadian infrastructure deficit in a democratic, equitable, and sustainable manner, reflecting on the proper balance of power between the three levels of government appears essential. But where do municipal powers stand in the country after multiple complex legislative and judicial changes have occurred – and continue to unfold? This text focuses on this question from a legal perspective and in the context of the country's infrastructure deficit, with examples from coast to coast, by highlighting two conflicting trends: expansion and preemption.

Municipal powers have expanded over the last 30 years as provinces changed how they delegate them to municipalities. The Supreme Court of Canada has noticed these changes, applied them, and concurrently transformed its view on municipal powers, again to the benefit of municipalities. The first two parts of this text focus on these major developments in Canadian municipal law and their consequences on the ability of municipal governments to find innovative solutions to the environmental, social, and transportation infrastructure deficit the country faces.

Even after these developments, however, municipalities frequently face reminders of their subordination to provincial control, a phenomenon known as "preemption" in the United States. U.S. states often prioritize their powers and interests over those of municipalities, a reality that has garnered significant attention and thorough examination in academic literature for its impact on municipal autonomy. Although the term "preempt" is usually not used in this sense north of the border, we demonstrate in our discussion that this concept is also pertinent and useful in a Canadian context for a clear understanding of where municipal powers stand.

Our country faces unprecedented challenges and crises. The most effective solutions to these will often involve our municipalities; a better understanding of their powers and the trends that shape them can help identify the best ways to attain our collective goals.

A NEW ERA IN CANADIAN MUNICIPAL LAW: FROM "LAUNDRY LIST" TO "SPHERES OF JURISDICTION"

Under the *Constitution Act, 1867*, provinces exercise absolute control over their municipalities through provincial statutes regulating their existence, finances, and powers.[1] However, despite the current constitutional framework, several aspects of provincial control over municipalities have been revisited in the last 30 years.[2] This text focuses on what has been deemed as the most significant contributor to municipal autonomy in the reforms – namely, a new drafting method for provincial statutes that allocate powers to municipalities.[3]

Prior to the reforms, municipalities received, through provincial statutes, long lists of narrowly defined, specific, and restrictive powers, a method of delegation commonly called a "laundry list." This approach has been transformed into a general delegation of broad powers in several domains, through the creation of "spheres of jurisdiction." This new drafting method was first introduced in Alberta in 1994 and has since spread across the country; eight provinces, including Ontario, Quebec, and British Columbia, have adopted this approach.[4] Across the provinces that adopted it, variations exist in the number and types of domains where it applies.[5]

For instance, in Quebec, municipal councils once had the power to adopt bylaws to "prevent any person from carrying fire over any public street, or in any garden, yard or field, otherwise than in a metal vessel."[6] Now, they simply have the power to "adopt by-laws in matters of safety."[7] Similarly, where they once could adopt bylaws "to prevent the throwing or depositing of ashes, paper, refuse, offal, dirt, garbage or any offensive matter or obstruction in any street, alley, yard, public ground or square or municipal stream or water,"[8] they now have the power to "adopt by-laws on nuisances."[9] In fact, the 2006 *Municipal Powers Act* granted Quebec municipalities broad powers in nine spheres

---

[1] *Constitution Act, 1867*.

[2] These include, depending on the province, natural person powers, consultation requirements, transfers of financial resources, and the acknowledgment of municipalities as a level of government. For an overview of the reforms, see, for example, Taylor & Dobson, *Power and Purpose*, and Garcea, "Empowerment of Canadian Cities."

[3] Garcea, "Empowerment of Canadian Cities," 93. Garcea highlights the fact that, after interviewing officials from the municipal and provincial levels, "[t]he widespread consensus among interviewees was that the inclusion of 'spheres of jurisdiction' provisions contributed the most to augmenting the authority and autonomy of municipal governments in performing governance and management functions."

[4] Taylor & Dobson, *Power and Purpose*, 17. The exceptions are Nova Scotia and Newfoundland and Labrador.

[5] Taylor & Dobson, *Power and Purpose*, 16–19.

[6] *Cities and Towns Act*, s 412(35) (repealed).

[7] *Municipal Powers Act*, s 62.

[8] *Cities and Towns Act*, s 413(12) (repealed).

[9] *Municipal Powers Act*, s 59.

or domains, including safety and nuisances.[10] Its section 2 states that "[u]nder this Act, municipalities are granted powers enabling them to respond to various changing municipal needs in the interest of their citizens" and that "[t]he provisions of the Act are not to be interpreted in a literal or restrictive manner" – a good illustration of the major shift it entails.

This new drafting method clearly enhances municipal autonomy and expands municipal powers. It reduces the need for municipalities to request new powers to address emerging issues (a process that previously required a statutory amendment from the province), with less risk of a municipal bylaw being struck down by courts for lack of habilitation (that is, for not having the power to adopt it).[11] Time will tell how far municipalities will push these new powers, but we can already witness interesting traces of legal innovation on their part. Indeed, since the changes, municipalities have introduced bylaws with new and creative ways of addressing burning issues like climate change and the housing crisis, among others.[12]

However, this new drafting method is not without limitations, which all stem from the fact that Canadian municipalities remain under absolute provincial control.[13] For example, a municipality might still need powers beyond those broadly granted. The City of Montreal, for instance, had to wait years to receive the powers it requested for inclusionary zoning through a statutory amendment to the *Act respecting land use planning and development*.[14] Additionally, provincial governments and their agents typically enjoy immunity from municipal bylaws.[15] The City of Montreal and surrounding municipalities thus had little to no input or control over various aspects of a major provincial-led project: the implementation of a 67-kilometre light-rail system, the Réseau express métropolitain (REM), in the metropolitan area.[16] Furthermore, provincial legislation generally prevails when it conflicts with a municipal bylaw (a topic that will be discussed in detail below where we consider state preemption in the United States). The next section will explore another potential limitation: how courts interpret and apply provincial statutes that grant powers to municipalities.

---

[10] The spheres are culture, recreation, community activities and parks, local economic development, power development and community telecommunications systems, environment, sanitation, nuisances, safety, transportation, and since 2023, housing. It should, however, be stressed that powers in local economic development, power development and community telecommunications systems, transportation, and housing are not as broadly defined as they are in the other areas.

[11] These effects were intentional from the outset for the first province to change its drafting method, Alberta. In 1994, during the debate on the bill introducing the new method, its sponsor stated, "Flexibility and innovation are key. Alberta Municipal Affairs becomes a facilitator, not a regulator [...] The new legislation sets a general framework within which a council can make laws and regulate with greater flexibility. This new concept will limit the number of amendments that will be required every time a local government wants to do something that has not been specifically stated in the legislation. [...] The main objectives are: to minimise the incidence of successful court challenges on the grounds that no substantive power existed to support a municipality's action, to enable councils to respond to unforeseen conditions without the need for amending legislation, and to reduce the size and complexity of our existing legislation." Alberta, Legislative Assembly, *Hansard*. Ongoing research on this topic reveals similar motivations among legislatures for these reforms. For the Quebec legislative intent behind the 2006 reform, see Frate, Robitaille, and Little, "Getting Rid of the Laundry List."

[12] See, for example, among many others in the last few years: Blais, "Prévost"; Judd, "Tofino"; McMillan, "'It's very courageous'"; Zimmer, "New Westminster."

[13] For an in-depth illustration of this issue, see Frate and Robitaille, "Pipeline Story," 99–100. That article also points out limitations resulting from interaction with a federal area of jurisdiction: interprovincial pipelines.

[14] *Act respecting land use planning and development*, s 145.30.1.

[15] In Quebec, for example, see *Interpretation Act*, s 42.

[16] Lévesque, "REM."

AN EVOLVING JUDICIAL PERSPECTIVE ON MUNICIPALITIES: FROM SERVICE PROVIDERS TO DEMOCRATIC SPACES OF GOVERNANCE

The autonomy of municipalities in Canada is significantly influenced by the approach courts take toward the judicial review process, whereby they ensure that municipal bylaws and resolutions are adopted and applied in accordance with the law and the Constitution. A strict approach reduces autonomy, while a liberal one enhances it. In that regard, the Supreme Court's decision in the case between Shell Canada and the City of Vancouver in 1994 marked a pivotal moment for Canadian municipalities, moving forward from a stricter to a more deferential judicial control of municipal bylaws and resolutions, hence reinforcing the role of municipalities as strong democratic spaces of governance.[17]

In the court's decision, the five-judge majority applied a strict approach, noting the absence of express powers in the city's charter authorizing the municipal council to make resolutions boycotting Shell due to its ties with the South African government during apartheid.[18] The decision went on to state that the main purpose of a municipality was essentially to provide basic services to its residents – and not to arbitrarily influence a foreign country's politics.[19]

However, writing for the four dissenting judges, Justice McLachlin expressed a contrasting vision of local citizenship in its purest democratic sense, emphasizing the need for Canadian courts to respect decisions taken by local elected officials.[20] She argued that municipalities must have broad jurisdiction to respond to the needs and welfare of their citizens, including their psychological welfare as members of a community, and to meet the numerous challenges of the 21st century.[21] From that perspective, the *Vancouver Charter* section delegating to the council the general power to adopt bylaws to "provide for the good rule and government of the city" was deemed to be an ample judicial basis for justifying the contested resolutions. Justice McLachlin concluded that the Vancouver "City Council may properly take measures related to fostering and maintaining [a] sense of community identity and pride" and that the "right of free expression, one of the most fundamental values of our society, may be exercised individually or collectively" through municipal decisions.[22]

---

[17] *Shell Canada*.

[18] *Vancouver Charter; Shell Canada*, 277–280. The majority adopted a narrow interpretation of the general power of municipalities to adopt bylaws for the city's good governance – a power that most provinces grant their municipalities – arguing that influencing another country's political regime was beyond municipal interests and, consequently, illegitimate.

[19] *Shell Canada*, 252, 278.

[20] *Shell Canada*, 242–258.

[21] *Shell Canada*, 242–258.

[22] *Shell Canada*, 252.

In other words, around the same time that Alberta was changing its drafting method, as explained in the previous section, the Supreme Court was divided on a related topic. Since then, the liberal reasoning of Justice McLachlin has had a profound impact and percolated into subsequent Canadian jurisprudence;[23] it has become the preferred approach to analysing the validity of municipal bylaws.[24] In fact, there is now a presumption that, unless stated otherwise by the legislator, municipalities must generally be considered empowered to adopt bylaws or resolutions on any matter delegated to them in broad and general terms by the province.[25]

If the legislative and judicial developments described above undoubtedly strengthen municipal autonomy and powers in Canada, the Supreme Court has nevertheless always stressed that the broad interpretation of municipal legislation is limited by the absolute wording of section 92(8) of the *Constitution Act, 1867*, which makes municipalities objects of exclusive provincial jurisdiction – or, in words that municipalities are not often fond of, "creatures" of provincial statutes.[26] Caution is thus needed, as observed by Mosonyi and Baker, who suggested that municipalities might be considered not a third level of government with full constitutional autonomy and recognition but rather a level "2.5."[27]

[23] See *114957 Canada Ltée; Catalyst Paper Corp; Canada (Minister of Citizenship and Immigration); Mainville; Hamelin; Lauzon-Foresterie*. For more details about this jurisprudential evolution, see Frate, Robitaille, and Little.

[24] The United Taxi case, in which the 1994 Alberta legislative reform was finally put to the judicial test before the Supreme Court, is among the most important decisions illustrating the new paradigm. The Supreme Court had to decide on the validity of the City of Calgary's decision to freeze the issuance of taxi plate licences under the new *Municipal Government Act*. The Court acknowledged the shift initiated by Justice McLachlin's dissent in *Shell Canada* and pointed to the legislative trend towards broad municipal powers. It then stated that the provisions of the Act must be construed broadly and purposively, respecting the evolution of modern municipalities, and concluded that the impugned bylaw operating the taxi licensing reform was perfectly legal. See *United Taxi Drivers' Fellowship*, para. 7–17.

[25] For more development, see Frate, Robitaille, and Little, 71.

[26] *See Toronto (City)*, in particular para. 2.

[27] Mosonyi and Baker, "Bylaw Battles," 19.

JEOPARDIZING MUNICIPAL AUTONOMY: DOES U.S.-STYLE PREEMPTION EXIST IN CANADA?

Despite these major developments, Canadian municipalities are frequently reminded of the legal hierarchy that exists between them and their "creators." They are not alone in this regard. South of the border, their U.S. counterparts, who also lack any constitutional recognition, must deal with frequent limitations to their autonomy as well.[28] There, the concept of preemption (more specifically, state preemption) is used to describe these limitations on municipal autonomy; according to the National League of Cities (NLC) in the United States, "preemption occurs when a higher level of government supersedes the authority of lower levels."[29]

Many authors who write on the subject in the U.S. have provided their own definitions. For example, Fowler and Witt state that "in the most basic sense, preemption occurs when higher-level governments pass laws restricting the policy authority of lower-level governments."[30] Ultimately, all definitions emphasize the overarching theme of higher-level governmental authority overriding local governance.[31] Various scholars have also attempted to create typologies of state preemption to better understand its different forms and impacts. For example, Fowler and Witt identify categories of preemption based on scope and intent, such as express preemption, implied preemption, and conflict preemption;[32] Goodman, Hatch, and McDonald identify four phases of state preemption, each with distinct policies and mechanisms, illustrating how the concept has evolved over time.[33]

From a Canadian perspective, we find the distinction made by Briffault between "old" and "new" preemption particularly useful because it marks an important change in tone in U.S. state preemption. Old preemption refers to the traditional judicial determination of whether a new municipal bylaw conflicts with an existing state law. It typically involves courts assessing the compatibility of local and

---

[28] Historically, in the United States as in Canada, municipalities could only pass bylaws on matters strictly and expressly delegated to them, with any ambiguity being resolved against the municipal decision and in favour of the citizen contesting it. In reaction to what has been called "Dillon's rule," named after Justice Forest Dillon, who is considered the creator of this rule of interpretation, some states have enacted a "home rule" approach, which is aimed at preventing states from excessively superseding local autonomy. See Frug, "The City as a Legal Concept." Dillon's rule was soon incorporated into Canadian jurisprudence, but after decades of its application by courts, some provinces, as we see in this text, started to adopt legislation with aims similar to the U.S. home rule approach.

[29] National League of Cities, "Preemption."

[30] Fowler and Witt, "State Preemption of Local Authority," 540.

[31] Swindell, Svara, and Stenberg, "Local Government Options," 8. Some authors also point out that local autonomy is not just about preemption, since state governments have many other ways by which they can supersede local authority, such as imposing the need for permissions prior to doing something, or adding restrictions and requirements. Others might well categorize these actions as forms of preemption.

[32] Fowler and Witt, "State Preemption of Local Authority," 540.

[33] Goodman, Hatch, and MacDonald, "State Preemption of Local Laws."

state regulations to ensure consistency within the legal framework.[34] In contrast, new preemption is a more aggressive and proactive approach by state legislatures to limit the authority of local governments; it often includes measures that not only preempt local ordinances but also impose penalties on local officials or governments, such as fines or the withdrawal of state aid. The rise of new preemption often seems linked to partisan and ideological polarization, particularly between state governments and urban areas with differing political leanings.

Despite its complexity, the concept of state – or, in the case of Canada, provincial – preemption is useful for embracing and analyzing the many nuances and shades of the relations between states or provinces and their municipalities.[35] It is thus with these limitations in mind, and without any pretense of presenting the most accurate or "real" categories, that we will investigate how states preempt municipalities and whether this phenomenon also affects their Canadian counterparts.

[34] Briffault, "Preemption: The Continuing Challenge"; Briffault, "Challenge of the New Preemption," 1997.

[35] "There is an enormous literature explicating and debating nuanced doctrinal points, such as how to interpret statutes that do not contain explicit preemption provisions, the various types of preemption (conflict, obstacle, field), the scope of local autonomy, the difference between preemption as a floor and as a ceiling, and whether exceptions to preemption exist and, if so, how far they extend." Cummings and Hulse, "Preemption as a Tool of Misclassification," 1874.

CLASSICAL FORMS OF PREEMPTION IN CANADA: FAMILIAR TERRITORY NORTH OF THE BORDER

This section will explore three classical (or "old") forms of preemption that are much discussed in the U.S. literature: conflict, ceiling, and floor preemption. According to Briffault, Reynolds, and Davidson, the "principal dispute in classic preemption cases is whether the state and local laws at issue are actually in conflict."[36] Conflict preemption can either be express, when a state explicitly prohibits municipal bylaws on certain matters, or implied, when a court of justice declares such a bylaw to be inconsistent – in conflict – with a state law.[37]

In Canada, courts have long recognized the principle that municipal bylaws that are inconsistent with provincial legislation should be declared inoperative.[38] Provincial statutes often include provisions that expressly provide for their paramountcy in case of conflict with municipal regulations. For example, Quebec's *Municipal Powers Act*, which we discussed earlier, includes such a provision in section 3.[39] In the environmental sector, Quebec's *Environment Quality Act* further emphasizes this precedence, stating that provincial regulations take priority over municipal bylaws, regardless of any actual or concrete conflict, unless expressly approved by the environment minister.[40] This means that if the province regulates an environmental issue, municipal bylaws cannot apply to it, since the province has already occupied the field.[41]

Recently, the municipality of Prévost, Quebec, which was the first in the province to prohibit the installation of certain gas-fired appliances in residences (furnaces, dryers, patio heaters, indoor and outdoor fireplaces), later saw the provincial government preempt its initiative by occupying the field with its own rule and forbidding all municipalities from banning natural gas without its prior authorization, hence limiting the capability of municipalities to fight climate change with innovative

---

[36] Briffault, Reynolds, and Davidson, *The New Preemption Reader*, 6. See also Briffault, "Challenge of New Preemption," 1997. "Conflict preemption" generally takes three main forms: frustration of purpose, where state laws undermine the objectives of local regulations; occupied field, which occurs when a state law occupies a regulatory area, leaving no room for local laws; and obstacle preemption, where state laws create obstacles that hinder local governments from effectively implementing their policies.

[37] Briffault, Reynolds, and Davidson, *The New Preemption Reader*, 6.

[38] *114957 Canada Ltée*, para 34–39; *British Columbia Lottery Corp*.

[39] *Municipal Powers Act*, s 3: "A provision of a municipal by-law adopted under this Act that is inconsistent with a provision of an Act or regulation of the Government or one of its ministers is inoperative." For other provincial legislations expressly providing for their paramountcy over conflicting municipal bylaws, see, for example, *Community Charter*, s 10(1) (B.C.); *The Municipal Act*, s 230 (Manitoba); *Municipal Government Act*, s 5 (P.E.I.).

[40] *Environment Quality Act*, s 118.3.3.

[41] *Saint-Michel Archange*.

solutions.[42] This type of preemption also seems present in Bill 212 in Ontario, which would force municipalities to get ministerial approval before adding bike lanes to their roads in order to ensure they do not negatively affect the flow of car traffic.[43]

Another classic form of preemption is "ceiling preemption," which, according to Goodman, Hatch, and McDonald, occurs when a state prohibits municipalities from requiring anything more than what state legislation already mandates.[44] This type of preemption originally emerged as tax and expenditure limitations (TELs), i.e., state-imposed restrictions capping the growth of local government revenues and expenditures.[45] These caps can be fixed dollar amounts, or they can tie growth rates to factors like population increases, inflation, or personal income.[46] It is inevitable that by "limiting the ability of local governments to impose a financial hardship on their constituencies," TELs had an impact on the capacity of local governments to maintain their essential infrastructures and finance new structural projects.[47]

A notable example of this form of ceiling preemption in Canada is illustrated by the Supreme Court case *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*.[48] As outlined by the Court, the Alberta government had passed a law aimed at "centraliz[ing] the control and funding of primary and secondary education in Alberta" and "implement[ing] spending restrictions upon school boards, and strengthen[ing] ministerial control over school board senior staff."[49] Since local authorities, including school districts, lack any constitutional status,[50] the Court concluded that they do not have any right to be consulted before the province adopts a new scheme limiting their finances and ability to levy taxes.[51]

In contrast, "floor preemption," as defined by the National League of Cities, establishes minimum standards that municipalities must adhere to, but allows them to enact bylaws that exceed these state

---

[42] The Quebec legislative assembly recently adopted a new law in which it is forbidden for municipalities to regulate environmental performance of buildings that "could impact energy distributors' capacity to adequately meet consumers' energy needs": *Act respecting the environmental performance of buildings*, s 31; Lecavalier, "Projet de règlement."

[43] Bill 212, *Reducing Gridlock, Saving You Time Act, 2024*.

[44] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 149.

[45] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 149–150, 154; Tax Policy Center, "What are tax and expenditure limits?"

[46] Tax Policy Center, "What are tax and expenditure limits?"

[47] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 150. For an example of these impacts, see Deller et al., "Do Tax and Expenditure Limits Hinder the Condition of Public Infrastructure?," 379.

[48] *Public School Boards' Assn. of Alberta*.

[49] *Public School Boards' Assn. of Alberta*, para 1–2.

[50] *Public School Boards' Assn. of Alberta*, para 33–42.

[51] Another well-known example of ceiling preemption in Canada, on a matter that created, at the time, major tensions within municipalities, involved a provincial bylaw that restricted drilling sites to a minimum distance of 500 metres from water sources for human consumption. In the 2010s, over 300 municipalities have sought to extend this limit to two kilometres to protect their water sources from leaking or contamination risks, but their efforts to gain ministerial approval have as yet been unsuccessful. See *Water Withdrawal and Protection Regulation*, s 32; McKenna, "Quebec Mayors Want More Help."

mandates.[52] In Canada, provincial measures of this type have recently been taken in order to tackle the housing crisis. For example, Ontario modified its *Planning Act* to remove municipal zoning powers in order to facilitate additional residential units and thus set minimum standards.[53] Similarly, British Columbia introduced changes to the *Local Government Act* and the *Vancouver Charter*, requiring its municipalities to modify their zoning bylaws with minimum standards to facilitate the construction of small-scale, multi-unit housing.[54]

It has been well discussed, however, that states' or provinces' funding of municipalities is sometimes inadequate to meet their evolving responsibilities – an issue conceptualized as a form of floor preemption. Again, similarities can be found between the United States and Canada. During the 1980s and 1990s, the American federal government began delegating social programs to states, which in turn imposed numerous unfunded mandates on local governments by downloading new responsibilities without any new funds.[55] In response to these challenges, U.S. municipalities tried to gain some constitutional recognition through court litigation, but without much success.[56] In Canada, particularly since the 1990s, provinces have increasingly delegated more responsibilities to municipalities without adequate funding, leading to a reliance on property taxes and conditional grants that often fall short of meeting service demands. Despite constitutional litigation in an attempt to prevent such delegations, Canadian court responses have always been negative[57] – leaving municipalities with insufficient resources to face new major challenges and address the resulting infrastructure deficit in many sectors.[58]

---

[52] National League of Cities, "What You Need to Know About Preemption." See also: Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 149, 154; Riverstone-Newell, "The Rise of State Preemption Laws in Response to Local Policy Innovation," 405, 419.

[53] *Planning Act*, s 35.1.

[54] *Local Government Act*, s 481.3; Vancouver Charter, s 565.03.

[55] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 150–151.

[56] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 151.

[57] A clear illustration of this can be found in the case *Ste-Rose-du-Nord (Municipality of the Parish of) v Québec (Attorney General)*. Quebec's legislative assembly had decided at the time that municipalities with fewer than 5,000 inhabitants could no longer benefit from "free" provincial police services; they would be obliged to establish their own police services, respecting the minimum standards fixed by the province, or pay for the services provided by the province. A municipality contested this reform, arguing that "the government, through this transfer of financial responsibility for a service that is inherently its own, seeks to relieve itself of a financial burden and make municipalities bear the brunt of levying a tax intended to finance part of the operating costs of its own police force." (Our translation.) *Ste-Rose-du-Nord*, 5. The Quebec Court of Appeal rejected the municipality's arguments, stating that there is no constitutional obligation to consult local authorities before delegating new responsibilities to them without adequate funding.

[58] See, for example: Federation of Canadian Municipalities, "FCM welcomes new $6 fund"; Black, "Federal budget 2023"; Draaisma, "Climate change could cost municipalities $700M more a year."

NEWER FORMS OF PREEMPTION IN CANADA: THE HOUSING CRISIS AS A CATALYST?

As mentioned earlier, it is generally recognized that a new era has begun in terms of state preemption. Briffault defines "new preemption" as "intentional, extensive, and sometimes punitive state efforts to block local action across a wide range of domains."[59] He writes with Reynolds and Davidson that this new era began around the turn of the century but accelerated rapidly after 2010 in a wide range of areas, such as "fracking, firearms, minimum wage and employment benefits, anti-discrimination laws, environmental protection, public health, and sanctuary cities."[60]

Included in these newer forms of preemption is what is often called "vacuum preemption" or "blanket preemption," where states take measures that prevent municipalities from acting on a topic or on several topics but without regulating the field themselves either. The result "is not uniform statewide regulation but no regulation – state or local – at all."[61] We are not aware of such developments in Canada as of yet.

Another form of new preemption is called "punitive preemption" or "super preemption."[62] Shragger writes that this type of state preemption "seek[s] to deter cities from – and punish[es] cities for – passing ordinances that are in conflict with state law."[63] He outlines three categories of punitions: "privately enforced civil penalties against local officials and governments, state-enforced fiscal sanctions for local governments, and criminal penalties (and possibly removal) for elected officials."[64] Goodman, Hatch, and McDonald highlight the fact that "[p]unitive preemptions are unique among the types as they also operate either by a preemption being imposed or the threat of a preemption."[65] Pough goes even further, pointing out that punitive preemption can pose a real threat to democracy.[66]

---

[59] Briffault, "Preemption: The Continuing Challenge."
[60] Briffault, Reynolds, and Davidson, *New Preemption Reader*, 11.
[61] Briffault, Reynolds, and Davidson, *New Preemption Reader*, 12.
[62] Schragger, "Attack on American Cities," 1181; Pough, "Understanding the Rise of Super Preemption."
[63] Schragger, "Attack on American Cities," 1182.
[64] Schragger, "Attack on American Cities," 1182. See also Pough, "Understanding the Rise of Super Preemption," 91–97; Scharff, "Hyper Preemption: A Reordering of the State-Local Relationship?," 1473–1474, 1494–1507.
[65] Goodman, Hatch, and McDonald, "State Preemption of Local Laws," 149.
[66] "Super preemption has the ability to chill the kind of local political activity that has come to characterize our cities as 'laboratories of democracy.' Indeed, by targeting not only the policies enacted by our localities, but also the politics surrounding those enactments, the punitive provisions in super preemption laws can ground local political movements before they begin. Given that local government is one of the rare forums where political minorities can create real change, this chilling effect runs the added risk of further alienating an already ostracized demographic." Pough, "Understanding the Rise of Super Preemption," 116.

Canada does not seem to have reached that stage of preemption, but still, recent measures adopted in order to tackle the housing crisis raise eyebrows. In 2023, Ontario launched the three-year $1.2 billion Building Faster Fund, where selected municipalities need to reach 80% of their annual housing start targets (as assigned by the province) each year to become eligible for funding.[67] Municipalities were asked to submit a "housing pledge," detailing the actions and strategies they will follow to reach their target. If they miss, they receive nothing. If their target is exceeded, they receive a bonus. In the same vein, the same year, the federal government established its own $4 billion (now $4.4 billion) fund to increase housing construction, and made agreements with more than 175 municipalities to do so.[68] These municipalities had to set targets and commit to a minimum number of initiatives in an action plan; municipalities failing to meet their objectives could see a decrease in their funding. In that case, if targets are not met, the penalties are not financial but still very serious: an advisor may be appointed to assess the municipality's progress and provide recommendations. The municipality may also be asked to create or modify a bylaw or approve or deny a permit to achieve the target – or this task may be done for the municipality. These latter measures would represent major intrusions into municipal autonomy and powers.

These examples share a common feature: municipalities that fail to reach their targets face penalties, including loss of financing or loss of control over their own bylaw or permitting process.[69] While Canada has not seen cases as extreme and ideologically-charged as some examples from the United States, there seems to be a link between the two: not acting according to the objective or request will result in a negative consequence for the municipality.[70] Does it qualify as punitive preemption? Maybe not, but it is certainly an important interference in municipal autonomy and powers. We can also question the long-term consequences of these provincial measures. While housing starts may certainly be affected by demanding bylaws and lengthy approval processes, wielding an axe to cut through them – the result of initiatives taken to reach the targets – may ultimately harm the creation of harmonious and sustainable neighbourhoods. In other words, while it is too early to draw definitive conclusions on the effects of these measures, the number of housing starts should certainly not be the only variable to consider.

---

[67] Government of Ontario, "Ontario Providing New Tools to Municipalities."

[68] Canada Mortgage and Housing Corporation, "Housing Accelerator Fund." It is worth noting that this fund led to significant backlash from the provinces, which are now considering legislative changes to require provincial authorization before a municipality can enter an agreement with the federal government. The premiers, after their Council of the Federation in Halifax in November 2023, made the following comment on the question in their final declaration: "Provinces and territories need to be partners in federal infrastructure and housing programming. Premiers agreed to explore legislative frameworks similar to Québec that require provincial authorization before municipalities or public agencies enter into any agreements with the federal government. Predictable and flexible federal funding that flows exclusively through provinces and territories is necessary to address unique needs and support long-term capital planning." See Council of the Federation, "Premiers focus on affordability."

[69] Financial incentives or financial penalties? For an exploration of this delicate question in the U.S. context, see Martin, "Defunding Cities."

[70] According to Schragger, "anti-urbanism" "is [...] deeply embedded in the structure of American federalism." Schragger, "Attack on American Cities," 1232.

Another example of preemption related to housing is the considerable extent to which Minister's Zoning Orders (MZOs) have been used in Ontario recently to expedite development by overriding municipal bylaws and processes.[71] In a similar vein, the adoption of the controversial Bill 329 in late 2023 now allows the Nova Scotia Housing Minister to bypass the Halifax Regional Municipality to speed up development.[72] Another trend is also worrisome: in Ontario, municipalities that submitted a housing pledge as described above can now pass bylaws with the support of only one-third of the municipal council if these advance "provincial priorities," including building 1.5 million homes by 2031.[73] Similarly, in Alberta, the controversial Bill 20 was adopted in 2024, modifying the *Municipal Government Act* to enable the province (through its Lieutenant Governor in Council) to order a municipality to amend or repeal a bylaw deemed "contrary to a policy of the Government, unless the municipality obtains the prior consent of the Government to pass that bylaw."[74] Whether these measures will snowball and be replicated in other parts of the country remains to be seen.

[71] Minister's Zoning Orders (MZO) are listed as regulations under the *Planning Act*.

[72] Nova Scotia Legislature, Bill 329, *An Act to Amend Chapter 39*.

[73] *Provincial Priorities*, O Reg 580/22, and for Toronto, *Provincial Priorities*, O Reg 582/22.

[74] Alberta Legislature, Bill 20, *Municipal Affairs Statutes Amendment Act; Municipal Government Act*, SA 1994, s 603.01 (c).

CONCLUSION

Where does this leave us? Canada has witnessed, over the past three decades, a notable shift toward greater municipal autonomy and powers, driven by both provincial legislatures and courts. However, under the current constitutional framework, this autonomy remains inherently fragile and frequently undermined.

In the United States, where municipal law shares similarities with Canada, the concept of state preemption has been widely used and discussed in recent years. Applying the preemption lens in a Canadian context seems promising, as it helps to identify, organize, and highlight – under one concept – the numerous instances where municipal autonomy is being undermined. Of course, we still seem far from the extent of state preemption seen in the United States in recent years, especially in terms of new preemption, but vigilance remains essential.

It is interesting to note that several manifestations of preemption of Canadian municipalities highlighted in this text have appeared in the context of the housing crisis, presenting a particular challenge. After all, housing is a human right. But it is also an area that requires the cooperation of several actors, including the three levels of government. In 21st-century Canada, many other areas share this feature. In our view, in most scenarios, more and better cooperation, not preemption, should be the solution.

The natural resources industry provides another good example in that regard. Our country needs to ensure the competitiveness and efficacy of this sector, along with predictable and stable legal regimes, but we must do this according to the Constitution, despite its inherent complexity. While most strategic infrastructure involving interprovincial and international transportation (such as pipelines, trains, and shipping) fall under federal jurisdiction, the exploration and extraction of natural resources are provincial responsibilities, with municipalities on the front lines of the risks these activities pose to the safety and environment of their populations.[75] None of them can or should be sidelined or marginalized by preemption measures.

In other words, the housing crisis and the infrastructure deficit more generally, while extremely serious, should not be catalysts for undermining municipalities and hampering their autonomy and powers, especially in the most recent and contestable forms of preemption. Municipalities are clearly part of the solution, not of the problem. It remains a political choice, however, since after all, preemption is only a consequence of the legal hierarchy that exists between our provinces and our municipalities. But the latter have proven many times that they are innovators, solution-finders, and problem-solvers; their solutions have often been replicated by other municipalities – and sometimes

[75] For more details on this topic, see Frate and Robitaille, "Pipeline Story."

even at the provincial and federal levels.[76] From our perspective, preemption poses a threat to all that potential.[77]

More research will help uncover additional instances of Canadian-style preemption, exploring its causes, frequency, chronology, and geographical distribution, and its impact on our municipalities' capacity to play an active role in addressing the infrastructure deficit and helping the country move forward.

[76] See, for example, the sources referred to at note 12.

[77] It is also the opinion of some U.S. authors. See, for example, Briffault et al., "Troubling Turn in State Preemption," 5–10; Lauren E. Phillips, "Impeding Innovation," 2262–2263.

BIBLIOGRAPHY

Legislation

Federal
Constitution Act, 1867, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(8).

Alberta
Bill 20, *Municipal Affairs Statutes Amendment Act*, 1st Sess, 31st Leg, Alberta, 2024.
Municipal Government Act, RSA 1980, c M-26 (repealed).
Municipal Government Act, SA 1994, c M-26.1.

British Columbia
Community Charter, SBC 2003, c 26.
Housing Supply Act, SBC 2022, c 38.
Local Government Act, RSBC 2015, c 1.
Vancouver Charter, SBC 1953, c 55.

Manitoba
The Municipal Act, CCSM c M225.

Nova Scotia
Bill 329, *An Act to Amend Chapter 39 of the Acts of 2008, the Halifax Regional Municipality Charter, and Chapter 21 of the Acts of 2021, the Housing in the Halifax Regional Municipality Act*, 1st Sess, 64th Leg, Nova Scotia, 2023.

Ontario
Bill 212, *Reducing Gridlock, Saving You Time Act, 2024*, 1st Sess, 43rd Leg, Ontario, 2024.
Planning Act, RSO 1990, c P.13.
Provincial Priorities, O Reg 580/22.
Provincial Priorities, O Reg 582/22 (for Toronto).

Prince Edward Island
Municipal Government Act, RSPEI 1988, c M-12.1.

Quebec

Act respecting land use planning and development, CQLR c A-19.1.
Act respecting the environmental performance of buildings, c P-9.02.
Cities and Towns Act, CQLR 1977, c C-19.
Environment Quality Act, c Q-2.
Interpretation Act, CQLR c I-16.
Municipal Powers Act, CQLR 2006, c C-47.1.
Water Withdrawal and Protection Regulation, Q-2, r 35.2.

Jurisprudence

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40.
British Columbia Lottery Corp. v Vancouver (City of), 1999 BCCA 18.
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.
Catalyst Paper Corp. v North Cowichan (District), 2012 SCC 2.
Hamelin v Municipalité de Lac-Simon, 2024 QCCA 637.
Lauzon-Foresterie (Fiducie) v Municipalité de L'Ange-Gardien, 2024 QCCA 506.
Mainville v Ville de Montréal, 2024 QCCA 1276.
Public School Boards' Assn. of Alberta v Alberta (Attorney General), 2000 SCC 45.
Saint-Michel Archange (Municipalité) v 2419-6388 Québec inc., 1992 CanLII 2888.
Shell Canada Products Ltd v Vancouver (City), [1994] 1 SCR 231.
Ste-Rose-du-Nord (Municipality of the Parish of) v Québec (Attorney General), 1994 CanLII 5869 (QCCA).
Toronto (City) v Ontario (Attorney General), 2021 SCC 34.
United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City), 2004 SCC 19.

Secondary materials

Alberta, Legislative Assembly, *Hansard*, 23rd Parl, 2nd Sess, 2nd Reading, (9 May 1994) at 1775 (Judy Gordon).

Black, Kerry. "Federal budget 2023: Long-term investments are needed to fix Canada's infrastructure gap." *The Conversation*, March 29, 2023.

Blais, Stéphane. "Prévost interdit l'installation de systèmes au gaz, une première." [Prévost bans installation of gas systems, a first]. *La Presse*, October 5, 2023.

Briffault, Richard. "The Challenge of the New Preemption." *Stanford Law Revie*w 70, no. 6 (2018): 1995–2027.

Briffault, Richard. "Preemption: The Continuing Challenge." *Journal of Land Use & Environmental Law* 36, no. 2 (2021): 251–70. https://www.jstor.org/stable/48713981.

Briffault, Richard, Nestor M. Davidson, Paul A. Diller, Olatunde Johnson, and Richard C. Schragger. "The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond." *ACS Issue Brief* (2017).

Briffault, Richard, Laurie Reynolds, and Nestor M. Davidson. *The New Preemption Reader: Legislation, Cases, and Commentary on State and Local Government Law*. St. Paul: West Academic Publishing, 2019.

Canada Mortgage and Housing Corporation (CMHC). "Housing Accelerator Fund: Large/Urban Stream." Updated July 8, 2024. https://www.cmhc-schl.gc.ca/professionals/project-funding-and-mortgage-financing/funding-programs/all-funding-programs/housing-accelerator-fund/housing-accelerator-fund-large-urban.

The Council of the Federation. "Premiers focus on affordability, housing, strategic infrastructure, and health." Updated November 6, 2023. https://www.canadaspremiers.ca/premiers-focus-on-affordability-housing-strategic-infrastructure-and-health/.

Cummings, Scott L., and Emma Curran Donnelly Hulse. "Preemption as a Tool of Misclassification." *UCLA Law Review* 66 (2019): 1872–1908.

Deller, Steven C., Lindsay N. Amiel, Judith I. Stallmann, and Craig S. Maher. "Do Tax and Expenditure Limits Hinder the Condition of Public Infrastructure? The Case of the Nation's System of Bridges." *Public Works Management & Policy* 18, no. 4 (2013): 379–397.

Draaisma, Muriel. "Climate change could cost municipalities $700M more a year to maintain pipes, sewers, report says." *CBC News*, December 13, 2022.

Federation of Canadian Municipalities, "FCM welcomes new $6 billion fund to address housing and urgent municipality infrastructure needs." *CFM News Releases*, April 2, 2024.

Fowler, Luke, and Stephanie L. Witt. "State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures." *Publius: The Journal of Federalism* 49, no. 3 (2019): 540–559.

Frate, Benoît, and David Robitaille. "A Pipeline Story: The Evolving Autonomy of Canadian Municipalities." *Journal of Law & Social Policy* 34 (2021): 94–110.

Frate, Benoît, David Robitaille, and Jack M. Little. "Getting Rid of the Laundry List: Exploring the Roots and Effects of the Municipal Powers Act in Quebec." In *Cities and the Constitution: Giving Local Governments in Canada the Power They Need*, edited by Alexandra Flynn, Richard Albert, and Nathalie Des Rosiers, 65–88. Montreal-Kingston: McGill-Queen's University Press, 2024.

Frug, Gerald E. "The City as a Legal Concept." *Harvard Law Review* 93 (1980): 233–290.

Garcea, Joseph. "The Empowerment of Canadian Cities: Classic Canadian Compromise." *International Journal of Canadian Studies* 49 (2014): 81–104.

Goodman, Christopher B., Megan E. Hatch, and Bruce D. MacDonald. "State Preemption of Local Laws: Origins and Modern Trends." *Perspectives on Public Management and Governance* 4, no. 2 (2020): 146–158.

Government of Ontario. "Ontario Providing New Tools to Municipalities to Build More Homes Sooner". Updated August 21, 2023. https://news.ontario.ca/en/backgrounder/1003396/ontario-providing-new-tools-to-municipalities-to-build-more-homes-sooner.

Judd, Amy. "Tofino becomes first municipality in B.C. to ban single-use plastic utensils." *Global News*, March 17, 2022.

Lecavalier, Charles. "Projet de règlement – Les villes ne pourront plus interdire le gaz naturel sans l'accord de Québec." [Draft regulation – Cities will no longer be able to ban natural gas without Quebec's approval]. *La Presse*, January 31, 2024.

Lévesque, Kathleen. "REM: des villes 'bousculées.'" [REM: Cities 'Shaken Up'] *La Presse*, March 26, 2019.

Martin, Eliza. "Defunding Cities: Reconsidering the Fiscal Sanctioning Measures of State Punitive Preemption Statutes." *University of Chicago Legal Forum* 2023, art. 16 (2024): 411–439.

McKenna, Kate. "Quebec Mayors Want More Help Protecting Their Water from Resource Drilling: Representatives of 338 Municipalities Want No Drilling within Two Kilometers of Waterways." *CBC News Montreal*, March 24, 2018.

McMillan, Anna. "'It's very courageous': St. Albert moves to ban conversion therapy." *CBC News*, July 9, 2019.

Mosonyi, Samuel, and Dennis Baker. "Bylaw Battles: Explaining Municipal-Provincial and Municipal-Federal Win-Rates." *Canadian Journal of Urban Research* 25 (2016): 11–22.

National League of Cities. "What You Need to Know About Preemption." Updated November 18, 2020. https://www.nlc.org/resource/what-you-need-to-know-about-preemption

Phillips, Lauren E. "Impeding Innovation: State Preemption of Progressive Local Regulations." *Columbia Law Review* 117, no. 8 (2017): 2225–2264.

Pough, Bradley. "Understanding the Rise of Super Preemption in State Legislatures." *Journal of Law & Politics* 34 (2018): 67–116.

Riverstone-Newell, Lori. "The Rise of State Preemption Laws in Response to Local Policy Innovation." *Publius: The Journal of Federalism* 47, no. 3 (2017): 403–425.

Scharff, Erin Adele. "Hyper Preemption: A Reordering of the State-Local Relationship?" *The Georgetown Law Journal* 106 (2018): 1469–1522.

Schragger, Richard C. "The Attack on American Cities." *Texas Law Review* 96 (2018): 1163–1233.

Swanson, Jeffrey. "Intrastate Federalism: Restricting Local Autonomy Through Court Preemptions." In "Home Rule Be Damned: Exploring Policy Conflicts between the Statehouse and City Hall," *PS: Political Science & Politics* 51, no. 1 (2018): 26–38.

Swindell, David, James H. Svara, and Carl Stenberg. "Local Government Options in the Era of State Preemption." *Local Government Review* 100, no. 6 (2018): 8–13.

Taylor, Zack, and Alec Dobson. *Power and Purpose: Canadian Municipal Law in Transition*. IMFG Papers on Municipal Finance and Governance, No. 47. Toronto: University of Toronto Press, 2020.

Tax Policy Center. "What are tax and expenditure limits?" *The Tax Policy Briefing Book* (website). Updated January 2024. https://www.taxpolicycenter.org/briefing-book/what-are-tax-and-expenditure-limits.

Zimmer, Eric. "New Westminster becomes first BC city to pass bylaw against 'renovictions.'" *Daily Hive Vancouver*, February 1, 2019.

UNIVERSITY OF TORONTO | SCHOOL OF CITIES

General inquiries:

Contact us at schoolofcities@utoronto.ca or 1-416-946-7534
Learn more about us at schoolofcities.utoronto.ca

Acknowledgements:

Project Director
Karen Chapple

Data Visualization
Jeff Allen

Series Editors
Kathryn Exon Smith
Serene Tan

Design
Tony Chang

We extend our gratitude to the following individuals for their contributions:

Amy Rhoda Brown
Elizabeth d'Anjou
Kosta Diochnos
Priya Perwani
Sarah A. Smith

Felicity Heyworth
Aniket Kali
Ben Liu
Mia Wang