

## Bylaw Battles: Explaining Municipal-Provincial and Municipal-Federal Win-Rates

Samuel Mosonyi  
Faculty of Law  
*University of Toronto*

Dennis Baker  
Department of Political Science  
*University of Guelph*

### *Abstract*

Municipal bylaws are routinely contested in court on the grounds that they are “ultra vires” or beyond the legal authority of the municipality. Many of these challenges allege that the municipal exercise of power infringes on federal or provincial powers as assigned by ss. 91 and 92 of the *British North America Act, 1867*. These conflicts have not been systematically studied and we address this lacuna by surveying the reported cases of municipal-federal and municipal-provincial conflicts in the LawSource database of Canadian judgments. Our preliminary finding—that challenges on federal grounds are much more likely to succeed than those on provincial grounds—requires an explanation. After factoring some disparities in the case sets (including a disproportionate number of zoning cases in the provincial context), we argue that the persistent difference in win-rates is due to a greater acceptance of municipal autonomy in the provincial context (despite their origins as “creatures of the province,” a number of provincial statutes have granted broad authority to many municipalities) whereas the federal conflicts run more clearly against constitutionally-defined interests. We conclude by considering this asymmetry and its significance for Canadian multi-level governance.

*Keywords:* ultra vires, municipal law, *Constitution Act 1867*, division of powers, federalism

### *Résumé*

Les règlements municipaux sont contestés régulièrement en cour sur la base qu'ils sont «ultra vires» ou en dehors des compétences de la municipalité. Plusieurs de ces contestations allèguent que les municipalités exercent un pouvoir qui porte atteinte aux pouvoirs provinciaux ou fédéraux, d'après les articles 91 et 92 de la *Loi Constitutionnelle de 1867*. Ces conflits n'ont jamais été étudiés systématiquement, et donc nous adressons cette lacune en surveillant les cas de conflits municipaux-fédéraux et municipales-provinciales dans les bases de données «LawSource» de jugements canadiens. Nos résultats primaires—que les contestations sur des bases fédérales sont plus probables à réussir que ceux sur des bases provinciales—nécessitent une explication. Après avoir considéré certaines disparités dans les arrêts (incluant un nombre disproportionné d'arrêt de zonage dans le contexte provincial), nous argumentons que la plus grande différence des rates «gagnantes» est à cause d'une acceptation plus générale de l'autonomie municipale dans le contexte provincial (malgré le fait que leur origine est une «créature de la province,» il y a un grand nombre de statues provinciales qui accordent des pouvoirs aux municipalités) tandis que les conflits fédéraux sont plus clairement contre des intérêts constitutionnels. Nous concluons en considérant cette asymétrie et sa signification pour les multiples niveaux de gérance de la gouvernance multi-niveaux.

*Mots clés:* ultra vires, droit municipal, *Loi Constitutionnelle de 1867*, partage des pouvoirs, fédéralisme

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As the level of government closest to its citizens, municipalities offer both the prospect of accessibility and the problem of overregulation. Their responsiveness is likely to draw them into all matters of concern and, while most of their attention will be drawn to local issues, municipal governments are inevitably going to be called upon to address matters beyond their jurisdiction. In some cases they will answer that call and, by accident or design, they will intrude upon powers that are properly assigned to other levels of government. Jurisdictional overreach need not be nefarious and, indeed, it may be the only means to address matters of true local concern: the recent battle between Hamilton and Canada Post over the placement of community mailboxes is illustrative (Mehta 2015). Responding to complaints about the placement in terms of litter, safety and traffic when the boxes are placed in “less-than-ideal locations,” Hamilton passed a bylaw that requires Canada Post to first obtain a permit, allowing Hamilton officials to evaluate the Crown Corporation’s choices. In doing so, they are directly challenging a federal law—the *Canada Post Corporation Act*<sup>1</sup> grants the power to expropriate property for the purposes of mail delivery—that is squarely within the federal government’s constitutional jurisdiction.<sup>2</sup> By using their power to regulate local matters even when it conflicts with the jurisdiction of the other level, Hamilton began what we refer to as a “bylaw battle.”

Perhaps needless to say, such bylaw battles often end up in court (and, indeed, the City of Hamilton soon found itself in court over the bylaw). The litany of cases where a municipality’s jurisdictional authority has been challenged in court and resolved through judicial review is the subject of this study. We contend that these “bylaw battles” reveal much about the constitutional status and power of municipalities in Canada. They demonstrate the relationships between the three levels of government and help assess the relative autonomy of municipalities. By simply looking at win-rates for bylaws against claims of provincial and federal jurisdiction, a key insight can be demonstrated: municipal bylaws are much more likely to withstand a challenge when the claim is based on alleged provincial jurisdiction than alleged federal jurisdiction. Our research suggests that Hamilton was less likely to succeed in its actions against Canada Post than it would against a provincial claim of jurisdiction (and, indeed, their bylaw was found *ultra vires* for intruding on federal jurisdiction,<sup>3</sup> as predicted in earlier drafts of this article). More importantly, a closer and more detailed examination of this case set can lead to a better understanding of inter-level jurisdictional conflict and a more robust account of what quasi-constitutional powers municipalities can exercise in formal and practical terms.

### *I. The Ambivalent Constitutional Position of Municipalities*

While there is an abundance of literature on both the Canadian division of powers and municipalities, these two subject areas are rarely examined in tandem. This is probably a reflection of the municipalities’ low standing in formal constitutional schema. In fact, in the *Constitution Act, 1867*, the word “municipal” appears only twice and, in both cases, grants the provincial government exclusive legislative authority. Section 92(8) provides a general provincial power over “municipal institutions in the province” and section 92(9) allows for the province to grant licencing powers to supplement provincial, local or municipal revenue. In addition, section 92 also provides the provinces with the power over “Property and Civil Rights in the Province” (13) and authority “generally” over “all Matters of a merely local or private Nature in the Province” (16), which essentially places all potential municipal power within the provincial sphere. As MacLean and Tomlinson observe, “[t]he existence and powers of the municipal government, the ‘lowest level’ of government, depend entirely on the province, the ‘middle level’ of government (2008, 1). Indeed, some have mused that a provincial government could abolish or amalgamate all local governments within its borders, at least in theory (Lightbody 2006, 40). As corporate entities in law, municipalities do not act on behalf of the Monarch and—unlike the federal and provincial governments—they are therefore not considered “sovereign” (Sancton 2011, 262). In formal constitutional terms, municipalities are considered nothing more than “mere creatures of the province” and thus, from a strict division of powers standpoint, not a primary subject of study and arguably only of interest as an indirect expression of provincial power.

This narrow, formalistic view runs directly counter to the reality of the important role that municipalities play in Canadian governance. Their roles can vary considerably across provinces: for instance, Ontario is the only province where municipalities have the requirement to provide social services and help fund them (Sancton 2009, 4). However, across all provinces, municipalities have some authority for the following areas: fire protection, animal control, traffic control, waste-collection, land-use planning, economic development, public libraries, parks and recreation, economic development, licencing of businesses, emergency planning and preparedness, rural

fences, drainage, regulation of ceremonies, and more (ibid.). Urban municipalities generally possess even more powers, like sewage collection, public transit, and water purification. However, there is significant difference in municipal responsibilities between provinces, which interrupts “the cultural continuities within the national borders” (Garber and Imbroscio 1996, 603). As Andrew Sancton notes, for larger provinces, it is difficult to imagine a legislative scheme without a local government; it would be bureaucratically infeasible for a province to make decisions about all matters within its sphere of jurisdiction (2011, 22). Moreover, the constitutional oddity is further demonstrated by contrasting the City of Toronto with the Province of Prince Edward Island (PEI). PEI contains approximately 140,000 people, while Toronto contains approximately 2.5 million and the Greater Toronto Area approximately 6.1 million. PEI is constitutionally protected as a province and wields influence disproportionate to its population, while Toronto is granted no constitutional authority. This is obviously an irritant for large municipal governments like Toronto, where some form of constitutional power might assist in performing their duties or helping them negotiate with the other levels of government (Smith 2010, 19).

The legal resolution to the constitutional disconnect between theory and practice is obvious: delegation. In the past, ‘Dillon’s Rule’ of delegation was invoked to deal with the powers and limitations of municipal authority. This approach required municipal bylaws to be founded on expressly delegated power and strictly limited the reach of these powers to the extent of the delegation (Hoehn 1996, 1). This approach is also known as the “laundry list:” if there is no express legal authority for an action, municipalities typically could not legislate in that area (Tindal et al. 2013, 201). Municipal power was therefore explicitly and completely dependent on provincial delegation: what power they had, they borrowed.

In Canada, the Supreme Court has generally moved away from Dillon’s Rule towards what the Court calls a “benevolent construction” or “broad and purposive approach” of municipal powers, affording considerable deference to municipal decisions.<sup>4</sup> The laundry list approach has been eschewed in favour of a broader interpretation of any delegation, according to Supreme Court rulings such as *Spraytech* and *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary* (Tindal et al. 2013, 217). In the Supreme Court’s *Spraytech* decision, the right of local governments to take proactive measures to stop environmental harm was upheld despite the federal and provincial jurisdiction over environmental matters (McAllister 2004, 122-123). Hoehn (1996, 2-3) argues that broad grants are “rarely effective in conferring jurisdiction,” but the Court’s more recent decisions have put this assessment in question. Kong suggests as much, arguing that the Supreme Court “has taken a generally deferential view of municipalities’ interpretations of their own powers” on the grounds that they have a more sound decision-making capacity than the judiciary (Kong 2010, 518). Coincident with this judicial move towards a more generous construction, some provinces (B.C., Alberta and Ontario) have, to varying extents, moved away from “laundry list” legislation towards more general powers for municipalities, in effect discouraging the courts from invalidating laws on a narrow interpretation of what has been delegated. Even in the largely deferential *Spraytech* decision, however, there are limits to the Court’s generous view of municipal power: it remains the judicial prerogative to analyze the true purpose of bylaws to ensure they conform to the “general welfare” purposes of the broad grant (ibid., 519). Magnusson (2005b, 907) argues that even broad grants of general authority can be interpreted restrictively by courts for fear of reading in authority that legislatures did not intend municipalities to have.

There are signs that municipalities are seizing the opportunity to advance their constitutional status. Some municipalities have attempted to pass their own local “constitutions”: Rossland and Pitt Meadows, two municipalities in British Columbia, have “entrenched” their powers despite a lack of provincial legal authority to do so (McAllister 2004, 249). In addition, aggressive councils and mayors have challenged their weak formal constitutional status. The influential role of the City of Vancouver in the creation of the Vancouver Area Network of Drug Users (VANDU) and its success in maintaining the Insite safe injection clinic is an example of how municipalities are increasingly important actors in the delivery of public health and safety services (Tindal et al. 2013, 202; Smith and Stewart 2006, 259-265). Despite pushback from the federal government and encroachment with a criminal law matter, the Supreme Court maintained the clinic’s status, as the municipality preferred.<sup>5</sup> Another example consistent with this view of informal strength is the major role played by the City of Windsor in influencing decisions regarding the Detroit River border crossing (Sutcliffe 2012, 153).

Cities are currently vulnerable to “arbitrary statutory change that undermines their fragile autonomy” (Sancton 2002, 274). However, Sancton (2011, 28) argues that s. 93 of the *Constitution Act, 1867*, which allows religious minorities in certain provinces to elect their own school boards, is a form of constitutional protection.

Magnusson proposes a similar, albeit more radical, argument. He challenges the idea that municipalities are creatures of the provinces and suggests an interpretation consistent with the “the principles of a free and democratic society” (Magnusson 2005a, 6). If the Constitution is to be interpreted as a living document in a liberal-democratic society, Magnusson suggests that the power over “municipal institutions” should be interpreted as a *protective* clause, rather than one granting absolute control to the provinces. Neither the provinces nor the federal government should have the right to “sweep away” such fundamental institutions (*ibid.*, 10).

We suggest that a robust appraisal of the constitutional status of municipalities requires an appreciation of both their formal and informal strength. The importance of informal strength is discussed by Asare et al. (2009, 84): “The blurring of formal and informal sources of authority is extended to the roles of government actors at various levels, with informal influence *often more relevant* than formal jurisdictions” [emphasis added]. A better assessment of the place of municipalities in Canada’s constitutional order requires further investigation of municipal authority and power using a *relational* analysis that compares municipal with federal and provincial jurisdiction where they are in clear conflict.

## 2. Bylaw Battles: Jurisdictional Conflicts With Other Levels of Government

Magnusson (2005b, 907) argues that Canadian municipalities are timid creatures, unwilling to legislate outside of their jurisdiction in fear of lawsuits. He argues that this has been exacerbated by restrictive readings of the *ultra vires* rule:

[M]unicipalities often struggle to find authority to do new things, and are frequently cautioned by their solicitors not to go too far [...] Timidity reigns, because municipalities are in a grey zone between the sovereign authority of the state and the free activity of civil society. (*ibid.*)

However, more recent articles by current municipal solicitors suggest otherwise, that challenging a bylaw is actually quite difficult. Malik et al. (2014, 4) argue that “[i]t should come as no surprise that in keeping with the modern judicial treatment regarding the interpretation of municipal powers, few challenges to the exercise of a municipality’s jurisdiction to enact a bylaw ever succeed.” With an emphasis on the purpose of a law for the *ultra vires* analysis, and given the broad range of permissible municipal objectives, “it can be extremely difficult for a challenger of a bylaw to identify what the overriding or dominant purpose for enacting the bylaw might have been” and “[c]onversely, it will be relatively easy for a municipality to establish that at least one of the reasons for enacting a bylaw falls within its jurisdiction” (*ibid.*). These competing assessments of the difficulty for ensuring constitutional compliance are an invitation for further empirical study. To our knowledge, no systematic studies of the Canadian judicial review of bylaws have been conducted.

In order to better assess the constitutional power of municipalities, one can look to the jurisprudence on municipal conflicts. In addition to the descriptive value of the overall number of cases, it is also possible to examine the success rate of federal versus provincial *ultra vires* challenges to municipal bylaws. Judicial “win rates” have been studied to determine the level of success governments have had in litigating Charter challenges (McCormick 1993; Choudhry and Hunter 2003) and they have been used to assess the strength of interest groups in shaping public policy through law (Morton and Allen 2001). To be sure, a simple win rate is a blunt measure and a more sophisticated analysis would consider whether the government actor was a complainant or respondent, the effect of repeat players and whether the action was “defensive” or “offensive.” These are important considerations, especially since these challenges are often brought by third-parties (i.e., not the government whose jurisdiction is asserted), but the limited data available for municipal jurisdictional conflict cases only allow for a more general analysis to be made presently. Morton et al. are right that “the reasons given to justify a decision are often more important in the long run than a decision’s basic outcome or ‘bottom line’” (Morton et al. 1995, 2) but we believe that the outcomes captured in the win rates, especially when placed in a comparative context, can tell us something about the relative power of municipalities before the bench.

For the purposes of this study, we consider a “win” to be from the perspective of the municipal bylaw (“win” means the bylaw survives the challenge and “loss” means the bylaw is struck down as *ultra vires*); no normative assessments about the merits of the bylaw or the resolution of the jurisdictional questions are intended. To develop a case set, we used the *Canadian Abridgement Digests*, accessible through WestLaw and LawSource, to identify cases where a litigant claims a municipal bylaw is *ultra vires*. To succeed with such a claim, the litigant would have to prove that jurisdiction properly belonged to either the federal or provincial legislature.<sup>6</sup> The

Digests contain an extensive variety of *ultra vires* categories<sup>7</sup> and some of these categories have been specifically excluded for the purposes of this study.<sup>8</sup> Since this study seeks only to determine the conflict of municipal bylaws, all categories relating to contracts and expenditures have been excluded because they typically raise complex collateral issues that are beyond the scope of this study. The remaining categories included all of those where bylaws were challenged on the grounds of being *ultra vires*. The study examines only those cases that were decided in or after 1993. Tribunal decisions, like those of the Ontario Municipal Board, are likewise omitted. In cases that have been appealed, only the highest appellate decision is considered.<sup>9</sup>

**Table 1. Federal and Provincial Win Rates for Municipalities**

Result	Level of Conflict			Total
	Federal	Provincial	Both	
Struck	14 (51.9%)	56 (31.6%)	1 (20.0%)	71 (34.0%)
Upheld	13 (48.1%)	121 (68.4%)	4 (80.0%)	138 (66.0%)

In total, after 29 exclusions on the basis of the above criteria, the data set consisted of 209 cases. Three observations about these 209 cases are easily made: (1) it is difficult to invalidate a municipal bylaw on *ultra vires* grounds, with two-thirds (138, 66%) of the impugned bylaws upheld against the challenge; (2) jurisdictional claims against municipal bylaws are more likely to be alleged as an intrusion on provincial (177) rather than federal jurisdiction (27);<sup>10</sup> and (3) the win-rates are considerably different, with a little under a half of the federal conflict cases surviving the challenge (13/27, 48.1%) and over two-thirds (121/177; 68.4%) of the provincial cases surviving. The first observation addresses the competing claims of Magnusson (2005b) and Malick et al. (2014) regarding the difficulty of challenging a bylaw on *ultra vires* grounds: it is difficult for complaints to succeed (losing two-thirds of the time) but even a one-third invalidation rate might make municipalities overly cautious about their jurisdictional authority. We leave the normative issue about the “appropriate” level of jurisdictional deference to others. While the overall statistics—with a sample size of 209—are reliable, the small number of federal-municipal cases (27) makes any generalizable observations regarding federal versus provincial rates difficult. Given that we have used all available reported cases in the *Abridgement*, in statistical terms “the entire population,” the limitation of the size of the data set is unavoidable. While this precludes a rigorous quantitative assessment (with statistically significant findings) and makes many statistical tools (which tell us whether the sample is representative of the whole) immaterial, we believe the frequencies observed are suggestive and worthy of discussion. Moreover, a qualitative look at those cases generates some tentative insights into the nature and resolution of the municipal-provincial and municipal-federal conflicts.

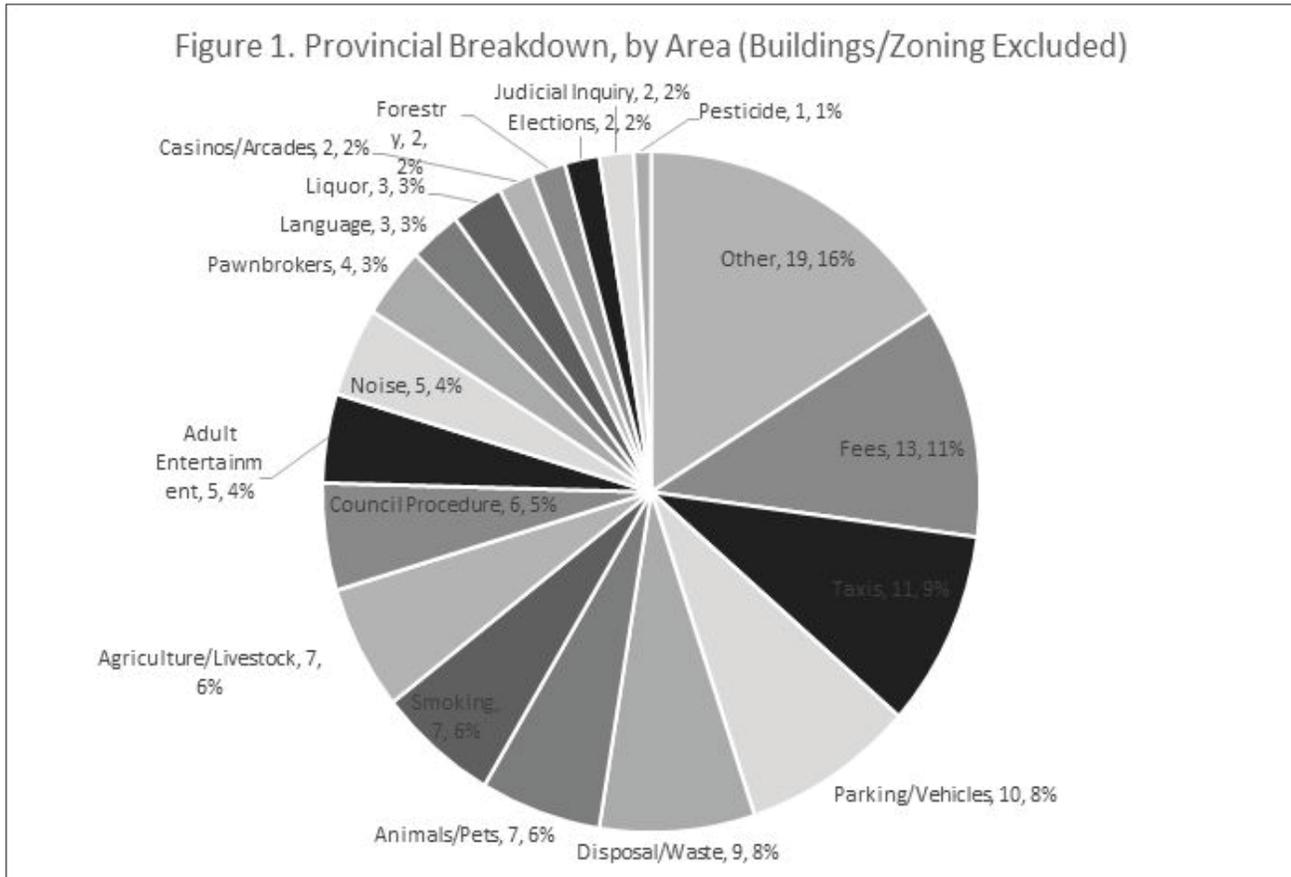
### 3. Explaining Frequencies and Win-Rate Disparities

A simple explanation of the disparity in win-rates is simply that the cases at each level are qualitatively different. A significant number of provincial-municipal conflicts are over zoning issues (33%), which constitute the most significant plurality of cases. The constitutional issues are potentially atypical for these cases: although the municipal power to pass zoning laws is clearly delegated from the province’s power over “property and civil rights” (s.92(13)), the challenges often implicate provincial laws regarding land-use. It is possible that the large number of such cases might distort the results. To check that our results are not related to land-use claims, we separated them out and considered the frequencies. When zoning cases are removed, no other single issue area dominates, leaving a wide and varied field of cases.

Among the 59 zoning cases, 42 have been upheld (71.2%). If zoning cases are removed from the data as in the chart above, 118 cases remain. The success rate for provincial cases, excluding zoning, is 79/118 (66.9%). The number of zoning cases upheld is nearly on par with the overall data (66.9% versus 68.4%). Thus, the zoning cases do not appear to dramatically inflate the provincial win rate.

There is a doctrinal distinction that may explain, at least theoretically, the win rate disparity but one that is not convincing in our reading of the jurisprudence: it is technically harder to challenge a bylaw as intruding on provincial jurisdiction because federal jurisdiction is protected “even if those powers have not been exercised” (MacLean and Tomlinson 2008, 69), whereas provincial jurisdiction may, or may not, require some degree of activity to be protected. While this additional protection might mean that federal jurisdiction is more secure

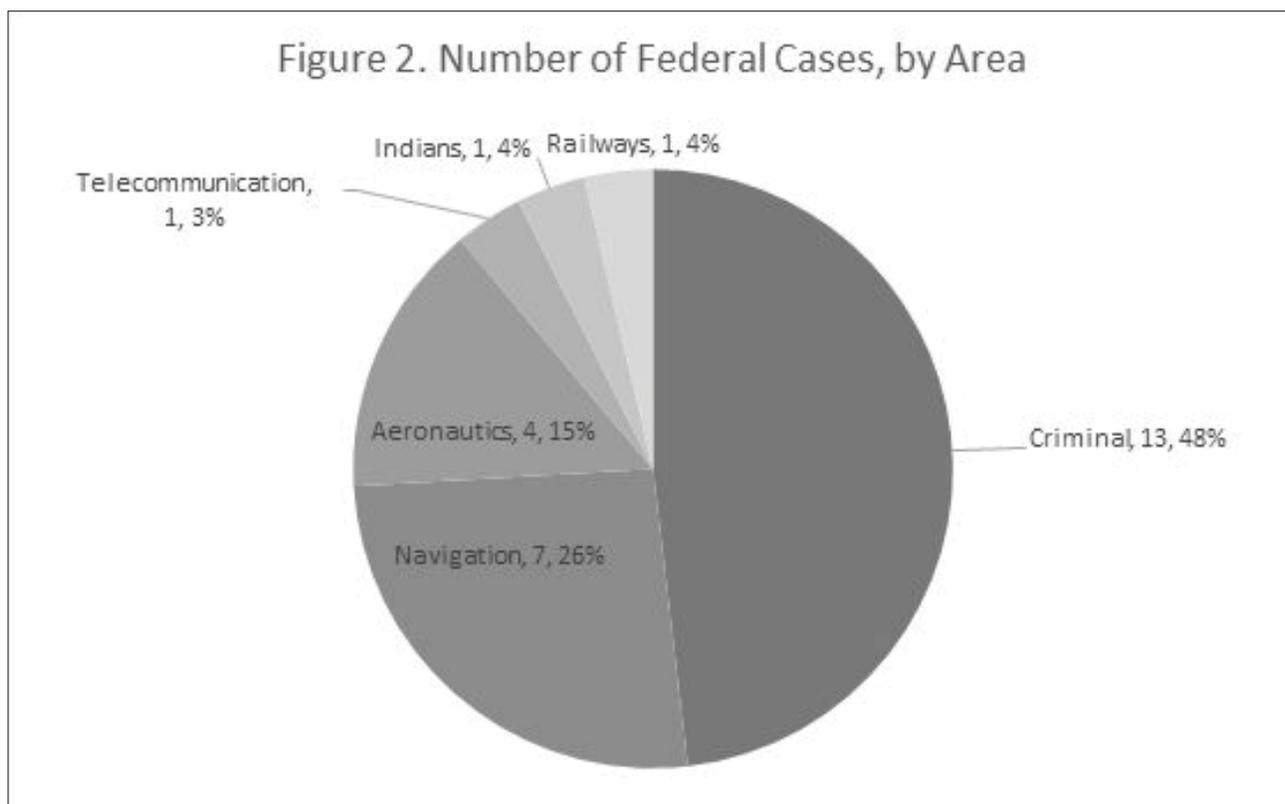
from municipal intrusions, we observed no judicial discussion of this feature in the cases. In other words, in no case did the success or failure of a challenge hinge solely on the grounds that the non-municipal level of government had (or had not) occupied the field or not. Given the paucity of judicial commentary on this feature, we are skeptical that it plays any role in explaining the win rate disparity.



A related explanation may simply be that the federal Parliament has simply been more cautious in interfering with municipal matters. Lightbody (2006, 39) depicts the federal role in municipal affairs as “cautious and difficult” and Bakvis et al. (2009, 227) argue that the federal government “treads softly where municipal and local government authorities are involved.” Such an explanation runs counter to the impression that the federal level is playing an increasingly greater role. As Sancton (2011, 27-28) notes, the federal government has a number of tools to bypass the provincial power over municipalities. For example, the federal government has provided infrastructure, green energy, and homelessness prevention funding directly to the municipalities (McAllister 2004, 119). A lack of constitutional formality has not precluded the federal government from intervening in municipal affairs, especially on issues that are local in scope but have nation-wide consequences (Jones 2012, 1247). While the federal government lacks constitutional authority to implement standards through municipal funding, it has been significantly involved in local affairs (Stoney and Graham 2009, 374). For example, even though many aspects of housing fall directly under the provincial jurisdiction over “property and civil rights,” the federal government plays a major role in insuring home mortgages through the Canada Mortgage and Housing Corporation (Lightbody 2006, 366). Municipalities often welcome federal involvement in local affairs to counteract provincial dominance. It has also been suggested that amalgamation places considerable pressure on municipalities, who turn to the federal government for solutions (Young and McCarthy 2009, 6). In short, despite concrete institutional and formal linkages, the federal-municipal relationship is broadening and deepening. It is thus difficult to see disengagement as an explanation for the win-rate disparity, even if it helps us to understand the overall smaller set of federal-municipal cases compared to provincial ones.

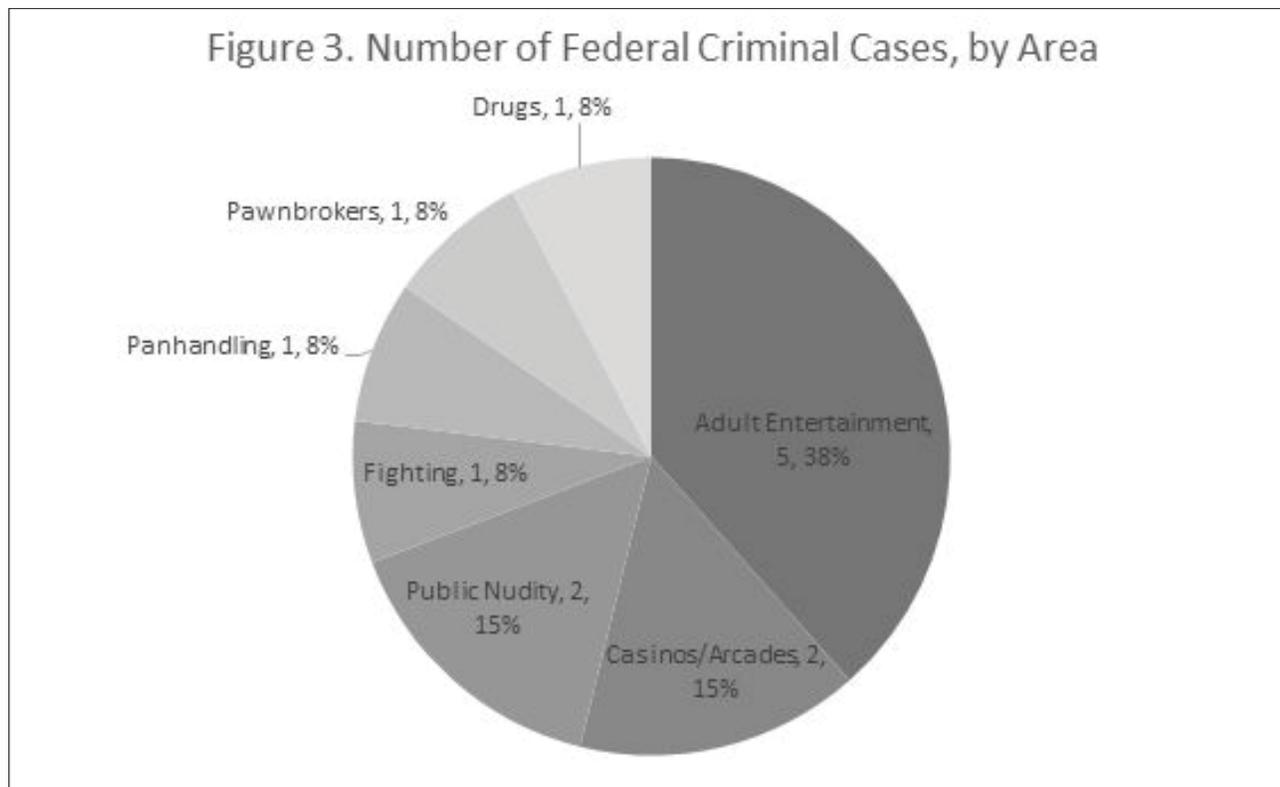
It must be noted that the federal conflict cases present more clearly “constitutional” issues. By this we mean that the impugned bylaw runs contrary to an express statement of federal authority in s. 91 of the *Constitution*

*Act, 1867*. For instance, a Calgary bylaw that mandated the wearing of lifejackets on a waterway was challenged on the ground that it infringed the exclusive federal power over navigation in s. 91(10).<sup>11</sup> The Alberta lower court ultimately ruled that the pith and substance of the bylaw was to promote the safety and welfare of the city's residents involved in boating. Even though the bylaw regulated conduct that fell within the federal power over navigation and shipping, this "does not in itself mean that they are unconstitutional [...] it is assumed that the Province and the City both are aware of and intend to conform to the limits of their constitutional authority."<sup>12</sup> The three bylaws that were struck for conflicting with the federal navigation power were all in Quebec: one regulated the speed of crafts,<sup>13</sup> one prohibited the anchoring of boats,<sup>14</sup> and one made boat ramps the exclusive jurisdiction of a municipality's residents.<sup>15</sup> These were in pith and substance governing navigation and directly encroached the federal power. On these grounds, given the clear federal power over the postal service in s. 91(5), we estimated that the City of Hamilton had a less than 50% chance of succeeding with its action against Canada Post, but it can improve its odds if it can demonstrate that its bylaws complement, rather than contradict, the federal power to expropriate the land. Hamilton did not do so, and its bylaw was ultimately found *ultra vires*.<sup>16</sup>



The exclusive legislative power over criminal law is granted to the federal government under s. 91(27) but that has not stopped provinces and municipalities from enacting "quasi-criminal" provisions to deter misconduct (Baker 2014). A little under half of the federal cases involved challenges that municipalities had encroached on the federal criminal law power. This is not surprising since municipalities have a vested interest in preserving public order and safety. When behaviours that are already covered under the criminal law are duplicated in municipal form, law enforcement officers can charge an offender criminally or under the bylaw. A municipal offence relies on the balance of probabilities standard, compared to the "beyond a reasonable doubt" threshold required in federal criminal cases. This could mean that officers who lack evidence for a criminal conviction could charge a less-onerous municipal violation instead. This preference—and the resulting objection from the aggrieved offender—may explain why *ultra vires* challenges to municipal bylaws on criminal grounds form the largest federal category. Provinces are, however, allowed to impose "Punishment by Fines, Penalty, or Imprisonment" to enforce any provincial laws that fall under s. 92 of the Constitution Act, 1867. If this power is validly delegated to municipalities, the municipal bylaw would possess statutory authorization to enact its "quasi-criminal" bylaws.

While there are very few cases overall, the “criminal cases” reflect the overall federal-municipal rate, with 4 of the 9 bylaws surviving the challenge (3 of 5 adult entertainment bylaws, 1 of 2 casino bylaws and no successful public nudity bylaws). In both of the public nudity cases, municipalities attempted to define what was meant by “topless”. This was found to usurp the role of Parliament, which has exclusive jurisdiction in regulating public morals.<sup>17</sup> The municipal bylaw amendment created a stricter standard than that imposed by the *Criminal Code*, and the lower court judge found this to be a “colourable attempt to regulate morality and thus displace the federal jurisdiction in respect of criminal law.”<sup>18</sup> In another British Columbia case, the City of Surrey passed a bylaw preventing bathing “without being clothed in proper bathing attire.” The City justified this bylaw on the grounds of public health, but it was found that the intent of the bylaw was to expand the definition of nudity beyond what was intended by Parliament, and was thus struck.<sup>19</sup>



In the adult entertainment cases, where the municipal win rate was higher than average, bylaws were generally struck when they attempted to legislate morality but they were upheld if they took a form closer to a zoning bylaw. In multiple lower court cases in Ontario, bylaws that prescribed proper dress and legislated physical contact were struck because this was found to be an attempt to extend the criminal law prohibitions.<sup>20</sup> In other lower court cases, bylaws that regulated types of touching and physical contact were ruled to be regulatory and a valid exercise of provincial authority.<sup>21</sup> In a New Brunswick lower court, a bylaw prohibiting the use of property for adult entertainment was found to be *intra vires* because it was a valid exercise of the municipality’s zoning power and it was not legislating morality.<sup>22</sup> An additional adult entertainment case challenged under provincial grounds was found by the Ontario Court of Appeal to be a valid provincial power.<sup>23</sup> The court’s rationale here focused on the fact that the “mere existence of provincial legislation in a given field does not oust the powers of a municipality to regulate a subject matter.”<sup>24</sup> Baker (2014, 10) suggests that this case has set an important precedent for upholding similar challenges in other municipalities. Thus, a general trend appears for criminal law cases: when the bylaw attempts to define proper conduct and regulate morality, courts are likely to strike down the bylaw for being in violation of federal jurisdiction. However, municipalities may have learned to frame the issue as a regulatory matter to achieve higher success rates. For instance, the public fighting bylaw in Edmonton was upheld because the Alberta Court of Appeal agreed that “in purpose and effect it *regulates* the conduct and activities of people in public places with a view to prompting the safe, enjoyable and reasonable use of property” [emphasis added].<sup>25</sup>

Perhaps the disparity in win rates may be best understood as an artefact of the notion that municipal power is delegated by the province. When it comes to provincial conflict cases, judges may be conscious of the fact that, as municipalities are “creatures of the province,” the provinces have the power to redress their jurisdictional defeat. Intrusions on the federal fields, however, are not as easily remedied, and could require the all-but-impossible tool of constitutional amendment. Provinces, on the other hand, can overturn their judicial loss through ordinary legislation that more clearly assigns the power to itself rather than the municipality.

In truth, the viability of a provincial response to a by-law battle may be more theoretical than actual. Practical considerations mean that provinces cannot simply trample over municipal interests. As Sancton (2009) has noted, while the statutory authority of the provincial legislature over the municipalities is seemingly unlimited, such statutes are broadly worded and delegate most of the regulatory power to Ministries, tribunals or other administrative actors. These agents can only interfere with municipalities to the degree that legislation allows them to do so and more specific legislative direction for additional powers may be inhibited simply for being inconsistent with the broad grant of authority.

Our study suggests this phenomenon is, in fact, occurring. For the provincial conflict cases, we considered whether the bylaw was enacted under a broad or specific grant of authority. A bylaw was coded as having a general grant by examining the legislation that the *ultra vires* challenge was based on: if it was a provincial Municipal Act, Local Government Act, Community Charter, or general act for a city (e.g. *City of Toronto Act*), it was classified as a general grant. Otherwise, it was classified as a specific grant (e.g. *Tenant Protection Act*, *Motor Vehicle Act*, *Tobacco Control Act*). Given that a broad grant provides more leeway for municipalities to craft their legislation, we suspected that those bylaws would be more likely to be upheld. Of the 176 cases where it could be determined if the grant of authority was broad or specific (excluding 4 cases that were both), 115 cases involved a broad grant as compared to 61 involving a specific grant. The survival rate for the bylaws was higher under broad grants of authority (82 upheld, 71.3%) compared to specific grants (38 upheld, 62.3%). While the difference in win rates is not dramatic, the “broad grants” rate is higher than the overall win rate against the province and the “specific grant” number is lower, suggesting that the nature of the grant might play some role.

In short, the judiciary, from the Supreme Court down to the lower court trial judges, appear to be giving some legal vitality to the broad grants of authority from the province and, if this trend continues, it could result in a new appraisal of the constitutional role of municipalities. The disproportionate win rate of municipal bylaws against provincial power (compared to the federal conflicts) suggests a sort of jurisprudential jujitsu: using the formal constitutional weakness of the municipalities as an informal strength. While it remains formally open to the province to carve out specific exceptions in the form of new statutory provisions, such an approach would plainly contradict the spirit of the broad grant and its presumption of municipal autonomy. In this way, the provincial ability to answer a by-law battle with new legislation resembles the notwithstanding clause (section 33) of the *Charter of Rights and Freedoms*: it allows for a potential response to a judicial outcome, but one that is often practically unavailable. If this is the case, then the municipalities, in some real and practical sense, have a greater constitutional status than we might expect from “mere delegates” of provincial power. While remaining formally subject to provincial whim, the support of the judiciary in upholding their by-laws against claims of provincial jurisdiction means that the informal power of municipalities is quite strong. While we would not say it is a third constitutional level of government, we suggest it might be considered “2.5.”

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## Notes

<sup>1</sup> R.S.C., 1985, c. C-10, s.19(k).

<sup>2</sup> *Constitution Act, 1867*, 30 & 31 Victoria c.3 (U.K.), s.91(5).

<sup>3</sup> *Canada Post v. City of Hamilton*, 2015 ONSC 3615 (CanLII).

<sup>4</sup> *Croplife Canada v. Toronto (City)*, 75 O.R. (3d) 357 (ON C.A., 2005) at para. 17.

<sup>5</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 19

<sup>6</sup> Of the bylaw illegalities, the Digest groups these into the following categories: “excess of territorial jurisdiction,”

“excess of jurisdiction over property and persons,” “conflict with provincial statutes,” and “unconstitutionality.” These three categories will be treated as a provincial encroachment for the purposes of this paper because all three relate to council exceeding the powers given to it by the provincial legislature. A closer look at these three encroachment types helps to clarify this. For “excess of territorial jurisdiction,” each municipality is delineated by boundaries that are set by the province. It may only exercise its powers within its own territory, with limited exceptions. For example, Ontario’s *Municipal Act* notes that “By-laws and resolutions of a municipality apply only within its boundaries.” A municipality in Ontario may exceed its boundaries if a neighbouring municipality or local body provides consent. By default, councils are banned from exercising powers outside their boundaries unless the legislature has expressly allowed this; if they attempt to do so, the bylaw is *ultra vires*. For “excess of jurisdiction over property and persons,” the bylaw is *ultra vires* if it regulates persons who do not fall within the enabling legislation. The final type of provincial encroachment consists of “conflict with provincial statutes.” Bylaws are *ultra vires* if they are “inconsistent with or in conflict with the provisions of a provincial enactment or if they infringe upon a right conferred by a provincial statute,” and bylaws are always subordinate to provincial legislation.

<sup>7</sup> Franki Elliott, Senior Reference Consultant, Carswell, e-mail message to first author, January 27, 2014.

<sup>8</sup> The excluded categories are:

Attacks on By-Laws And Resolutions – Grounds – Ultra Vires – Beyond Power of Municipality – Indirect Taxation  
 Municipal law – Municipal contracts – Ultra vires contracts – General  
 Municipal law – Municipal contracts – Ultra vires contracts  
 Municipal law – Municipal contracts – Estoppel – Ultra vires contracts  
 Municipal law – Municipal finance – Expenditures – Ultra vires expenditures – Statutory authority  
 Municipal law – Municipal finance – Expenditures – Ultra vires expenditures – Demonstrated need  
 Municipal Law – Municipal finance – Expenditures – Ultra vires expenditures – Gratuitous payments to municipal officers

<sup>9</sup> Cases were omitted when the highest appellate decision neglected the *ultra vires* issue entirely. If the highest appellate decision commented on the substance of the *ultra vires* challenge, the case was included in the analysis.

<sup>10</sup> In 5 cases, an *ultra vires* claim was made on both federal and provincial grounds.

<sup>11</sup> *R. v. Latouche*, 2010 ABPC 166

<sup>12</sup> *Ibid.* at para. 106

<sup>13</sup> *McLeod c. St-Sauveur (Ville)*, [2005] R.J.Q. 1511.

<sup>14</sup> *La Rochelle c. Austin (Municipalité)*, J.E. 2004-295, REJB 2003-51811.

<sup>15</sup> *Chalets St-Adolphe inc. c. St-Aldophe d’Howard (Municipalité)*, 2011 QCCA 1491.

<sup>16</sup> *Canada Post v. City of Hamilton*, 2015 ONSC 3615 (CanLII).

<sup>17</sup> *Maple Ridge (District) v. Meyer*, 2000 BCSC 902.

<sup>18</sup> *Ibid.* at para. 59.

<sup>19</sup> *Skinnydipper Services Inc. v. Surrey (City)*, 2007 BCSC 1625 at para. 27-28.

<sup>20</sup> *Pimenova v. Brampton (City)*, 49 M.P.L.R. (3d) 1 (ON, 2004); *Tsui v. Vaughan (City)*, 2013 ONCJ 643.

<sup>21</sup> *Ontario Adult Entertainment Bar Assn. v. Metropolitan Toronto (Municipality)*, 35 O.R. (3d) 161 (ON C.A., 1997); *Mississauga (City) v. Theofilaktidis*, 2004 ONCJ 427; *563080 Alberta Ltd. v. Calgary (City)*, 38 M.P.L.R. (2d) 54 (AB C.Q.B., 1997).

<sup>22</sup> *613742 N.B. Inc. v. Moncton (City)*, 2009 NBQB 16.

<sup>23</sup> *Adult Entertainment Assn. of Canada v. Ottawa (City)*, 2007 ONCA 389.

<sup>24</sup> *Ibid.* at para. 71.

<sup>25</sup> *R. v. Keshane*, 2012 ABCA 330 at para. 39.

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