

**LAW, CULTURE, AND THE CITY: URBAN LEGAL ANTHROPOLOGY, THE  
COUNTERHEGEMONIC USE OF HEGEMONIC LEGAL TOOLS, AND THE  
MANAGEMENT OF INTANGIBLE CULTURAL HERITAGE SPACES WITHIN  
TORONTO'S MUNICIPAL LEGAL FRAMEWORKS**

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## **ABSTRACT**

The deep process of revision needed in managing Toronto and Canada’s urban intangible cultural heritage not only affects redevelopment decisions and cultural policies at the municipal level, and cultural heritage legislation and regulations at the provincial level, but it also calls for the need to address issues at the federal level, such as correctly acknowledging what terms like “heritage value” mean when drawn from international cultural heritage legislation and the currently unratified status of the UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage* within Canada. Through the application of urban legal anthropology, as well as through a lens drawing on urban legal geography, this dissertation canvases cases of unequal valuation of cultural spaces linked to musical subcultures and Toronto’s redevelopment strategies and Music City initiatives. It then turns to what has led to this unequal valuation and examines various existing legal tools in Ontario that lend themselves to counterhegemonic application allowing for better and more equitable intangible cultural heritage protection in the city. These tools will include, for example, the *Ontario Heritage Act and Regulations* and Heritage Conservation Districts among others. This dissertation also turns to international legal tools, and legal tools used in other jurisdictions, for the protection of intangible cultural heritage spaces, and which could realistically be implemented within existing Canadian and Ontarian heritage legislation. Finally, the importance of community consultation practices and paths towards more equitable and engaged community consultation will be explored. These are important considerations where encouraging and engaging the cultural and artistic expression of urban citizens is essential for creating societies and sustaining cities that value and respect cultural diversity and human rights.

## **DEDICATION**

For the many beautiful souls with whom I have spent countless hours silently sharing floors, stages, fields, and strange spaces in a common love of music, dance, performance, and bass, from sunset to sunrise, during those silent dark hours of the day/night spectrum, in the early morning as the sun rose, and in the middle of a Sunday afternoon. For anyone who loved and lost a space that was important to them, brought meaning to their life, helped them through a time when they felt lost or lonely, brought comfort alongside joy and happiness, and provided a place to be and to look forward to being. And for the person who has shared many of these places with me over the years in so many different cities: Thank you, James, for watering the seed of this dissertation—my frustration with injustice, noise complaints, displaced music venues, marginalized art and performance, and castigated street art. Thank you for encouraging me to think about researching and writing about these passions, helping me to remember why I ventured into the legal sphere in the first place, and patiently and actively listening to my PhD-induced ramblings while I worked out the ins and outs of this dissertation. Thank you also for always being willing to read drafts, half-finished musings, and taking the time to provide careful and candid feedback. Thank you for keeping me company in the many, often very long, committee meetings, community consultations, and during those really early mornings and very late nights when we dragged ourselves to and from the outer edges of Toronto to my various research spots downtown and in the middle of nowhere, and also for making academic conferences taking place in even the most obscure places an adventure. And to my parents who dutifully and (somehow) understandingly drove my sixteen-year-old self to raves that meant so much to me, always getting me there just in time to stand in the requisite hour-long line up and still make it inside to catch the headliner. Finally, my Osgoode PhD crew, and LP friends who always ensured a constant supply of chats, support, and snacks, especially in Room 3037.

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## **INTRODUCTION**

“Cities are where the future happens first.”<sup>1</sup>

As urbanization increasingly defines our presence in the world and in society, sitting in on the processes, events, experiences, opinions, and perspectives of those who have little ability to shape their experience of the everyday in the city reveals the cracks in the ceiling of city governance structures above and the holes in the surrounding tapestry of city decision-making and consultation processes. These spaces are found on street corners, in neighbourhood haunts, in parks, in faded basements pubs, up creaky sets of stairs in live-work lofts overlooking the street, behind the doors of a repurposed factory space, in crisp and bright coffeeshops, loud music halls, pulsing nightclubs, shiny supperclubs—the list goes on. As is noted in the third and most recent report of the Special Rapporteur in the field of cultural rights (UN Human Rights Council):

By engaging people and encouraging their interaction through artistic and cultural expression, actions in the field of culture can open a space in which individuals and groups can reflect upon their society, confront and modify their perception of one another, express their fears and grievances in a non-violent manner, develop resilience after violent or traumatic experiences, including human rights violations, and imagine the future they want for themselves and how to better realize human rights in the society they live in. The increased social interactions, mutual understanding and trust that can be built or rebuilt through these initiatives are essential to achieve a range of human rights goals and to respect cultural diversity.<sup>2</sup>

This dissertation project began as an investigation into how law could more equitably value different iterations of culture and cultural practices in the city—including subcultural forms. The short answer I have arrived at is: better intangible cultural heritage management, which can be accomplished through more developed and equitable cultural heritage legislation,

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<sup>1</sup> *C40 Cities* (website), online: <[www.c40.org](http://www.c40.org)>; *C40 Cities* (website), online: <[www.c40.org/about](http://www.c40.org/about)>. The C40 Cities Climate Leadership Group—of which Toronto is a member—is a network that connects over eighty of the world’s major cities in encouraging urban action to tackle climate change.

<sup>2</sup> UNHRCOR, 37th Sess, UN Doc A/HRC/37/55 (2018) at 1.

protection, recognition, and management, especially in terms of acknowledging and dealing with intangible cultural heritage, and better public engagement and consultation design to understand and represent the heritage value, community cultural wealth, and use-value of diverse cultural spaces facing redevelopment processes.

Chapter 1 discusses different notions of value and the valuation of spaces of culture in the city and introduces the tensions and often competing interests between the use-values and exchange-values of spaces in the city, notably in the context of urban (re)development projects and strategies. Here, the notion of and importance of “culture” in the city will be introduced, as will the working definition of “culture” as it is used in this dissertation. Other key framing theories will also be introduced, such as an expanded notion of cultural capital that draws on the Pierre Bourdieu’s framework for calculating cultural capital, where I will propose an expansion of this framework through reference to critical theories and the LatCrit work of Tara Yosso in order to better discuss the (sub)cultural capital and the (sub)cultural community wealth generated in a city’s spaces of culture, art, music, dance, and so on. Drawing on this expanded framework, I turn to a discussion of relationally vulnerable claims to space where differential and faulty valuation of iterations of culture and community (sub)cultural wealth presents an additional challenge to preserving access to a space when exchange-values and use-values can clash within decisions and processes related to urban redevelopment and heritage preservation issues. At this point, the international right to culture, intangible culture, and culture in the city will be introduced with reference to key international legal and policy frameworks developed by UNESCO and UN-Habitat. Subsequently, I turn to how the right to culture in the city has been

framed within nascent city-based human rights charters—such as the *Montreal Charter of Rights and Responsibilities*.<sup>3</sup>

The notion of intangible heritage is then distinguished from tangible (built and visible) heritage in relation to mechanisms that may exist for its protection as part of the right to culture in the city. Having established the basis for discussing different iterations of culture and intangible culture and heritage in the city, this dissertation then turns to a discussion of “diversity” and operationalizing a pluralistic acknowledgment and valuation of an equality of differences in the city—both in relation to Toronto and more broadly in relation to cities in general. *Buen vivir* and scholars who have written on the subject—such as Boaventura de Sousa Santos—are introduced before the discussion moves to how the notion of *buen vivir* can be shifted from international decolonial development application to the local city level. In particular, subaltern cosmopolitanism and the counterhegemonic use of hegemonic legal tools is explored for potential application within municipal legal frameworks with regard to the governance of culture and cultural spaces in the city. Finally, Chapter 1 concludes with a discussion of the commodification of culture in the city as it affects the governance and preservation of intangible cultural heritage, heritage value, community (sub)cultural wealth, and use-value in the city. Here, the notion of “authenticity” is introduced alongside Toronto’s “growth machine” apparatus, and the effects of the commodification of culture and authenticity in the city on subcultures and nighttime spaces will be addressed.

Chapter 2 provides a description of the methodologies drawn on and applied within the research for and writing of this dissertation. I discuss the interplay between theory and methodology, and do so in relation to interdisciplinarity and the development of an urban form of

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<sup>3</sup> City of Montreal (1 January 2006), online <ville.montreal.qc.ca>: Not to be confused with the *Charter of Ville de Montréal*, CQLR, c C-11.4.

legal anthropology. Here, what is meant by “urban legal anthropology” is introduced alongside its utility—as well as that of ethnographic methodologies—and this is then discussed in relation to subaltern cosmopolitanism and counterhegemonic legality, which were introduced in Chapter 1. The use of reflexivity in anthropological and ethnographic methodologies is another topic that appears in Chapter 2. Here, the tools of institutional ethnography as guidance will be drawn out, as well the use of participant observation, informant engagement strategies, and approaches to the ultimate goal of “writing up” the findings of an urban legal anthropology research project. Finally, a key element in the research that went into this dissertation involved virtual communities, virtual networks, and social media. As such, these are discussed in relation to methodology, and examples are drawn out from the case studies that are further explored in later chapters.

Chapter 3 delves into the central case study of Toronto’s Music City strategy, the overarching context of the “Creative City” and culture-based creative-city inspired redevelopment strategies, and the municipal legal frameworks and texts that structure these endeavours and policies. The role of culture, music, and the arts in city redevelopment are discussed both in general as well as specifically in relation to Toronto. Here, the notion of commodification and the commodification of culture, drawn in from Chapter 1, are applied and unpacked further. I then turn to a description of the notion of a “Music City”, and how Toronto is engaging with this goal—notably in relation to the guiding documents, frameworks, and legislation that have been developed. Once again, Chapter 1 is drawn on in a discussion of heritage preservation and sustainable diversity as applied to the Music City and Creative City context, and the tensions that arise between use-values and exchange-values are referenced in this context as well.

The next three chapters are made up of the specific case studies that this dissertation has drawn on. Each site is described alongside the redevelopment threats faced in each situation, and the theoretical framework and methodologies laid out in the first two chapters will be applied to the site assessment of each case study site. The first case study turns to the Government—a recently demolished music venue along Toronto’s waterfront. In addition to a discussion of the music communities and cultures that found a home within its space, Toronto’s waterfront development processes are introduced in this section. The second case study examines and contrasts two music venues found within the same building—the now defunct Waverly Hotel. The Silver Dollar Room is highlighted for the novel recognition it received for its intangible cultural heritage merits even where existing applicable legislation is not currently effectively designed to meaningfully engage with intangible cultural heritage preservation. Comfort Zone, the second of the two venues, was affected very differently when facing the same redevelopment pressures as the Silver Dollar Room and was ultimately displaced. The third and final case study also examines two music venues. The Brunswick House was a historic music venue that has since been transformed into a chain drugstore location, and the Matador Ballroom is distinct amongst the music venues canvassed in this dissertation as it lays dormant. Having been closed for years, it now faces a unique set of barriers where its attempts to *reopen* are thwarted by the surrounding neighbourhood, in contrast to the more common situation of displacement or forced closure of music venues in Toronto.

Having established the counteractive forces at play within Toronto’s municipal legal frameworks where its Music City strategies are being overwhelmed by music venue closures and a lack of effective intangible cultural heritage assessment, Chapter 7 turns to strategies that may be used to address the protection of city spaces full of high use-value and community cultural

wealth. Drawing on Chapter 1’s discussion of the counterhegemonic use of hegemonic legal tools, Chapter 7 begins with an assessment of the counterhegemonic potential of existing heritage management tools, policies, and legislation. In particular, international legal frameworks—such as UNESCO’s *Convention on the Safeguarding of the Intangible Cultural Heritage*<sup>4</sup>—are canvassed for local application alongside the limited existing mechanisms for addressing intangible cultural heritage at the provincial and municipal levels. A key element in meaningful engagement with intangible cultural heritage is the determination of heritage value in an equitable, inclusive, critical, and progressive manner. To this end, Chapter 7 discusses how heritage value can and should be assessed in a manner that unseats authorized heritage discourse and unseats the dominance of the tangible over the intangible in heritage value determinations.

The 2013 *Burra Charter* is drawn on for guidance in progressive heritage value determinations, especially as the Canadian Register of Historic Places has already adopted the *Burra Charter*’s definition of heritage value into its national standard guidance for crafting the Statement of Significance that comprises the information evaluated by provinces in heritage designation decisions.<sup>5</sup> Despite this, the *Burra Charter*’s full guidance for heritage value determinations is not present or effectively acknowledged within the guidelines.<sup>6</sup> Chapter 7 also turns to a series of other legal mechanisms that carry potential for counterhegemonic application, such as the establishment of Heritage Conservation Districts and the better use of Section 37 height and density trading.<sup>7</sup>

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<sup>4</sup> *Convention on the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006).

<sup>5</sup> *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 [2013 *Burra Charter*]; Canadian Register of Historic Places, “Writing Statements of Significance” (Parks Canada, 2006), online: <[www.historicplaces.ca](http://www.historicplaces.ca)>.

<sup>6</sup>; “Practice Note: Understanding and Assessing Cultural Significance”, version 1, Nov 2013, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013.

<sup>7</sup> City of Toronto, Toronto Planning, *Toronto Official Plan* (August 2007), s 5.1.1.

Chapter 7 also addresses the precarity that characterizes many spaces of high cultural value in the city and how this is often exacerbated by a lack of ownership of the space in question. Another example from Toronto’s musical past—the Twilight Zone—is drawn on here. This chapter goes on to examine the potential that better intangible cultural heritage protection has for dealing with precarious property. Creative *placekeeping*—as opposed to creative *placemaking*—is introduced as well as a shift in city redevelopment mentality. To this end, a number of mechanisms and strategies that are in line with creative placekeeping are examined for their utility—such as the use of Assets of Community Value and Article 4 Directions for preserving cultural spaces, the use of the Agent of Change Principle, and the development of 24-hour city governance frameworks. Finally, in this same vein, a legislated form of tolerance that appears in the *Civil Code of Quebec* is also examined for its counterhegemonic merits and placekeeping-friendly application.

Chapter 8 introduces a key underlying problem that arose in all of the case studies examined previously. The lack of effective public consultation that equitably sought out affected parties and the variety of groups and individuals affected by redevelopment decisions appears as a recurring flaw that must be addressed by a city that seeks to meaningfully engage with diversity. Current designs for processes that purport to seek out the concerns of citizens leave the onus on affected citizens to be aware of consultations, where they exist, attend consultations at certain times of the day and at locations that can limit access, and, if attendance is even possible, feel comfortable participating and engaging (in English) with the structure and jargon of urban planning.

Drawing on Arnstein’s ladder of citizen participation, this chapter looks at the reality of public consultation in Toronto as regards spaces of culture, community (sub)cultural wealth, and

intangible cultural heritage, and suggests that current consultation processes veer dangerously towards tokenism. After canvassing a variety of public consultation and engagement scenarios—including those that have been a part of Toronto’s Music City initiative—Chapter 8 suggests the application of REAP (Rapid Ethnographic Assessment Procedures) in rethinking public consultation design regarding urban (re)development and as a better way of assessing the heritage value of important spaces of culture, high community (sub)cultural wealth, and use-value in the city such that the tenets of *buen vivir* are better met, and perennially dominant voices within processes that shape the city are unseated.

#### **A. A Note on Gentrification**

Intermeshed with the subject of the Creative City redevelopment aesthetic and culture-led redevelopment, the term “gentrification” will come to mind for many. I hesitate in my use of the term, originally developed by Ruth Glass in 1964, as it is overbroad and has come to be an unhelpfully dismissive term that imports many complex debates that will not be explicitly engaged in the scope of the present project.<sup>8</sup> While one might certainly identify some of the marginalizing and displacing effects on diverse iterations of culture that culture-led redevelopment can have as gentrification, along the same lines as Mariana Valverde, I take the term to relate more specifically to changes in real estate and the labour force.<sup>9</sup> I avoid using the term where possible, but acknowledge that it can certainly carry relevance to the issues dealt with here, and can be a useful description in some cases despite its overbroad characteristics. Where I do refer to “gentrification”, the term is used to broadly refer to the replacement or

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<sup>8</sup> Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012) at 14.

<sup>9</sup> Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 20.

overlay of certain kinds of spaces that target certain demographics with spaces that tend to attract another demographic—often one with increased access to socioeconomic or political capital.

There is, however, a well-developed literature on the subject of gentrification available for perusal. For just a taste of some of the “gentrification debates”, Japonica Brown-Saracino’s *The Gentrification Debates: A Reader* is an excellent starting point, along with the 2008 book *Gentrification* by Loretta Lees, Tom Slater, and Elvin Wyly, *Gentrification in a Global Context: The New Urban Colonialism* edited by Rowland Atkinson and Gary Bridge, and *The New Urban Frontier: Gentrification and the Revanchist City* by Neil Smith.<sup>10</sup> For some interesting and location specific case studies and discussions regarding Canada, Toronto, and gentrifying forces, Norma Rantisi, Deborah Leslie, and Ute Lehrer are but a few examples for further reading of scholars doing interesting work in the area.<sup>11</sup>

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<sup>10</sup> Japonica Brown-Saracino, ed, *The Gentrification Debates* (New York: Routledge, 2010); Loretta Lees, Tom Slater, and Elvin Wyly, *Gentrification* (New York: Routledge, 2008); Rowland Atkinson & Gary Bridge, eds, *Gentrification in a Global Context: The New Urban Colonialism* (London, UK: Routledge, 2005); Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (London, UK: Routledge, 1996). See also Johannes Novy & Clair Colomb, “Urban Tourism and Its Discontents: An Introduction” in Johannes Novy & Clair Colomb, eds, *Protest and Resistance in the Tourist City* (Abingdon: Routledge: 2017) 1 at 10-11, 14-15.

<sup>11</sup> Ute Lehrer & Thorben Wieditz, “Condominium Development and Gentrification: The Relationship Between Policies, Building Activities and Socio-Economic Development in Toronto” 18:1 (2009) *Canadian Journal of Urban Research* 10; Deborah Leslie & Norma M Rantisi, “Creativity and Urban Regeneration: The Role of La Tohu and the Cirque du Soleil in the Saint-Michel Neighborhood in Montreal” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global perspectives* (London, UK: Routledge, 2013) 83.

# **CHAPTER ONE: THEORIES OF VALUE, CULTURE AND CULTURAL SPACES IN THE CITY**

## **I. INTRODUCING USE-VALUE VERSUS EXCHANGE-VALUE IN THE CITY** \*

The work of Logan and Molotch “construct[s] a sociology of cities on the basis of a sociology of urban property relations” that seeks to “clarify the interconnections between a wide range of urban phenomena.”<sup>1</sup> In doing so, they turn to a structuralist approach and the “Marxian lexicon” to propose an analytical framework that draws on the “exchange-value” and “use-value” of place, but in a manner adjusted to speak to the urban development context.<sup>2</sup> “Exchange-value”, in this context, refers to “the utilization of property to generate profit” while “use-value” refers to “values individuals assign to property that do not enter into commodity exchange.”<sup>3</sup>

The urban theorist Henri Lefebvre is often cited to have stressed that a complete recognition of use-values is needed “in order to redress the historical imbalance resulting from the excessive emphasis on exchange-values typical of the capitalist production of the urban space.”<sup>4</sup> The undervaluation of the cultural capital of certain groups and individuals, and the unequal valuation of different iterations of culture, cultural practices, and attached spaces of cultural practice, is interlaced with the comparative valuation of the use-value/exchange-value of

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\* © Sara Ross. Parts of Section I were previously published in: Sara Ross, “Making a Music City: The Commodification of Culture in Toronto’s Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks” (2017) 27 *Journal of Law and Social Policy* 126.

<sup>1</sup> See generally John R Logan & Harvey L Molotch, *Urban Fortunes: The Political Economy of Place* (Berkeley: University of California Press, 1987); see especially, *ibid* at viii; Ray Hutchison, “Book Review of Urban Fortunes” (book review) (1988) 94:2 *Am J Sociology* 459 at 459.

<sup>2</sup> Logan & Molotch, *supra* note 1 at viii; Aaron Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2006) at 17.

<sup>3</sup> Hutchison, *supra* note 1 at 459.

<sup>4</sup> Edésio Fernandes, “Constructing The ‘Right to the City’ In Brazil” (2007) 16:2 *Social & Legal Studies* 201 at 208. See e.g. Henri Lefebvre, *Writings on Cities*, selected, translated and introduced by Eleonore Kofman & Elizabeth Lebas (Oxford, Blackwell, 1996); Henri Lefebvre, *The Production of Space*, translated by Donald Nicholson-Smith (Malden: Blackwell, 1991); Henri Lefebvre, *Le Droit à la Ville* (Paris: Anthropos, 1968); Henri Lefebvre, *La Revolution Urbaine* (Paris: Gallimard, 1970).

spaces within municipal legal governance frameworks. Seeking to build on Lefebvre’s notion of the production of space by people, Logan and Molotch do so “by offering specific concepts, mechanisms, and examples of how individuals and groups” produce space within the urban setting and the use-value/exchange-value framework.<sup>5</sup> Where space is created by people and may also be viewed for its intangible properties, different spaces and their attached value-attribution—whether measured in terms of “use” or “exchange”, or both—can overlap and coexist within the physical boundaries of tangible space. An overlap in created spaces and alternate values can also be generated in the same space but at different times—for example, day versus night, and so on. These overlaps within the same physical boundaries and tangible space can create an antagonistic relationship between the contrasting and conflicting value interests of the parties that occupy the space. Logan and Molotch suggest that cities, as growth machines, tend to focus on the revenue potential of spaces and emphasize exchange-values in development projects, but that this often functions to the detriment of those who struggle to access or maintain these spaces for use in their everyday lives.<sup>6</sup> That is, however, not to say that those for whom the use-value of a space is the focus will not also potentially derive “exchange benefits” from exchange-value focused interests and projects in the city.<sup>7</sup>

Drawing on this framework is useful in considering how the use-value generated within a space is treated, valuated, protected, and promoted in comparison to the exchange-value it carries. Where much of Logan and Molotch’s work is related to the production of neighbourhood

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<sup>5</sup> Logan & Molotch, *supra* note 1 at xi, ix.

<sup>6</sup> *Ibid* at viii-ix. For further discussion of the city as a growth machine, see *ibid* at ch 3ff, and for an excellent discussion of how Logan and Molotch’s growth machine theory applies to Canadian cities, and Toronto in particular, see Moore, *supra* note 2, ch 2ff. Briefly, the urban growth machine is characterized by the united desire for growth—or, a “growth consensus”—of a coalition of dominant or “elite” groups, actors, and organizations in the city, even if they have otherwise divergent interests (Logan & Molotch, *supra* note 1 at 50).

<sup>7</sup> *Ibid* at viii-ix.

space, residents, and use-value,<sup>8</sup> use-value can also be drawn on to address the occupation, use, and/or identification of a space that is not necessarily connected with habitation. Intangible cultural heritage is interconnected with the use-value of a space and can be generated within a space of community cultural wealth and high use-value, regardless of the exchange-value the space may or may not carry. People in the city frequent spaces that are important to them beyond the limits of their home and neighbourhood. These forms of use and occupation of space often arise in relation to cultural activities and practices in addition to leisure activities. These uses of space may occur at unconventional times of the day or night where use may go unnoticed by those who use the space, or the surrounding space, at other times during the day or night. Or, they may overlap in ways that clash, causing nuisance claims to arise.

While, today, “the iterability of sounds, odours, vibrations and dust traversing property boundaries represents the traces of different lives pursued,”<sup>9</sup> nuisance clashes tend to carry a greater threat for displacement for those using the space who are relationally vulnerable—often with weaker property claims to the space and/or less social, economic, or cultural capital to ensure their voice is heard and valued.<sup>10</sup> Additionally, an overlap in the use of space, but one that occurs less visibly at different times of the day or night, may result in one group’s complete lack of awareness of the presence of the other group. This may ultimately bring about the inability of the relationally vulnerable users of the space to preserve their use-access to the space as their invisibility can lead to a neglect in consultation when the space or the access to the space is altered or removed.

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<sup>8</sup> See generally *ibid*; see also *ibid* at 49.

<sup>9</sup> Davina Cooper, “Far Beyond ‘The Early Morning Crowing of a Farmyard Cock’: Revisiting the Place of Nuisance Within Legal and Political Discourse” (2002) 11:1 Soc & Leg Stud 5 at 10.

<sup>10</sup> See also Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) at 19-22 for a discussion of the legal chronotope and hegemony of conventional notions of property ownership and spatiotemporal existence in the city space.

## II. CULTURE IN THE CITY: WHAT IT IS AND WHY IT MATTERS\*

The cultural fabric of everyday life is seen in the micro context of small social spaces and within the “lawscapes” where the law and the city intersect.<sup>11</sup> In addition to this, as theorist Iris Marion Young puts it, life in the city is characterized by the “being together of strangers, diverse and overlapping neighbours.”<sup>12</sup> Ultimately, the burgeoning diversities of cultures, subcultures, and cultural practices and spaces must coexist within the close-quartered setting of the city. Differences are inevitable and even encouraged in the context of city life as “[d]eviant or minority groups find in the city both a cover of anonymity and a critical mass unavailable in the smaller town.”<sup>13</sup> But when superimposed, pushed together, and forced to coexist, often within contested terrain, clashing parties often face unequal results. As the UN’s Habitat III issue papers note—urban law “often has a dual character with an apparently neutral technical nature accompanied by a complex social aspect including the potential for differential impact on different groups within the urban environment.”<sup>14</sup>

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\* © Sara Ross. Parts of Section II were previously published in: Sara Ross, “Buen Vivir and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach” (2015) 5:1 City University of Hong Kong Law Review 55.

<sup>11</sup> Andreas Philippopoulos-Mihalopoulos, ed, *Law and the City* (Abingdon, Oxon: Routledge-Cavendish, 2007); Valverde, *Chronotopes*, supra note 10 at 21; Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Post-modern Conception of Law” (1987) 14:3 JL & Soc’y 279. For a description of a “small social space” see e.g. Sally Engle Merry, “Anthropology of International Law” (2006) 35 Annual Review of Anthropology 99 at 106.

<sup>12</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 237, 240; Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012) at 34.

<sup>13</sup> Young, supra note 12 at 238.

<sup>14</sup> UN-Habitat, Habitat III Issue Paper #6, “Urban Rules and Legislation” (31 May 2015) at 2 [Habitat III Issue Paper #6, “Urban Rules”]. The UN-Habitat Conference on Housing and Sustainable Development occurs only once every twenty years (see (website), online: <habitat3.org>. UN-Habitat is the United Nations program focusing on the future of cities and life in cities. For the other official documents outlining the UN-Habitat’s mandate see the *Vancouver Declaration on Human Settlements* (Habitat I), 1976, UN Doc A/Conf.70/15; the *Istanbul Declaration on Human Settlements* (Habitat II and the Habitat Agenda), 1996, UN Doc A/Conf.165/14; the *Declaration on Cities and Other Human Settlements in the New Millennium*, UNGAOR 25th Sess, 2001, Supp No 3, UN Doc A/S-25/7/Rev.1.

In working towards greater social justice within cities, what Young terms a “realization of a politics of difference” is needed.<sup>15</sup> Here, the city space must be designed with a view to affirming, representing, sustaining, and celebrating the distinct practices and activities of diverse groups and individuals and “their distinctive characteristics and cultures” in order to work towards a pluralistic equality of differences.<sup>16</sup> In opposition to social assimilation, ignorance of difference, or the formation of a singular identity for a city, this recognition and sustenance of diversity is in line, as we will see, with Boaventura de Sousa Santos’ argument that “the ideal of equality is the ideal of equal difference.”<sup>17</sup> It also speaks to a re-humanizing of the city, such as that which is called for by the Habitat III issue papers:

Enhancing local culture and recognizing cultural diversity can be a powerful way to mitigate urban conflicts, foster tolerance, preserve the social fabric and promote pluralism. Social inclusion of disadvantaged groups, particularly in the redevelopment of urban areas and cultural spaces, can be facilitated through wider recognition of their cultural identity.<sup>18</sup>

#### **A) Defining Culture (Or Not)? \***

Without attempting to canvas all of what the word “culture” can mean, or attempting to crystalize its essence, I deploy the term “culture” as it is used in the UNESCO *Universal*

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<sup>15</sup> Young, *supra* note 12 at 227, 240. See also Hae, *supra* note 12 at 34.

<sup>16</sup> Young, *supra* note 12 at 227, 240. See also Hae, *supra* note 12 at 34. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 473 [Santos, *Toward*]

<sup>17</sup> Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 219 [Santos, *Epistemologies*].

<sup>18</sup> UN-Habitat, Habitat III Issue Paper #4, “Urban Culture and Heritage” (31 May 2015) at 4 [Habitat III Issue Paper #4, “Urban Culture”]. See also Sophia Labadi & William Logan, “Approaches to Urban Heritage, Development and Sustainability” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 1 at 1; *The Florence Declaration on Heritage and Landscapes as Human Values: Declaration of the Principles and Recommendations on the Value of Cultural Heritage and Landscapes for Promoting Peace and Democratic Societies*, ICOMOS, 18<sup>th</sup> GA (adopted October 2014), online: *ICOMOS* <[www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA\\_2014\\_results/GA2014\\_Symposium\\_FlorenceDeclaration\\_EN\\_final\\_20150318.pdf](http://www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA_2014_results/GA2014_Symposium_FlorenceDeclaration_EN_final_20150318.pdf)> [*Florence Declaration*]

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5.

*Declaration on Cultural Diversity*.<sup>19</sup> Here, “culture” is defined as: “[T]he set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that ... encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>20</sup> While this provides a guiding definition, as regards identifying “culture” and cultural spaces in the city context, UN-Habitat (with reference to the 2004/2005 “State of the World Cities Report”) muses:

Culture, it seems, has many meanings. As a practical human activity, it is an inherent part of both individual and collective development, from the education of a single child to the finest artistic expression of entire peoples and nations. Both historically and in terms of the future, culture suggests the capacity to survive as well as adapt to change. Especially in cities, culture takes form in the environment of palaces, temples, opera houses, art museums, places of entertainment, parks, memorials, marketplaces, shops and restaurants. These, in turn, become visual symbols of local identity.<sup>21</sup>

Or, as Lisa Alexander notes in her 2012 article “Hip-Hop and Housing: Revisiting Urban Space, Power, and Law” that draws on William Julius Wilson’s iteration of the term “culture”, it describes “the micro-level processes of meaning making and decision making—that is, the way that individuals in particular groups, communities, or societies develop an understanding of how the world works and make decisions based on that understanding.”<sup>22</sup>

Arts, culture, leisure activities, and their associated spaces, can sometimes be dismissed as the mundane of everyday life. But they are much more important than this as they are often

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<sup>19</sup> GA Res 25, UNESCOR, 31st Sess, Annex 1, UN Doc 31C (2001) Doc 31CGA Res 25, Annex I, 41 ILM 57 (adopted on 2 November 2001) [UNESCO *Declaration on Cultural Diversity*].

<sup>20</sup> *Ibid.*

<sup>21</sup> UN-Habitat, “Trading on Culture: Planning the 21<sup>st</sup> Century City”, 2004, UN Doc SOWC/04/F/04 (2004) at 3, online: *UN-Habitat* <mirror.unhabitat.org/documents/media\_centre/sowc/Featuretrade.pdf>. See also UN-Habitat, “State of the World Cities 2004/2005: Globalization and Report” (New York: Routledge, 2005).

<sup>22</sup> Lisa T Alexander, “Hip-Hop and Housing: Revisiting Culture, Urban Space, Power & Law (2012) 63 *Hastings LJ* 803 at 809-10, citing William Julius Wilson, “Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty” (2010) 629 *Annals Am Acad Pol & Soc Sci* 200 at 202. See also Daniel Silver, Terry Nichols Clark & Clemente Jesus Navarro Yanez, “Scenes: Social Context in an Age of Contingency” (2010) 88:5 *Social Forces* 2293 at 2295, who discuss the definitional issues of “culture” and question the boundaries of what can be considered “culture” in the city from the perspective of policymakers—from opera and Shakespearean theater to local cuisines, local music, fairs, and street entertainment.

the planes within which inequality in the city ultimately plays out for most urban inhabitants.<sup>23</sup> They not only provide a means for “social differentiation and identity construction in the post-modern, post-industrial society” and “are aspects of the quality of life that contribute to comprehensive personal development and to cultural and social integration,” but they can also provide an escape from everyday life’s unsavoury bits, a sense of belonging and social cohesion—they can breathe meaning into one’s life in the city.<sup>24</sup> As Heather McLean and Barbara Rahder explain with regard to urban cultural enclaves, and about Toronto’s Kensington Market in particular:

Grassroots arts and culture events may seem small and insignificant within the grander scheme of making cities safe and attractive for global corporate investment. Yet, these events have a way of shaping the social imaginaries celebrated and performed in urban spaces. They valorize, exclude, and change communities and the relationships within, around, and beyond them in ways both anticipated and unanticipated.<sup>25</sup>

Rather than simply focusing on seeking housing close to work and life’s necessities, individuals increasingly seek a quality of life that is inherently related to cultural and leisure spaces of intangible cultural experiences. Culture-based city redesign projects, seek not only to respond and capitalize on this development, but also to harness the tourism possibilities of cultural city spaces and experiences that can draw global tourism interest, reputation as a global city destination, and the corresponding tourism dollars that can result.<sup>26</sup>

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<sup>23</sup> See also Hae, *supra* note 12 at 6-7. Johannes Novy & Clair Colomb, “Urban Tourism and Its Discontents: An Introduction” in Johannes Novy & Clair Colomb, eds, *Protest and Resistance in the Tourist City* (Abingdon: Routledge: 2017) 1 at 10, 14

<sup>24</sup> *Ibid* at 139; City of Montreal, *Montréal Charter of Rights and Responsibilities* (1 January 2006), online <ville.montreal.qc.ca>, art 11 [*Montreal City Charter*]; Ernst & Young, “Creating Growth: Measuring Cultural and Creative Markets in the EU” (December 2014) at 7, online: <[http://www.ey.com/Publication/vwLUAssets/Measuring\\_cultural\\_and\\_creative\\_markets\\_in\\_the\\_EU](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU)> [EY, “Creating Growth”].

<sup>25</sup> “The Exclusionary Politics of Creative Communities: The Case of Kensington Market Pedestrian Sundays” (2013) 22:1 *Can J Urban Research* 90 at 106.

<sup>26</sup> See also Shoshanah Goldberg-Miller, *Planning for a City of Culture: Creative Urbanism in Toronto and New York* (New York: Routledge, 2017) at 13, 15.

### **III. RECALIBRATING THE CALCULATION OF BOURDIEUSEAN CULTURAL CAPITAL IN THE CITY\***

Bourdieuian cultural capital is limited by its traditional focus on white middle- and upper-class cultural preferences as the standard by which all other iterations of culture are situated and valued.<sup>27</sup> Broadly, cultural capital includes family, class position, and the investment made in the cultural capital of youth, usually with the intent that the return on this investment will reproduce the parent's class position (often middle class) in the youth.<sup>28</sup> Particular activities are highly valued when investing in cultural capital, such as travel, language abilities, high culture, the high arts,<sup>29</sup> and so on.<sup>30</sup> Cultural capital is not necessarily inherited or unavoidably possessed by middle-class individuals, but it is accumulated by gathering certain types of knowledge, abilities, and skills.<sup>31</sup>

When considered in this way, Bourdieusean cultural capital can be seen as the aggregate value of "included" or "acceptable" but differently valued constitutive elements,<sup>32</sup> from which a distinct total value in the cultural capital of individuals and groups can be derived that would be void of "excluded" or "unacceptable" constitutive cultural capital elements. To overcome these limitations of Bourdieusean cultural capital, Tara Yosso's critical approach to cultural capital

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<sup>27</sup> Tara J Yosso, "Whose Culture has Capital? A Critical Race Theory Discussion of Community and Cultural Wealth" (2005) 8:1 *Race Ethnicity and Education* 69 at 76.

<sup>28</sup> *Ibid* at 76.

<sup>29</sup> Shane Homan identifies the "high" arts as opera, classical music, and musical theatre ("From Coombs to Crean: Popular Music and Cultural Policy in Australia" (2013) 19:3 *International Journal of Cultural Policy* 382 at 383). Homan also notes the distinction between "entertainment" and "high" cultural forms (*ibid* at 384).

<sup>30</sup> Gerry Veenstra, "Culture and Class in Canada" (2010) 35:1 *Can J Sociology* 83 at 100: Based on statistical analysis, Veenstra identifies traditional "highbrow" cultural practices in Canada with activities such as "listening to CBC radio, attending classical music performances, and visiting art galleries". In contrast, Veenstra identifies "lowbrow" cultural practices in Canada as visiting or attending "parks, historic sites, ... theatrical performances, festivals, or popular music performances" (*ibid* at 101).

<sup>31</sup> Yosso, *supra* note 27 at 76.

<sup>32</sup> Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (London, UK: Routledge & Kegan Paul, 1984) at 114-16, 118-19; Veenstra, *supra* note 30 at 86-87.

suggests a means by which to displace the focus of Bourdieusean cultural capital from the values and interests of white middle- and upper-class individuals to those traditionally excluded by this theory<sup>33</sup>—those who inhabit the margins and whose interests often go unheard or ignored due to a plethora of intersecting forms of subordination or stigmatization, and tend to be on the losing end of urban policies.<sup>34</sup> In order to adapt the notion of *what* constitutes cultural capital and *who* may have cultural capital, Yosso expands the Bourdieusean framework to better account for a diversity of groups and individuals.<sup>35</sup> This expansion better recognizes, reflects, and accounts for the diversity of groups, individuals, and (sub)cultures who occupy the city space. To accomplish this expansion, she begins by highlighting the shortcomings of traditional iterations of Bourdieusean cultural capital by challenging the hierarchical valuation of cultural capital associated with upper- and middle-classes, to the exclusion of racialized and marginalized communities.<sup>36</sup> In the case studies that follow in Chapters 4-6, as well as in the other Chapters that follow, while not explicitly framed in this manner within these sections, I approached my methodology, research, and assessment of countercultural and transgressive cultural communities and spaces through the lens of Yosso’s expansion of traditional iterations of Bourdieusean cultural capital.<sup>37</sup>

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<sup>33</sup> Yosso, *supra* note 27 at 77.

<sup>34</sup> On intersecting forms of subordination, see e.g. Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43 *Stan L Rev* 1241. For a discussion of hidden subjectivities and the use and politics of space, see e.g. Patricia L Price, "At the Crossroads: Critical Race Theory and Critical Geographies of Race" (2010) 34:2 *Progress in Human Geography* 147 at 151 and also Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 11. See also Alexander, *supra* note \_\_\_ for a discussion of cultural collective efficacy as “a form of positive bonding social capital generated through participation in cultural endeavors”—a better acknowledgement of which is instructional for better place-based lawmaking design (at 808-10)

<sup>35</sup> See generally Yosso, *supra* note 27; see also Alexander, *supra* note 22.

<sup>36</sup> Yosso, *supra* note 27. See also Pierre Bourdieu & J Passeron, *Reproduction in education, society and culture* (London: Sage, 1977).

<sup>37</sup> I take this approach as a means of viewing theory as part of the research process and as a part of “doing” theory where it is applied as a guiding framework for entering, experiencing, thinking about, and questioning research spaces (see e.g. John Flood, “Socio-Legal Ethnography” in Reza Banakar & Max Travers, eds, *Theory and Method*

Bourdieuian cultural capital traditionally views these communities as "full of cultural poverty disadvantages" because alternative forms of cultural capital remain unacknowledged and unrecognized in the traditional Bourdieuian framework.<sup>38</sup> Through Yosso's expanded notion of cultural capital, she argues that racialized and marginalized communities are in reality characterized by a wealth of cultural capital and highly socially valued elements—what Yosso terms "community cultural wealth"—that comprise their cultural capital.<sup>39</sup> While these alternative forms of cultural capital and cultural knowledge are greatly valuable to the individuals within these communities or marginalized groups, they do not necessarily carry value, or capital, within the context of dominant society.<sup>40</sup> Therefore, the problem with the traditional parameters and definition of cultural capital is that community difference and diversity are not effectively accounted for. Without effectively accounting and valuating

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*in Socio-Legal Research* (Oxford: Hart Publishing, 2005) 33 at 33; Mariana Valverde, "Specters of Foucault in Law and Society Scholarship" (2010) 6 *Ann Rev Law Soc Sci* 45 at 47, 53-54

<sup>38</sup> Yosso, *supra* note 27 at 69.

<sup>39</sup> *Ibid* at 70. Yosso describes six of these unacknowledged and unrecognized forms of cultural capital that make up community cultural wealth: aspirational capital, familial capital, social capital, navigational capital, resistant capital, and linguistic capital. These six, which are not an exhaustive list, feed into and edify community cultural wealth, which is then translated into cultural capital (see *ibid* at 78).

<sup>40</sup> *Ibid* at 76. Elsewhere, Sarah Thornton's work on club cultures (*Club Cultures: Music Media and Subcultural Capital* (Cambridge, UK: Polity Press, 1995) addresses alternative forms of cultural capital that exist within subcultures. She refers to cultural capital in this context as "subcultural capital". I agree with Alan O'Connor's critique of Thornton's use of cultural capital ("The Eagle and the Hummingbird: Questions for Cultural Studies" (2001) 10:1 *Pretexts: literary and cultural studies* 93 at 98-99). He views Thornton's application of Bourdieu's notion of cultural capital as an aberration that fails to deploy the notion in the way Bourdieu intended. Yosso avoids this pitfall by arguing for an extended form of cultural capital that includes alternative forms of cultural capital rather than creating an alternative hierarchical framework for these other forms of cultural capital. In passing, it bears mentioning that these notions of alternative cultural capital or subcultural capital criticized by O'Connor may also be described in terms of what Bourdieu calls, "non-certified cultural capital", see e.g. Bourdieu, *supra* note 32 at 358. This approach is taken up by Lise Bernard in "Le capital culturel non certifié comme mode d'accès aux classes moyennes : L'entregent des agents immobiliers" (2012) 1 *Actes de la recherche en sciences sociales* 68. Bernard discusses the cultural capital deployed by real estate agents as non-certified cultural capital—such as having a way with words or a well-honed knowledge of how to negotiate social contexts—but which can nonetheless enable an individual to enjoy the same benefits as would be provided by having strong certified cultural capital in terms of enabling a satisfactory placement within the middle and upper classes (*ibid*).

alternative forms of cultural capital and the community cultural wealth of diverse groups within the city, they are vulnerable to unequal treatment by a city's legal complexes.<sup>41</sup>

Further, Yosso's expanded framework for cultural capital better speaks to the *buen vivir* approach to development (discussed later in this section) as it asserts the importance of equally valuating diverse ways of knowing and being and, when applied to the city context, calls for equal consideration of different iterations of culture in designing municipal policies that regulate culture in the city.<sup>42</sup> Yosso's expanded framework also facilitates what the Habitat III issue papers highlight: (1) "[e]nhancing local culture and recognizing cultural diversity can be a powerful way to mitigate urban conflicts, foster tolerance, preserve the social fabric and promote pluralism;" and (2) that "[s]ocial inclusion of disadvantaged groups, particularly in the redevelopment of urban areas and cultural spaces, can be facilitated through wider recognition of their cultural identity and their cultural capital."<sup>43</sup>

Finally, while Yosso's expanded framework better recognizes (all forms of) community cultural wealth and use-value generated in cultural spaces in the city, it also provides a useful way to think about and value the existence of sometimes unconventional notions of intangible cultural heritage in spaces in the city that may otherwise be marginalized, undervalued, or excluded. These spaces may carry heritage value or merit to marginalized groups or individuals in the city but might fall outside of the traditional parameters of what would constitute a highly

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<sup>41</sup> "Legal complexes" include "the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms, and forms of judgement" (Nikolas Rose & Mariana Valverde, "Governed by Law?" (1998) 7:4 *Social and Legal Studies* 541 at 542, see also Hae, *supra* note 12 at 7).

<sup>42</sup> Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 2012) at viii. Eduardo Gudynas, "Buen Vivir: Today's Tomorrow" (2011) 54:4 *Development* 441 at 441 [Gudynas, "Today's Tomorrow"]; Eduardo Gudynas, "Buen Vivir" in Giacomo D'Alisa, Federica Demaria & Giorgos Kallis, eds, *Degrowth: A Vocabulary for a New Era* (Abingdon, Oxon: Routledge, 2015) 201 at 202 [Gudynas, "Buen Vivir"]; Santos, *Epistemologies*, *supra* note 17 at 2-16. See also Sara Ross, "Buen Vivir and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach" (2015) 5:1 *City University of Hong Kong Law Review* 55.

<sup>43</sup> Habitat III Issue Paper #4, "Urban Culture", *supra* note 18 at 4.

valued cultural space if only based on the traditional parameters of Bourdieusean cultural capital. As such, Yosso's expanded framework for cultural capital better syncs with international conventions governing intangible cultural heritage protection, the internationally recognized human right to culture, and the right to the city framework.<sup>44</sup>

#### **IV. RELATIONALLY VULNERABLE CLAIMS TO HIGH USE-VALUE SPACES OF COMMUNITY CULTURAL AND SUBCULTURAL WEALTH\***

As I will discuss shortly, the generated use-value within urban spaces described by Logan and Molotch aligns with Yosso's description and model of community cultural wealth, and extends to a discussion of transgressive and unruly community *subcultural* wealth within spaces of urban cultural practice.

While some scholars prefer the term "scene" when referring to music cultures,<sup>45</sup> I am in agreement with Paul Hodkinson's insistence on "the continued value of the notion of subculture as an analytical tool to conceptualize groupings," such as those that I discuss.<sup>46</sup> I use the term

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<sup>44</sup> See e.g. *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975); *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 (entered into force 18 March 2007); *Convention on the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) [2003 UNESCO *Intangible Cultural Heritage Convention*]; *Declaration on the Principles of Tolerance* (adopted 16 November 1995 by UNESCO, 28th Mtg (1995)); *Universal Declaration on Cultural Diversity*, GA Res 25, UNESCOR, 31st Sess, Annex 1, UN Doc 31C (2001) Doc 31CGA Res 25, Annex I, 41 ILM 57 (adopted on 2 November 2001); *Global Charter-Agenda for Human Rights in the City* (2011), online: *UCLG Committee on Social, Inclusion, Participatory Democracy and Human Rights* <[www.uclg-cisd.org/en/right-to-the-city/world-charter-agenda](http://www.uclg-cisd.org/en/right-to-the-city/world-charter-agenda)>; *European Charter for the Safeguarding of Human Rights in the City*, 2000, online: *UCLG Committee on Social, Inclusion, Participatory Democracy and Human Rights* <[www.uclg-cisd.org/en/right-to-the-city/european-charter](http://www.uclg-cisd.org/en/right-to-the-city/european-charter)> [*European City Charter*]; *Montreal City Charter*, *supra* note 24; *Vaughan Accord*, online: <[www.vaughan.ca/council/vaughan\\_accord](http://www.vaughan.ca/council/vaughan_accord)>.

\* © Sara Ross. Parts of Section IV were previously published in: Sara Ross, "Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping" (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>45</sup> See e.g. Richard A Peterson & Andy Bennett, "Introducing Music Scenes" in Andy Bennett & Richard A Peterson, eds, *Music Scenes: Local, Translocal, and Virtual* (Nashville: Vanderbilt University Press, 2004); Silver, Clark & Yanez, *supra* note 22.

<sup>46</sup> Paul Hodkinson, "Translocal Connections in the Goth Scene" in Andy Bennett & Richard A Peterson, eds, *Music Scenes: Local, Translocal, and Virtual* (Nashville: Vanderbilt University Press, 2004) 131 at n 1. See also Paul Hodkinson, *Goth: Identity, Style, and Subculture* (Oxford: Berg, 2002). Hodkinson's research focuses on goth subculture and he suggests that the term "subculture" may be used "to emphasize the relatively substantive, bounded

“subculture” rather than “scene” in order to better represent the importance of these iterations of culture that are often disregarded in contrast to relationally dominant or more conventional iterations of culture. “Scene” can carry with it a dismissive tone in comparison to “(sub)culture”, and I seek to avoid this. Examples of subcultures could include many possibilities: the afterhours electronic dance music (“EDM”) subcultural community, Do-It-Yourself (“DIY”) music communities like the Queercore community in Toronto, the B-boy/B-girl dance subculture, skateboard or parkour communities, graffiti and street art subcultural communities, steampunk subcultural communities, drum-n-bass (“DnB”) and junglist music communities, and so on.

As noted, Yosso’s expanded framework for cultural capital, breaks down the faulty boundaries of traditional Bourdieusean cultural capital, welcomes alternative, marginalized, and unruly cultural capital into the framework, and facilitates recognizing new forms of community cultural wealth.<sup>47</sup> Unequal treatment of diverse iterations of culture and cultural capital runs in tandem with a relationally lower valuation of the use-value of particular spaces, along with their associated cultural practices, members, and community cultural wealth. When a potentially high exchange-value is engaged, or when particular elements of cultural capital are undervalued and result in a perceived lower aggregate cultural capital value for certain iterations of culture, this process tends to disproportionately affect unruly spaces and unruly practices that generate noise and other side effects of unconventional or alternative day/night use patterns that tend to be

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form taken by certain elective groupings, something which contrasts with an emphasis on fluidity and multiplicity” that appears in the work of other scholars such as, for example, Andy Bennett (“Subcultures or Neo-Tribes? Rethinking the Relationship between Youth, Style, and Musical Taste” (1999) 33:3 *Sociology* 599) and David Muggleton (“The Post-Subculturalist” in Steve Redhead, Derek Wnne & Justin O’Connor, eds, *The Club Cultures Reader: Readings in Popular Cultural Studies* (Oxford: Blackwell, 1997) 185.

<sup>47</sup> Yosso, *supra* note 27 at 69, 70. Aspirational capital, familial capital, social capital, navigational capital, resistant capital, and linguistic capital are six forms of unacknowledged and unrecognized cultural capital that Yosso identifies as comprising community cultural wealth. Of course this is not a complete list, but these six forms of cultural capital contribute to the community cultural wealth that comprises cultural capital (see *ibid* at 78). See also Alexander’s development of the concept of cultural collective efficacy to justify progressive and critical place-based lawmaking where “participation in neighborhood-based musical, artistic, and other cultural endeavors can be an important source of collective efficacy” (*supra* note 22 at 808-10, 829-30).

associated with undervalued or deficit-valued cultural capital.<sup>48</sup> In this way, faulty valuation of elements of cultural capital that could fit into Yosso's expanded framework results in the inequitable valuation of certain iterations of culture and community cultural, which works to the detriment of relationally vulnerable groups in the city space.

While Logan and Molotch deploy the notion of use-value largely in relation to inhabited spaces, it is similarly useful in addressing non-residential spaces of occupation, use, and identification that carry a high community cultural or subcultural wealth as well as the intangible cultural heritage of a community or group.<sup>49</sup> When applying Logan and Molotch's framework of use-value and exchange-value to this context, acknowledging the use-value that these spaces carry is crucial in order to preserve, protect, and promote important spaces of culture in the city. Yet, in decisions pertaining to urban redevelopment and preservation strategies that affect or target a city's cultural and subcultural spaces, the meaningfulness of a space—or what holds great cultural community wealth, use-value, or bears a group or community's intangible cultural heritage—can, as Logan and Molotch identify, often play second fiddle to the commercial viability or exchange-value of a space.<sup>50</sup> This clash in valuation is especially pertinent where a space that is used and created by communities and individuals can carry both a use-value as well as an exchange-value. Here, exchange-values risk overshadowing non-commodified use-value, and the exchange-value merits of a future redeveloped space frequently overshadow the use-value of an existing community space.

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<sup>48</sup> See Cooper, *supra* note 9 at 7, 12-14, 24. See also Mariana Valverde's incisive discussion of the hegemonic narrative of conventional spacetime patterns of urban property ownership and the "attempt to stuff the social chronotope of the domesticity of the 'married with children' cultural chronotope into the legal chronotope of 'single-family detached' (*Chronotopes*, *supra* note 10 at 19-22).

<sup>49</sup> See generally Logan & Molotch, *supra* note 1 and also *ibid* at 49.

<sup>50</sup> See also Alexander, *supra* note 22, who argues for the importance of valuing neighbourhoods and community spaces for what they *have* and the value they carry for a community versus their perceived deficiencies and what they might be seen to lack (at 807).

Spaces like these, however, are crucial to the development, sustenance, and practice of culture(s) and subculture(s) in the city. A sense of belonging and community is generated by attending and participating within spaces, venues, and even businesses like stores that cater to repeat attendees with shared cultural reference points, preferences, and tastes.<sup>51</sup> Spaces and venues, regardless of any tangible, built heritage merit to the physical space, can nonetheless serve as a “community center”. Here, for example, small businesses or leisure spaces can provide vital *de facto* social and cultural space for communities as well as cultures and subcultures to gather outside of their home and even their neighbourhood.<sup>52</sup> As historic preservation scholars James Michael Buckley and Donna Graves note, “[S]ome of the most critical elements in any social or cultural community are private places of business that provide goods and services and create important gathering spaces outside of home and workplace.”<sup>53</sup> Groups and individuals spend time in these “third realms” that carry great importance to them and are where the fabric of culture, life, and leisure is woven. Spaces and venues thus play a key role as safe spaces and as a nucleus for the development and flourishing of friendships, relationships, and community connections.<sup>54</sup>

Safeguarding these spaces speaks to the kind of cultural and neighbourhood vibrancy espoused by nascent frameworks for city-based human rights charters (discussed later in this section)—such as the *Global Charter-Agenda for Human Rights in the City*, the *European*

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<sup>51</sup> Katherine N Rankin, Kuni Kamizake & Heather McLean (“Toronto’s Changing Neighborhoods: Gentrification of Shopping Streets” in Sharon Zukin, Philip Kasinitz & Xiangming Chen, eds, *Global Cities, Local Streets: Everyday Diversity from New York to Shanghai* (New York: Routledge, 2016) 140 at 154, 159) demonstrate this in their interaction with shopkeepers in a study of Toronto’s Bloordale and Mount Dennis neighbourhoods. See also Alexander, *supra* note 22 at 829-30; Dolores Hayes, *Urban Landscapes as Public History* (Cambridge, Mass: The MIT Press, 1997).

<sup>52</sup> Rankin, Kamizake & McLean, *supra* note 51 at 161, 165-66.

<sup>53</sup> James Michael Buckley & Donna Graves, “Tangible Benefits from Intangible Resources: Using Social and Cultural History to Plan Neighborhood Futures” (2016) 82:2 *Journal of the American Planning Association* 152 at 160.

<sup>54</sup> See e.g. Benjamin Boles, “Fight for Your Right to Party”, *NOWToronto* (15 May 2014), online: <nowtoronto.com>.

*Charter for the Safeguarding of Human Rights in the City* (“*European City Charter*”), and, in Canada, *Montreal Charter of Rights and Responsibilities* (“*Montreal City Charter*”)—that seek to safeguard culture, cultural spaces, and the right to the city and culture in the city.<sup>55</sup> Further, for local grassroots spaces of music in the city, not only do these spaces serve as a community gathering place of high intangible cultural importance and high use-value, but they also provide the infrastructure that is needed for the survival of music scenes and (sub)cultures in cities.<sup>56</sup>

But where the use of these spaces can occur during periods of the night or day that do not conform to traditional or dominant day/night use and life patterns, this use has a tendency to be viewed as disruptive, stigmatized, unimportant and may clash with the use of neighbouring spaces—leading to nuisance complaints that engage local by-laws.<sup>57</sup> These uses may also be invisible during, for example, daytime hours, which contributes to the lack of acknowledgment of the use-value of a space and to the inability of the relationally vulnerable users of the space to maintain use-access to the space, especially where relationally vulnerable groups are often disadvantaged in nuisance clashes—such as groups or individuals with a weaker property claim to the space in question, less cultural capital, or less socioeconomic clout in asserting their views.<sup>58</sup>

Subcultures, for example, display and generate an iteration of culture in the city and can often inhabit spaces of subcultural practice at the margins of society—often within derelict or neglected spaces of the city.<sup>59</sup> Such communities can find themselves in a position of relational

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<sup>55</sup> Rankin, Kamizaki & McLean, *supra* note 51 at 161, 165; *Global Charter-Agenda for Human Rights in the City*, *supra* note 44; *European City Charter*, *supra* note 44. For Montreal, Quebec, the *Montreal City Charter*, *supra* note 24.

<sup>56</sup> Holly C Kruse, “Local Independent Music Scenes and the Implications of the Internet” in Ola Johansson & Thomas L Bell, eds, *Sound, Society and the Geography of Popular Music* (Farnham: Ashgate, 2009) 206 at 210.

<sup>57</sup> See Cooper, *supra* note 9 at 7, 12-14, 24. See also Valverde, *Chronotopes*, *supra* note 10 at 19-22.

<sup>58</sup> See Cooper, *supra* note 9 at 7, 12-14, 24. See also Valverde, *Chronotopes*, *supra* note 10 at 19-22; Valverde, *Everyday*, *supra* note 8 at 48-77.

<sup>59</sup> Hae, *supra* note 7 at 40. See also Alexander, *supra* note 22 at 808-10.

vulnerability in their claims to and use of spaces and properties—especially where municipal legal frameworks can have a differential, negative effect on the subcultural groups using these spaces.<sup>60</sup> Vulnerability is generated when their interests clash, compete, or must be compared with more dominant, accepted, or visible cultural iterations that can be coded as less disruptive in their use of spaces and properties in the city. The claims to space by relationally vulnerable groups and individuals, including youth-based subcultures, tend towards the use of space—sometimes itself unconventional—in unconventional ways and/or at unconventional times in contrast to dominant societal day/night use patterns and norms.<sup>61</sup> These spaces of subcultural practice can often be impermanent in nature as “subcultures are usually located at one remove from property ownership [and] territorialise their places rather than own them.”<sup>62</sup>

While these occupants of a space may or may not go unnoticed by those who only use the space according to more conventional or dominant day/night use patterns, when the space is observed for the effects potential changes might have on occupants, the physical invisibility of unconventional spatiotemporal occupants can lead to a lack of accounting for their presence as well as a failure to, or difficulty in, engaging with them. Whether this is due to an unknowing, thoughtless, or purposeful oversight, the alternative or unconventional space/time coding of their occupation exacerbates the tendency of municipal governance structures to stifle unruly spaces and association within these spaces, which has a negative effect on the spontaneous organic development and flourishing of subcultural communities that inhabit these spaces.<sup>63</sup>

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<sup>60</sup> Paul Chatterton & Robert Hollands, *Urban Nightscapes: Youth Cultures, Pleasure Spaces and Corporate Power* (London, UK: Routledge, 2003) at 204; Habitat III Issue Paper #6, “Urban Rules” *supra* note 14 at 2. See also Alexander, *supra* note 22 at 823-25.

<sup>61</sup> Hae, *supra* note 7 at 40. Talbot, *supra* note \_\_\_ at 132-33. See also Cooper, *supra* note 9 at 24.

<sup>62</sup> Ken Gelder, *Subcultures: Cultural Histories and Social Practice* (London, UK: Routledge, 2007) at 3; Hae, *supra* note 7 at 6.

<sup>63</sup> *Ibid* at 3; Valverde, *Chronotopes*, *supra* note 10 at 19-22.

As described in 2009 by current MP and former Toronto City Councillor Adam Vaughan regarding the City of Toronto’s desire to stabilize certain districts and shift them away from characterization as nighttime spaces of culture, “We find that the quickest way to get rid of a nightclub is to approve a condo on site that displaces the nightclub [...] therefore you can start to stabilise the district.”<sup>64</sup> In a 2013 review of nightlife and entertainment in downtown Toronto, produced for the Office of the Chief Planner of the City of Toronto, an assessment of the district affected by this strategy (the Toronto Entertainment District, or “TED”) noted that

If the success of [the above] strategy can be measured in the limit of the growth of nightclubs, then it has been wildly successful. As of 2013, not only had the growth of this industry ceased in the TED, but it had dramatically reversed—there were only thirty nightclubs left, while the lofty ascents of both residential and office populations remained unaffected. It is clear, then, that “stabilizing” the district has a particular meaning that does not necessarily apply evenly to all types of development.<sup>65</sup>

While the use-value of even the more mainstream nightclubs—that still tend towards noisy, youth-oriented, marginal and/or unconventional use and occupation patterns—may be high for the subcultural transgressive groups in question, chances are that these same spaces and use patterns will not carry a high exchange-value if examined within urban legal frameworks governing development and redevelopment city projects.<sup>66</sup> This weakness in exchange-value is seen to lead to differential or negative effects of municipal legal frameworks on the subcultural groups using these spaces.<sup>67</sup>

Looking, for example, at the nighttime space and linked subcultures and subcultural practices, youth represent one group that is particularly engaged in generating and sustaining

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<sup>64</sup> The quotation in the text is an example of purposeful stifling of unruly venues in Toronto, see e.g. Sebastien Darchen & Diane-Gabriel Tremblay, “The Local Governance of Culture-led Regeneration Projects: A Comparison between Montreal and Toronto” (2013) 6:2 *Urban Research & Practice* 140 at 150.

<sup>65</sup> Anna Wynveen et al, “Not Zoned for Dancing: A Comprehensive Review of Entertainment in Downtown Toronto” (Toronto: Office of the Chief Planner, 2014) at 25.

<sup>66</sup> Chatterton & Hollands, *supra* note 60 at 208.

<sup>67</sup> *Ibid* at 204; Habitat III Issue Paper #6, “Urban Rules” *supra* note 14 at 2.

these types of subcultural sites both through leisure-based consumption and production as well as through the entrepreneurial and employment component of nighttime cultural production and consumption practices.<sup>68</sup> This subsection of society becomes disproportionately affected when nighttime cultural production and consumption practices are regulated by urban law—such as, for example, noise emission standards and by-laws—in a manner more stymying than what similar production and practices would receive during traditionally identified daytime use hours.<sup>69</sup>

Whether, on the one hand, individuals are involved in the entrepreneurial end as subcultural event promoters, employees, or, on the other hand, purely involved on the consumption end through the input of significant time and leisure interests into a particular subcultural scene, space, and facilitation of these often music-centered events, regard for the individuals involved in the scene, their practices, and the safeguarding of their associated spaces is not something that is on the radar of most urban redevelopment processes and policies, such as noise by-law enforcement, zoning by-law amendment proposals, height and density plan hearings and approvals, and so on. As Miranda Campbell explains, the “surge in youth cultural production represents a significant employment trend that has yet to be grappled with at the policy level.”<sup>70</sup> In addition, youth are not traditionally targeted for their opinions in city redesign projects that affect their unowned spaces of cultural production and consumption that they

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<sup>68</sup> See e.g. Miranda Campbell, *Out of the Basement: Youth Cultural Production in Practice and Policy* (Montreal: McGill-Queen’s University Press, 2013) at 3; Chatterton & Hollands, *supra* note 60 at 5, 71, 88-89, 209-10; Hae, *supra* note 7 at 40; EY, “Creating Growth”, *supra* note 24 at 5-6.

<sup>69</sup> Habitat III, Issue Paper #6, “Urban Rules”, *supra* note 14 at 2; *Toronto Municipal Code*, c 591, *Noise*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; Toronto Music Advisory Council’s (TMAC) “Noise Bylaw Recommendations” (August 2015), online: <[www.toronto.ca/legdocs/mmis/2015/ma/bgrd/backgroundfile-84014.pdf](http://www.toronto.ca/legdocs/mmis/2015/ma/bgrd/backgroundfile-84014.pdf)>; Andreas Kalogiannides, “Can the City of Toronto Reconcile its Noise by-law Review with Creation of a ‘Music City’?” (29 June 2015) *torontomusiclaw.com* (blog), online: <[www.kalogiannideslaw.com/torontomusiclaw](http://www.kalogiannideslaw.com/torontomusiclaw)>. See also Mariana Valverde’s discussion of the political and social exclusions that occur through processes of local law and its imposition of hegemonic spatiotemporal narratives of “‘the’ life-course” (Chronotopes, *supra* note 10 at 19-22).

<sup>70</sup> Campbell, *supra* note 68 at 3.

occupy, use, and/or inhabit. This lack of consultation is exacerbated by the difficulty of contacting the groups and individuals who occupy a space during unconventional and irregular times.<sup>71</sup>

Spaces of subcultural practice, however, are important for the cultural flourishing of subcultural groups in a city, where disregard of these groups forms part of a larger disrespect of equitable access to city space for alternative ways of knowing, living, and alternative cultural practices. Subcultures, countercultures, and their related spaces are a relevant layer of pluriculturalism within which subaltern cosmopolitan contact zones (discussed further later in this section) may flourish in the city, especially where cosmopolitan legality “is a subaltern legality targeting the uncivil and the strange civil society.”<sup>72</sup>

In pioneering the notion of subcultural geographies, where a subcultural group “creates its own geography, a set of places or sites ... through which it gains cohesion and identity,” Ken Gelder reminds us that “societies at various times and for various reasons have legislated against [subcultures] and attempted to regulate and/or reform them.”<sup>73</sup> Gelder’s reminder calls to mind the legal geography-oriented scholarship of theorists such as Nicholas Blomley and Mariana Valverde who highlight the regulation and removal of those deemed “undesirable” within the city space.<sup>74</sup> Within spaces of subcultural practice, individuals or members may be seen as having deviated from their other cultural or class backgrounds in a manner that can transcend or

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<sup>71</sup> See also Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford: Oxford University Press, 2010) at 6 [Zukin, *Naked City*]; Steven Miles & Malcolm Miles, *Consuming Cities* (New York: Palgrave Macmillan, 2004) at 58; Valverde, *Chronotopes*, *supra* note 10 at 19-22.

<sup>72</sup> Santos, *Toward*, *supra* note 16 at 469; Young, *supra* note 12 at 238. See also Kruse, *supra* note 56 at 210.

<sup>73</sup> Gelder, *supra* note 62 at 2. For an interesting parallel, see Alexander, *supra* note 22 at 829-30, where she discusses the community bonding effects of participation in grassroots cultural and informal artistic practices within these types of (sub)cultural community spaces.

<sup>74</sup> See e.g. Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 76 [Blomley, *Unsettling*]; Mariana Valverde, "Taking Land Use Seriously: Toward an Ontology of Municipal Law" (2005) 9:1 *Law, Text, Culture* 34 [Valverde, "Land Use"]; Valverde, *Everyday*, *supra* note 8. See also Hae, *supra* note 7 at 5; Deborah Talbot, *Regulating the Night: Race, Culture and Exclusion in the Making of the Night-time Economy* (Hampshire: Ashgate, 2007) at 85, 132-33; Chatterton & Hollands, *supra* note 60 at 235.

reject past cultural or class affiliations and run contrary to, diverge from, or run on a parallel trajectory to dominant culture.<sup>75</sup> These spaces are vital as contact zones where transgressive intercultural translation occurs through common interest in a space and cultural practices within the space that transcends other cultural adherences.<sup>76</sup> As sociologists Paul Chatterton and Robert Hollands explain,

While alternative places are often ‘melting pots’ for a range of marginal groups, they are also characterised by a desire, however fleeting, for affectual solidarity and togetherness. Many groups on the margins have come together through disillusionment and frustration with mainstream culture, and represent attempts to recreate a sense of belonging, sociation ... and ‘authenticity’.<sup>77</sup>

Where dominant societal views of spaces of subcultural practice with a high use-value and subcultural community wealth may code these subcultural spaces as unnecessary, inconvenient, or nostalgic, this again demonstrates a lack of equal regard for the diversity of ways of knowing and being that exist in the city. Spaces of subcultural community wealth that carry the intangible cultural heritage of a community and exist on the fringes of dominant society serve as vital spaces of expression and cultural generation for those on the margins to find a space to articulate themselves.<sup>78</sup> Failing to equitably respect the use-value of these spaces and their protection, rejects the well-being and voices of those for whom these spaces carry importance. This failure, in turn, exemplifies the hierarchical valuation of diverse iterations of cultures and cultural practices much in the same way that a traditional iteration of Bourdieusean cultural capital does not account for the expanded elements of culture described by Yosso and fails to pluralistically recognize and value an equality of differences amongst all who are present within a city’s urban core. Disregard of certain spaces of culture and subcultures in the city, where cultural practices

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<sup>75</sup> Gelder, *supra* note 62 at 3.

<sup>76</sup> Hae, *supra* note 7 at 6. See also Alexander, *supra* note 22 at 830.

<sup>77</sup> Chatterton & Hollands, *supra* note 60 at 207 [references omitted]; Alexander, *supra* note 22 at 830.

<sup>78</sup> Chatterton & Hollands, *supra* note 60 at 204; Alexander, *supra* note 22.

and communities are generated and negotiate their experience of the city, injures a city's claims to cultural wealth and diversity.<sup>79</sup> Working against the devaluation of certain iterations of culture, and the importance of expanding understandings of accepted cultural capital alongside the key relevance that particular spaces carry for non-dominant groups or individuals, a carefully designed context-sensitive evaluation of the intangible merits of a space is necessary in order to potentially safeguard the use-values and intangible cultural merits of the spaces of less dominant iterations of community cultural wealth that can become (or remain) invisible in decision-making processes that affect these spaces.

#### **V. THE INTERNATIONAL RIGHT TO CULTURE AND CULTURE IN THE CITY AS ENSHRINED IN INTERNATIONAL LEGAL FRAMEWORKS \***

Internationally, UNESCO provides a starting point for considering the international legal frameworks designed to promote and preserve culture within cities.<sup>80</sup> The human right to culture has received increasing recognition on the international stage through UNESCO-based initiatives that address not only tangible and intangible cultural heritage, but now also recognize this right within city-oriented initiatives that address life and culture in the city. Building on the

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<sup>79</sup> Goldberg-Miller, *supra* note 26 at 41; Hae, *supra* note 7 at 6. See also generally Young, *supra* note 12.

\* © Sara Ross. Parts of Section V were previously published in: Sara Ross, "Buen Vivir and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach" (2015) 5:1 City University of Hong Kong Law Review 55.

<sup>80</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, *supra* note 44; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 44; 2003 UNESCO *Intangible Cultural Heritage Convention*, *supra* note 44; *Declaration on the Principles of Tolerance*, *supra* note 44; *Universal Declaration on Cultural Diversity*, *supra* note 44. UNESCO is the acronym for the United Nations Educational, Scientific and Cultural Organisation. See also the *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 4 UNTS 275 (adopted on 16 November 1945, entered into force 7 April 1948). See also the *Report of the Special Rapporteur in the field of cultural rights* (UNHRCOR, 37th Sess, UN Doc A/HRC/37/55 (2018)) and its "current question in focus", which is identified as "the contribution of artistic and cultural initiatives to creating and developing right-respecting societies" ("Cultural Rights", *United Nations Human Rights Office of the High Commissioner* (website), online: <[www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx](http://www.ohchr.org/EN/Issues/CulturalRights/Pages/SRCulturalRightsIndex.aspx)>).

groundwork of urban theorists such as Henri Lefebvre and, more recently, David Harvey,<sup>81</sup> the “right to the city” framework has provided a platform from which the importance of and right to spaces and practice of culture in the city can be structured.<sup>82</sup> This framework views collective urban city spaces as belonging to their urban citizens, where the use-value of these spaces is protected from encroaching dominance by market interests and unjustified infringement by the state, and within which urban citizens have available to them the elements (cultural, social, political, economic, and environmental) necessary for a decent life.<sup>83</sup>

One significant development is UN-Habitat. Mandated by the United Nation’s General Assembly in 1978, UN-Habitat is a program developed by the United Nations to address issues arising from the significant global increase in urban growth.<sup>84</sup> It had a prolific and visible year in 2016 with the Habitat III Conference that, pursuant to UN Resolution 66/207, took place in October 2016 in Quito, Ecuador.<sup>85</sup> This United Nation’s global summit on urbanization occurs every twenty years.<sup>86</sup> The series of twenty-two Habitat III issue papers released in advance of the summit—and which led up to the drafting of the New Urban Agenda<sup>87</sup>—are of particular interest in considering culture and redevelopment in the city. In terms of culture in the city, within these papers one can find many of the underlying values that also appear in the city-based human

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<sup>81</sup> See e.g. Lefebvre, *Le Droit à la Ville*, *supra* note 4; David Harvey, *Social Justice and the City*, revised ed (Athens: University of Georgia Press, 2009).

<sup>82</sup> Hae, *supra* note 7 at 6-7.

<sup>83</sup> See e.g. *ibid* at 6.

<sup>84</sup> UNGAOR, 56<sup>th</sup> Sess, UN Doc A/Res/56/206 (2002); UNGAOR, 29<sup>th</sup> Sess, UN Doc A/Res/29/3327 (1974). For the other official documents outlining the UN-Habitat’s mandate see the *Vancouver Declaration on Human Settlements* (Habitat I), 1976, UN Doc A/Conf.70/15; the *Istanbul Declaration on Human Settlements* (Habitat II and the Habitat Agenda), 1996, UN Doc A/Conf.165/14; the *Declaration on Cities and Other Human Settlements in the New Millennium*, UNGAOR 25<sup>th</sup> Sess, 2001, Supp No 3, UN Doc A/S-25/7/Rev.1.

<sup>85</sup> *Implementation of the outcome of the United Nations Conference on Human Settlements (Habitat II) and strengthening of the United Nations Human Settlements Programme* (UN-Habitat), UNGAOR, 66<sup>th</sup> Sess, UN Doc A/66/207 (2012).

<sup>86</sup> See UN Habitat, “About Us”, *UN Habitat*, online: <[unhabitat.org/about-us/un-habitat-at-a-glance](http://unhabitat.org/about-us/un-habitat-at-a-glance)>. See also the website for Habitat III: online: <[habitat3.org](http://habitat3.org)>.

<sup>87</sup> *Draft Outcome Document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)*, HABITATIIIOR, Annex, Agenda Item 10, UN Doc A.Conf.226.4 (2016) [New Urban Agenda] (the New Urban Agenda was officially adopted in October 2016 at the Habitat III Conference).

rights charters canvased below—inclusivity, equality, protection and promotion of tangible and intangible cultural heritage in its diverse iterations.

**A) The Right to Culture as Enshrined in Nascent City-Based Human Rights Charters**

Where municipal legal and governance structures have a fundamental role in the everyday guarantee of human rights and the right to culture in the daily lives of urban citizens, the right to culture is essential to consider at the municipal level. The popularization of the “right to the city” framework has led to its enshrinement within numerous city-based human rights charters, such as the *World Charter on the Right to the City*, drafted during the 2001 gathering of the World Social Forum, the *Mexico City Charter for the Right to the City*, the *Gwangju Human Rights Charter*, the *Montreal Charter of Rights and Responsibilities* (“*Montreal City Charter*”), the *Global Charter-Agenda for Human Rights in the City*, and in the *European Charter for the Safeguarding of Human Rights in the City* (“*European City Charter*”).<sup>88</sup> The latter is significant as over 400 cities in Europe have become signatories to this document that recognizes culture and cultural rights in the city. Not only does the *European City Charter*, at Article XV, delineate a right for urban citizens to culture “in all its expressions, forms and manifestations” and highlight the importance of spaces for cultural activities, but Article XXI goes on to formulate a right to leisure, both in terms of time for leisure activities as well as space for leisure activities.<sup>89</sup> Setting the stage for these provisions, the *Preamble* to the *European City Charter* also notes that “[c]ity life today also demands that certain rights be more clearly defined” and that, in this context, new issues must be acknowledged, including “the opportunity for social exchange and

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<sup>88</sup> *European City Charter*, *supra* note 44.

<sup>89</sup> *Ibid.*

leisure.”<sup>90</sup> Drawing on this *European City Charter* structure, the *Montreal City Charter*, the first of its kind in North America, also incorporates a similar right to the city approach.<sup>91</sup>

Nascent city human rights charters like the *European City Charter* and the *Montreal City Charter*, pinpoint the intersection between human rights and local governance structures and provide a mechanism and the groundwork for better addressing culture, as it is understood internationally and even nationally, at the municipal level.<sup>92</sup> These city-based charters update and build on the principles of the *Universal Declaration of Human Rights* in order to better meet the context of increased globalization, urbanization, pluriculturalism, and diversity.<sup>93</sup> But they have yet to be widely adopted in North America and are currently mostly in place as useful guides to how life and culture in the city *should* be treated and managed. As the *Montreal City Charter* alerts us, it is “not intended to serve as the basis for legal action nor to be used in a judicial or quasi-judicial forum.”<sup>94</sup>

Certainly city-based human rights charters are a relatively new development that carry future potential, but it remains to be seen if they will continue primarily as guiding documents without the teeth necessary to effect actual change as to how culture is governed in the city context, or if they will be adopted and incorporated in a more meaningful manner. Even where city-based human rights charters do appear, such as in Montreal, the legal frameworks of the governing city in question must more comprehensively incorporate the underlying values of

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<sup>90</sup> *Ibid*, preamble.

<sup>91</sup> *Montreal City Charter*, *supra* note 24.

<sup>92</sup> See also Kristal Buckley, Steven Cooke & Susan Fayad, “Using the Historic Urban Landscape to Re-Imagine Ballarat: The Local Context” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 93 at 94-85.

<sup>93</sup> *Universal Declaration of Human Rights*, GA Res 217A (111), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71; *International Covenant on Economic, Social, and Cultural Rights*, GA Res 2200A (XXI), 21 UNGAOR, Supp No 16, UN Doc A/6313 (1966) 49, 993 UNTS 3 (entered into force 3 January 1976). See also Patrick Champagne, « Les droits de la personne dans la ville et la charte montréalaise des droits et responsabilités : Synthèse », online : *Affaires municipales et Occupation du territoire, Québec* <[www.mamrot.gouv.qc.ca/pub/observatoire\\_municipal/veille/charte\\_montrealaise\\_droits\\_responsabilite.pdf](http://www.mamrot.gouv.qc.ca/pub/observatoire_municipal/veille/charte_montrealaise_droits_responsabilite.pdf)>

<sup>94</sup> *Montreal City Charter*, *supra* note 24, art 32.

these city charters in order to afford them greater capacity to effect meaningful change. Nonetheless, as we will continue to explore, city-based human rights charters are but one extra-legal tool amongst other extra-legal and legal tools (some with stronger teeth than others to effect change) within legal frameworks governing cities.<sup>95</sup>

## **VI. OTHER LEGAL TOOLS FOR PROTECTING THE RIGHT TO CULTURE AND INTANGIBLE CULTURE IN THE CITY**

Even though Canada is a signatory to the 1972 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage* and has numerous World Heritage sites within its borders,<sup>96</sup> Canada has yet to ratify the 2003 UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* (“2003 UNESCO *Intangible Cultural Heritage Convention*”) and has not federally implemented any programs or policies explicitly designed to safeguard intangible cultural heritage.<sup>97</sup> As such, most federal, provincial, and municipal policies and legislation focus on tangible cultural heritage while intangible cultural heritage remains largely ignored.<sup>98</sup> The exceptions to this are Quebec’s *Cultural Heritage Act* and Newfoundland’s Provincial Strategic Cultural Plan: “Creative Newfoundland and Labrador: The Blueprint for Investment and Development in Culture”.<sup>99</sup> Other provinces, such as Ontario (as

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<sup>95</sup> *Ibid*, art 32.

<sup>96</sup> 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975). See also Richard MacKinnon, “The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and its Implications for Sustaining Culture in Nova Scotia” in Michelle L Stefano, Peter Davis & Gerard Corsane, *Safeguarding Intangible Cultural Heritage* (Woodbridge: Boydell Press, 2012) 153 at 153.

<sup>97</sup> Antoine Gauthier, “Intangible Cultural Heritage in Canada: Political Context, Safeguarding Initiatives, and International Cooperation” at 4, online: Quebec Council for Intangible Cultural Heritage/Conseil Québécois du Patrimoine Vivant (CQPV) <patrimoinevivant.qc.ca/wp-content/uploads/2013/04/Intangible-Heritage-in-Canada-ICHCAP-publishing.pdf>; 2003 UNESCO *Intangible Cultural Heritage Convention*, *supra* note 44.

<sup>98</sup> MacKinnon, *supra* note 96 at 153.

<sup>99</sup> *Cultural Heritage Act*, CQLR, c P-9.002; Newfoundland & Labrador, Newfoundland & Labrador, Department of Tourism, Culture, & Recreation, “Creative Newfoundland and Labrador: The Blueprint for Investment and Development in Culture” (2006) at 34.

we will see with the case of the Silver Dollar Room) have sometimes read “intangibility” into their provisions for protecting tangible (built) cultural heritage.<sup>100</sup>

There are a few reasons for the yet-unratified state of the 2003 UNESCO *Intangible Cultural Heritage Convention* in Canada. Concerns include the view that the definition of intangible cultural heritage that appears in the *Convention* is too vague and that the obligations that the *Convention* would impose on the State are too onerous to fulfill—such as the creation and maintenance of inventories of Canada’s intangible cultural heritage—due to the multicultural nature of Canada’s population.<sup>101</sup> In addition, since cultural policy is predominantly a provincial matter, Antoine Gauthier suggests that another potential reason is that the federal government is waiting to see if provincial interest exists for this somewhat new category of heritage protection.<sup>102</sup>

#### **A) What is “Intangible” Culture and Intangible Cultural Heritage \***

Not only is the recognition of intangible culture and intangible cultural heritage lacking at the municipal, neighbourhood, and community level, but the notion itself is relatively new in terms of popular understandings of “heritage”, viewed by many as predominantly comprised of physical material things such as buildings, structures, or even landscapes.<sup>103</sup> Previously an

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<sup>100</sup> City of Toronto, By-law No 57-2015, *To designate the property at 484 Spadina Avenue (Silver Dollar Room) as being of cultural heritage value or interest* (11 December 2014) [By-law No 57-2015]; *Ontario Heritage Act*, RSO 1990, c O.18; *Ontario Regulation 9/06*, O Reg 9/06.

<sup>101</sup> Gauthier, *supra* note 97 at 2.

<sup>102</sup> MacKinnon, *supra* note 96 at 159.

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>103</sup> *Ibid* at 153.

“ignored heritage” for a long time, intangible cultural heritage makes a far more recent appearance within available international legal mechanisms for safeguarding cultural heritage.<sup>104</sup> On the one hand, the notion of protecting something intangible—an activity that occurs within a space or particular use that is made of a space—as an identity-building element is new concept to many, and this novelty is exacerbated by a lack of federal or provincial legal protection designed to protect lived cultural practices and intangible cultural heritage. But, on the other hand, the concept is increasingly growing in prominence and acceptance, especially as a way in which local communities or groups that identify with a living cultural practice and/or knowledge can become empowered in identity-construction and preservation strategies.<sup>105</sup>

“Intangible cultural heritage” is defined at Article 2(1) of the 2003 UNESCO *Intangible Cultural Heritage Convention* as

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.<sup>106</sup>

The *Convention* goes on to note at Article 2(2) that intangible cultural heritage “is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a

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<sup>104</sup> UNESCO *World Commission on Culture and Development*, “1994 Report of the World Commission on Culture and Development” in *Our Creative Diversity* (Paris: UNESCO, 2001) at 30. See also, Dawson Munjeri, “Tangible and Intangible Heritage: From Difference to Convergence” (2001) 56:1-2 *Museum International* 12 at 13. Also, cf e.g. *Convention Concerning the Protection of the World Cultural and Natural Heritage*, supra note 96 and the 2003 UNESCO *Intangible Cultural Heritage Convention*, supra note 44. For an explanation of the history leading up to the development of an international framework for protecting intangible cultural heritage, see Richard Kurin, “Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal” (2004) 56:1-2 *Museum International* 66 at 67-69 [Kurin, “A Critical Appraisal”].

<sup>105</sup> MacKinnon, supra note 95 at 153-54; 2003 UNESCO *Intangible Cultural Heritage Convention*, supra note 44; Labadi & Logan, supra note 18 at 12. See also the *Florence Declaration*, supra note 18; Buckley, Cooke & Fayad, supra note 92; *Recommendation on the Historic Urban Landscape*, GC Rec, UNESCOR, 36th Sess (adopted on 10 November 2011).

<sup>106</sup> 2003 UNESCO *Intangible Cultural Heritage Convention*, supra note 44.

vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.”<sup>107</sup> Article 2(3) further clarifies that “safeguarding” indicates “measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.”<sup>108</sup>

However, as scholars have suggested, the *Convention*’s definition at Article 2(1) is more akin to a description than a definition.<sup>109</sup> Tullio Scovazzi provides a helpful summary of the three essential components that comprise intangible cultural heritage as it is applied at the international level: “a manifestation of such heritage (objective component), a community of people (subjective or social component) and a cultural space (spatial component).”<sup>110</sup> Scovazzi bases these components on the practice that the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage has developed in creating and maintaining the lists of intangible cultural heritage as mandated by the *Convention*: the “Representative List of the Intangible Cultural Heritage of Humanity” and the “List of Intangible Cultural Heritage in Need of Urgent Safeguarding”.<sup>111</sup> In addition, human cultural activity, actions, and experiences must be more than only utilitarian in order to be considered intangible cultural heritage.<sup>112</sup> Moreover, intangible cultural heritage must be “something that is shared within and symbolically identified

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> See e.g. Tullio Scovazzi, “The Definition of Intangible Cultural Heritage” in Silvia Borelli & Federico Lenzerini, eds, *Cultural Heritage Rights, Cultural Rights, Cultural Diversity: New Developments in International Law* (Leiden: Martinus Nijhoff Publishers, 2012) 179 at 180.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> Kurin, “A Critical Appraisal”, *supra* note 104 at 69.

with a cultural community” and passed on through traditions genealogically or otherwise.<sup>113</sup> A cultural community, however, does not need to be ethnically or regionally based—thus allowing for modern cultural forms (Richard Kurin provides examples ranging from modern dance to rap music).<sup>114</sup>

Ethnomusicologist Wim van Zanten further situates the definition of intangible cultural heritage by elaborating that in creating the *Convention*, the question of who had the authority or the ability to define intangible cultural heritage was central, and that the ultimate decision was that this authority should lie with the bearers of culture, or “that [which] communities, groups, and, in some cases, individuals recognize as part of their cultural heritage.”<sup>115</sup> But as Kurin suggests, “The point of the whole [2003 UNESCO *Intangible Cultural Heritage Convention*] is, one might argue, the preservation of grassroots cultural diversity around the world, and particularly, within the contemporary nation-state.”<sup>116</sup> Kurin also explains that “[t]he Convention does some very good things. It reinforces *the idea that the practice of one’s culture is a human right*.”<sup>117</sup>

## **VII. RESPECTING “DIVERSITY” VERSUS DIVERSITY IN CITIES AND CULTURE: BUEN VIVIR AND MOVING TOWARDS AN EQUALITY OF DIFFERENCES \***

Within today’s unprecedented global trend towards urbanization, cities increasingly define the lives of individuals,<sup>118</sup> who must negotiate the widening social, cultural, and economic

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Wim van Zanten, Wim, “Constructing New Terminology for Intangible Cultural Heritage” (2004) 56:1-2 *Museum Intl* 36 at 38; 2003 UNESCO *Intangible Cultural Heritage Convention*, *supra* note 44, art 2.

<sup>116</sup> Richard Kurin, “Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention” (23 November 2006) Inaugural Public Lecture, Smithsonian Institution and the University of Queensland MoU Ceremony, at 15 [Kurin, “Key Factors”].

<sup>117</sup> Kurin, “A Critical Appraisal”, *supra* note 104 at 75 [emphasis added].

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gaps, inequalities and exclusions produced within the city.<sup>119</sup> But they must also negotiate the complex realities of diversity and differences as they play out and are amplified within the close-quarters of the city and downtown mixed-use, compact, life, work, and leisure spaces.<sup>120</sup> While “Creative City” literature may reify buzz words such as “diversity” and “tolerance”—even rating a city’s degree of creative success according to a tolerance index<sup>121</sup>—it can be the *image* of these notions that is sought after by city governments, rather than meaningful inclusivity and equal exchanges.<sup>122</sup> As Neil Smith asserts, “The pursuit of difference, diversity and distinction forms the basis of the new urban ideology but it is not without contradiction. It embodies a search for diversity as long as it is highly ordered, and a glorification of the past as long as it is safely brought into the present.”<sup>123</sup>

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<sup>118</sup> A trend even recognized in 1978 by the United Nations in their creation of the UN-Habitat program, which addresses urbanization and settlement affairs and “is mandated by the UN General Assembly to promote socially and environmentally sustainable towns and cities” (*supra* note 84); Labadi & Logan, *supra* note 18 at 1.

<sup>119</sup> There is a significant dialogue related to this subject. See e.g. Harvey, *supra* note 81; Sharon Zukin, “Cultural Strategies of Economic Development and the Hegemony of Vision” in Andy Merrifield & Erik Swyngedouw, eds, *The Urbanization of Injustice* (New York: New York University Press, 1997) 223 [Zukin, “Cultural Strategies”]; Madhavi Sunder, “Cultural Dissent” (2001) 54:3 *Stan L Rev* 495; Saskia Sassen, “The Global City: Strategic Site/New Frontier” in Engin F Isin, ed, *Democracy, Citizenship and the Global City* (London: Routledge, 2000) 48; Saskia Sassen, *Cities in a World Economy*, 4th ed, (Los Angeles: Sage, 2012) at ch 6ff.

<sup>120</sup> See Martine August, “Social Mix and Canadian Public Housing Redevelopment: Experiences in Toronto” (2008) 17:1 *Can J Urban Research*, suppl. Canadian Institute of Planners 82 at 90-91; Joël Thibert, “Inclusion and Social Housing Practice in Canadian Cities: Following the Path from Good Intentions to Sustainable Project” (Ottawa: Canadian Policy Research Networks, 2007) at 6; Mariana Valverde, *Everyday*, *supra* note 8 at 210. See also Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002) at 304 [Florida, *Rise*]; City of Toronto, Culture Division. *Culture Plan for the Creative City* (Toronto: Culture Division, 2003).

<sup>121</sup> See e.g. Florida, *Rise*, *supra* note 120 at 251 (Table 14.1); Richard Florida, Charlotta Mellander & Kevin Stolarick, “Inside the Black Box of Regional Development: Human Capital, the Creative Class, and Tolerance” in Charlotta Mellander et al, eds, *The Creative Class Goes Global* (London, UK: Routledge, 2014) 11 at 23. Richard Florida, *The Rise of the Creative Class: Revisited* (New York: Basic Books, 2012) at 231-35. The “Creative City” will be discussed in greater depth later in this section and in Chapter 3.

<sup>122</sup> Novy & Colomb, *supra* note 23 at 8-9, 11; Goldberg-Miller, *supra* note 26 at 41 (i.e. “The celebration of festivals and fairs as a part of creative city norms can be viewed as giving a voice and a role to marginalized groups. However, these kinds of festivals do not reflect racial equity but rather give a municipality the appearance of diversity without actually practicing inclusivity”); *ibid* at 42 (“True tolerance ... needs to include intolerance—that is, the intolerance of racial bias, economic straitjacketing, and the marginalization of less-represented members of the urban ecology such as visible minorities, women, and the LGBT community”); August, *supra* note 120 at 91. See also Damaris Rose, “Discourses and Experiences of Social Mix in Gentrifying Neighbourhoods: A Montreal Case Study” (2004) 13:2 *Can J Urban Research* 278 at 281.

<sup>123</sup> Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (London, UK: Routledge, 1996) at 111.

In Mariana Valverde's study of "the mundane details of how cities regulate space, settle disputes, and interpret ordinances and regulations" in Toronto, she notes that diversity became a recurring background theme.<sup>124</sup> While Toronto's motto is "Diversity our strength", and it can be difficult to specifically locate policies or people that vocally oppose diversity, Toronto's often "neoliberal vision of gentrified urban diversity"<sup>125</sup> is nonetheless primarily a reified version of the notion of diversity that is sought, rather than meaningful and substantive inclusivity, a pluralistic equality of differences or diversities, or an environment of equal valuation and exchange amongst differing iterations of culture and cultural practices. The realities of diversity, such as noisy or conflicting use patterns, are not necessarily as clearly protected, respected, or embraced: "People rarely stopped to think about just what 'diversity' means, however. Nearly everyone whose work was studied expressed a sincere commitment to the idea of diversity if the topic came up."<sup>126</sup> As Valverde's study revealed, "[I]n practice, certain dimensions of diversity were more valued than others, in different ways depending on the context."<sup>127</sup> Valverde, however, explains that "[t]his is hardly surprising, since activists as well as scholars have long noted that there's a tendency for institutions and individuals to imagine they're promoting equality or diversity in general when in fact they're only addressing a single factor (gender, say, or race)."<sup>128</sup>

Municipal legal and governance structures have a fundamental role in the everyday guarantee of human rights and the right to culture in the daily lives of urban citizens, as such, they also play a key role in how diversity within the city is thought about and addressed. The displacing effects of redevelopment processes within the city (often via what is labelled

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<sup>124</sup> Valverde, *Everyday*, *supra* note 8 at 2.

<sup>125</sup> *Ibid* at 210.

<sup>126</sup> *Ibid* at 2. See also Goldberg-Miller, *supra* note 26 at 14.

<sup>127</sup> Valverde, *Everyday*, *supra* note 8 at 2.

<sup>128</sup> *Ibid*.

gentrification) can erode the diverse iterations of culture and intangible urban cultural heritage generated in the urban cores of cities, especially where the impact, or the substantive “reality” of diversity can be in some ways unpleasant. A deficit of “diversity in practice” or, “diversity on the ground” can result without careful management of how redevelopment decisions are made and implemented.

As Toronto’s former Chief Planner Jennifer Keesmaat noted: “Our city’s motto is ‘Diversity Our Strength,’ yet we know traditional planning processes don’t always hear equally from Toronto’s many communities.”<sup>129</sup> For example, consultations leading up to decisions regarding a proposed project or decision affecting a neighbourhood tend to be attended and dominated by the same demographic: property owners who reside in the affected space or neighbourhood as well as well-educated, predominantly non-racialized, middle-aged individuals.<sup>130</sup> There is usually a glaring dearth in the participation and consultation of young or racialized individuals as well as tenants in general.<sup>131</sup> This demographic observation is alarming since, according to the 2016 Statistics Canada Census, over 50 percent of residents of Toronto proper self-identified as belonging to a visible minority group.<sup>132</sup> This dearth in representative participation and consultation further reinforces already dominant voices within the city to the detriment of divergent perspectives and marginalized voices.

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<sup>129</sup> Jack Landau. “Inaugural Planning Review Panel to Involve 28 Toronto Residents”, *Urban Toronto* (10 September 2015), online: <urbantoronto.ca>.

<sup>130</sup> In addition to my observations of this imbalance while attending consultations in Toronto for a variety of issues, Mariana Valverde also notes this in her discussion of how consultations might be better structured in gentrifying neighbourhoods and suggests that this imbalance is generally expected by city planners (Mariana Valverde, “How to Consult in Gentrifying Neighbourhoods”, online: (17 November 2015) Spacing: Canadian Urbanism Uncovered <spacing.ca>; Mariana Valverde, “A Tale of Two – or Three – Cities: Gentrification and Community Consultation” in Jay Pitter & John Lorinc, eds, *Subdivided: City-Building in an Age of Hyper-Diversity* (Toronto: Coach House Books, 2016) 219).

<sup>131</sup> *Ibid.*, in addition to my own observations.

<sup>132</sup> Statistics Canada, 2016 Census, “Focus on Geography Series”, (16 November 2016), available online: <www12.statscan.ca>.

Moving into the post-2015 Millennium Development Goals era, the UN's specialized agencies such as UNESCO assert that culture must be seen as a valuable "force for sustainability in development" in "rethinking strategies for development and seeking to identify new sources of dynamism."<sup>133</sup> Culture and cultural heritage can, beyond market potential, promote cohesion and engagement and "provide innovative and cross-cutting solutions to complex issues."<sup>134</sup> But within this context, and the increasingly diverse and interconnected nature of our reality, is a post-2015 focus on the value of the difference and a plurality of cultures that have much to gain in mutually beneficial exchanges.<sup>135</sup> But the possibility of mutually beneficial exchanges first requires establishing a pluralistic respect for an equality of differences and different values in approaching development, which is as important locally, at the municipal city-level, as it is in the global and international development framework.<sup>136</sup>

As canvassed above, UNESCO, UN-Habitat, and city human rights charters provide a guide for how culture, cultural practices, and cultural spaces might be better governed, but key hurdles remain to their effective operationalization at the city-level. The same is true of how these frameworks engage the right to the city movement as well as a plurality of values in terms of what is to be achieved by redevelopment decisions. Beginning to incorporate these perspectives into city development and cultural governance guides is a step in the right direction but falls short of a truly transformative impact on the everyday regulation of life, law, and culture in the city that pioneers of the right to the city movement, such as Lefebvre, would have

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<sup>133</sup> See UNESCO's Contribution to Post-2015, "The Power of Culture for Development", online: <[en.unesco.org/post2015/power-culture-development](http://en.unesco.org/post2015/power-culture-development)>.

<sup>134</sup> *Ibid.* See also Labadi & Logan, *supra* note 18 at 1-2.

<sup>135</sup> UNESCO's Contribution to Post-2015, "The Power of Culture for Development", *supra* note 133.

<sup>136</sup> See also Labadi & Logan, *supra* note 18 at 1-2.

envisioned.<sup>137</sup> At least for now, these documents function mostly as guides for cities and as potential extra-legal mechanisms.

To be able to effect the changes needed at the municipal level and to be able to apply redevelopment strategies in an inclusive, equal manner that is respectful of the equality of differences and diversities, a different mentality, and a very different way of approaching life and cultures in the city is needed. Municipal legal frameworks and the city's legal complexes must undergo "a deep process of revision."<sup>138</sup> Approaching revision through the lens of *buen vivir* sourced from international development discussions, may provide a guide for what this different mentality and approach might look like at the city-level.

#### A) **What is *Buen Vivir*?**

In the international development sphere, critical theorists question the prevailing development approaches imposed by Western and Eurocentric dominant legal and development frameworks for their failure to respect the diversity of knowledges and cultures of the spaces and countries that are the subject of development discussions. In this context, rather than simply a "development alternative" *buen vivir* calls for a recalibration and decolonization of current approaches to development and human rights—an "alternative thinking of alternatives" relying on interculturality.<sup>139</sup> Where Eurocentric, Western, and often neoliberal approaches to development currently occupy the center stage, interculturality and an alternative thinking of alternatives would deconstruct and displace their centrality (rather than rejecting them) in order to equitably consider diverse alternatives and perspectives generated from non-Eurocentric, non-

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<sup>137</sup> Hae, *supra* note 7 at 37; Lefebvre, *Le Droit à la Ville*, *supra* note 4.

<sup>138</sup> Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum on Subaltern Cosmopolitan Politics and Legality" in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 29 at 60 [Santos, "Beyond Neoliberal Governance"].

<sup>139</sup> Santos, *Epistemologies*, *supra* note 17 at 21, 42. See also Gudynas, "Buen Vivir", *supra* note 42 at 202; Eduardo Gudynas, "Buen Vivir: Un Necesario Relanzamiento" (2010) 13 *Revista Yachaykuna-Saberes* 40 at 43 [Gudynas, "Necesario"].

Western, or post-neoliberal thought, in addition to diverse non-dominant and subaltern alternatives generated from within the West (such as feminist perspectives and other critical Western approaches).<sup>140</sup>

The notion of *buen vivir* can be loosely translated as a “good life”, a “decent life”, and an “integral and *collective* well-being,” one that encompasses the notion of an acceptable quality of life and decenters the value primacy of the individual in order to account more significantly for the distinct social context, space, and specific environment or extended community—which, in addition to human community members, may include nature, animals, and so on—within which an individual is situated.<sup>141</sup> The spread of the concept of *buen vivir*, is traceable to the “movement of movements” witnessed during meetings of the World Social Forum and the struggles of subaltern and marginalized groups and individuals (notably from the Global South) for global cognitive justice and against the destruction and devaluation of different knowledges and ways of knowing—or, as termed by Boaventura de Sousa Santos, against “epistemicide”.<sup>142</sup> While these meetings may have popularized the term as it is known today, the first World Social Forum meeting was held relatively recently in 2001 in Porto Alegre, Brazil. Peruvian sociologist and decolonial scholar Anibal Quijano reminds us that the term was first deployed by Felipe Guáman Poma de Ayala—the indigenous Peruvian, Quechua- and Spanish-speaking author whose work documented and critiqued the history and colonial damage done to Andean civilization and the injustices that grew out of the clashes and convergences of Incan and Spanish

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<sup>140</sup> Santos, *Epistemologies*, *supra* note 17 at 42-43; Gudynas, “Today’s Tomorrow”, *supra* note 42 at 445.

<sup>141</sup> Escobar, *supra* note 42 at viii; Gudynas, “Today’s Tomorrow”, *supra* note 42 at 441; Gudynas, “Buen Vivir”, *supra* note 42. See also Luis Macas, “El Sumak Kawsay” (2010) 13 *Revista Yachaykuna-Saberes* 13; Anibal Quijano, “‘Bien Vivir’ para Redistribuir el poder : Los pueblos indigenas y su propuesta alternativa en tiempos de dominación global” (2010) 13 *Revista Yachaykuna-Saberes* 47, at 62, fn 1.

<sup>142</sup> See generally Santos, *Epistemologies*, *supra* note 17, see especially *ibid* at 92.

cultures.<sup>143</sup> Although sometimes used interchangeably with the terms “vivir bien” or “buen vivir”, “bien vivir” is cited as the most common or long-standing term in indigenous communities in the northern parts of South America.<sup>144</sup> “Buen vivir”, however, is the most commonly used term in the Peruvian and Bolivian Altiplano (plateau) region, and is the iteration favoured by Boaventura de Sousa Santos in his work on the subject.<sup>145</sup>

As leading *buen vivir* scholar Eduardo Gudynas suggests, *buen vivir* is “best understood as an umbrella for a set of different positions” that can be considered “as a platform where critical views of development are shared.”<sup>146</sup> The essence and applicability of *buen vivir* is intimately linked to the local, and to context-specific situated growth. The term *buen vivir* benefits from an underlying recognition of plurality and inclusiveness that welcomes situated and contextualized knowledges and is “relative to every historical, social and environmental context.”<sup>147</sup> This plurality is also evidenced in the origins of *buen vivir*, which are attributable to “the confluence of knowledge of different origins,” and the existence of analogous and complimentary concepts within other knowledges/epistemologies.<sup>148</sup>

More broadly, *buen vivir* references an outcry for basic human dignity and for an interculturality that respects the diversity of knowledges, ways of knowing, and lifeworlds in the face of widening inequalities and the unequal valuation of non-dominant and non-Western or non-Eurocentric epistemologies, lives, and cultures forced to negotiate the Western and

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<sup>143</sup> Quijano, *supra* note 141 at 62, fn 1. See also Felipe Guaman Poma de Ayala, *El primer nueve corónica [sic] y buen gobierno*, 1st ed by John V Murra, Rolena Adorno & Jorge Urioste (Mexico, DF: Siglo Veintiuno, 1980); Terence N D’Altroy, *The Incas* (Malden, Blackwell Publishing, 2003) at 15.

<sup>144</sup> Quijano, *supra* note 141 at 62, fn 1.

<sup>145</sup> *Ibid.*

<sup>146</sup> Gudynas, “Today’s Tomorrow”, *supra* note 42 at 444-45, 447. See also, Quijano, *supra* note 141 at 62.

<sup>147</sup> Santos, *Epistemologies*, *supra* note 17 at 53-54, 67; Gudynas, “Buen Vivir”, *supra* note 42 at 202; Gudynas, “Today’s Tomorrow”, *supra* note 42 at 441, 444.

<sup>148</sup> *Ibid* at 444, 446-47; Gudynas, “Buen Vivir”, *supra* note 42 at 202. For analogous treatment of these concepts within the urban/city context see e.g. *European City Charter*, *supra* note 44 and the “Right to the City” framework (Lefebvre, *supra* note 4; Harvey, *supra* note 81).

Eurocentric dominant legal and organizing frameworks that continue to constitute the scaffolding of our increasingly globalized society and cities.<sup>149</sup> *Buen vivir* seeks to displace dominant knowledges such that they comprise only one alternative within a field of options.<sup>150</sup> This reconfiguration, that deconstructs and displaces currently favoured epistemologies, seeks to better account for the voices and perspectives of those who have been (and continue to be) unheard, ignored, marginalized, and excluded or marginalized from participation and consultation, and to do so within a framework of inclusiveness disconnected from hierarchical valuation premised on norms and knowledges currently taken as assumed and settled knowledge. Boaventura de Sousa Santos suggests that this would, in turn, better establish an equality of differences, respect for a diversity of knowledges, and an emphasis on commonalities even where ideological differences nonetheless exist<sup>151</sup>—which are all elements needed for the equitable flourishing of all urban citizens and their cultural allegiances, preferences, and practices—and a flattening of unequal treatment and injustice within the city space.

In the context of development—or for the present purposes, also redevelopment—*buen vivir* is critical of consumerism and instead places its focus on social and environmental fulfillment.<sup>152</sup> That is not to say that economic growth is not a desirable outcome, but that growth is seen as secondary to, or potentially incidental to, the social and environmental context and intercultural considerations.<sup>153</sup> The critical common perspective of *buen vivir*, and its different iterations, reacts to the “conventional domination of utilitarian values, particularly expressed in the reductionism of life to economic values and the subsequent commoditization of almost everything,” which can be seen within many city redevelopment projects that seek culture as an

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<sup>149</sup> Santos, *Epistemologies*, *supra* note 17 at 2-16, Gudynas, “Buen Vivir”, *supra* note 42 at 202.

<sup>150</sup> Gudynas, “Buen Vivir”, *supra* note 42 at 202.

<sup>151</sup> Santos, *Epistemologies*, *supra* note 17 at 42-43; Santos, *Toward*, *supra* note 16 at 473.

<sup>152</sup> Gudynas, “Buen Vivir”, *supra* note 42 at 204.

<sup>153</sup> *Ibid.* See also Gudynas, “Today’s Tomorrow”, *supra* note 42 at 444, 446.

economic panacea.<sup>154</sup> Contrary to a market or exchange-value centered approach, *buen vivir* highlights the different kinds of value that exist, including “esthetic, cultural, historical, environmental, spiritual and so on.”<sup>155</sup> As Gudynas outlines, discussions related to the social philosophy of *buen vivir/vivir bien*—or a “good life”—arise generically in the context of general criticisms against conventional notions of development and international development, more specifically in relation to forms of development derived from contemporary capitalism, and substantively in relation to the epistemological foundations of dominant notions of development, in order to instead turn to alternative knowledges and critical approaches to development that displace the centrality of classical Western development theory.<sup>156</sup>

### **B) Towards A Buen Vivir in the City**

Boaventura de Sousa Santos’ exploration of the notion of *buen vivir* is particularly fruitful for application to the city and urban (re)development context through his focus on the potential the notion carries for intercultural dialogue.<sup>157</sup> This focus sets his discussion of *buen vivir* apart from the work of other theorists who have at times been critical of how *buen vivir* has and is currently applied by the governments of countries such as Bolivia and, particularly,

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<sup>154</sup> *Ibid* at 445. See e.g. Ute Lehrer & Thorben Wieditz, “Condominium Development and Gentrification: The Relationship Between Policies, Building Activities and Socio-Economic Development in Toronto” 18:1 (2009) *Can J Urban Research* 10; Ute Lehrer & Andrea Winkler, “Public or Private? The Pope Squat and Housing Struggles in Toronto” (2006) 33:3 *Social Justice* 142; Ute Lehrer & Jennifer Laidley, “Old Mega-Projects Newly Packaged? Waterfront Redevelopment in Toronto” (2008) 32:4 *Intl J Urban & Regional Research* 786; Sophia Labadi, “The Impacts of Culture and Heritage-Led Development Programmes: The Cases of Liverpool (UK) and Lille (France)” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 137.

<sup>155</sup> Gudynas, “Today’s Tomorrow”, *supra* note 42 at 445.

<sup>156</sup> *Ibid* at 441; Gudynas, “Buen Vivir”, *supra* note 42 at 201-202.

<sup>157</sup> See e.g. Santos, *Epistemologies*, *supra* note 17 at 212-13. See also Gloria Alicia Caudillo Felix, “El Buen Vivir: Un Diálogo Intercultural” (2012) 8:2 *Ra-Ximhai* 345 at 358-59, 362-63.

Ecuador in a manner that distorts *buen vivir*'s original roots in the ancestral knowledge, memory, and practices of indigenous and afro-descendent communities of these same countries.<sup>158</sup>

While my application of the notion of *buen vivir* follows in the vein of Santos' discussion, my decision not to include an in-depth assessment of all of the facets of the present and historical social context of *buen vivir* is not in any way intended to diminish or ignore it, but rather to focus on shifting the scale of application of *buen vivir* in order to suggest an important way of rethinking and approaching development at the municipal urban redevelopment level through a humanistic, use-value-centric approach rather than one primarily focused on economic progress.<sup>159</sup> As those critical of current applications of *buen vivir* remind us, frameworks like *buen vivir* are not immune to co-option, misappropriation, harmful hybridization, and a reestablishment of hierarchies of dominance; nor are they immune to the symptoms of an overdeveloped focus on the economic aspects of development, even when the essence of *buen vivir* sought to deconstruct these same hierarchies and focuses.<sup>160</sup>

But these critiques also clarify that it is unhelpful to reify or crystallize a particular understanding of *buen vivir* as it must remain a dynamic site of resistance, transformation, transgression, and contestation.<sup>161</sup> Additionally, these critiques stem from a different application of the notion *buen vivir* than the one applied in the present project, which, drawing on Santos, focuses on the transformative and radical positive potential *buen vivir* may have as a basis for

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<sup>158</sup> Catherine Walsh, "Development as *Buen Vivir*: Institutional Arrangements and (De)colonial Entanglements" (2010) 53:1 Development 15; Gudynas, "Necesario", supra note 139 at 45-46. See also Felix, supra note 155 at 356-59, 362-63.

<sup>159</sup> Walsh, supra note 158 at 16. Walsh also warns that adapting and hybridizing the notion of *buen vivir* may speak more to "notions of integral human development" that originate from "alternative visions of development emerging from the Western world," which may cause *buen vivir* to "lose some of its radical force" (*ibid* at 19-20). See also Valverde, *Chronotopes*, supra note 10 at 19, 21), where a narrowing in on local municipal lawmaking and regulatory frameworks can reveal "law's contradictory internal dynamics."

<sup>160</sup> See e.g. Walsh supra note 158 at 19-20.

<sup>161</sup> *Ibid*. See also Quijano, supra note 141 at 62; Felix, supra note 155 at 362-63.

equitable intercultural dialogue in order to think about new approaches to municipal-scale (re)development projects.<sup>162</sup>

Santos proposes an epistemology upon which to build a world more focused on equitably acknowledging and valorizing the diverse ways of knowing that exist, notably those of marginalized and subaltern groups and individuals.<sup>163</sup> Santos argues for a displacement of the current dominant epistemologies that structure approaches to development. That which Eurocentric, Western, and dominant governance structures perceive as knowledge must be displaced in order to allow for, and welcome, other ways of knowing and living—those from the other side of the “abyssal line”—to be free to rise to shape a new present and a vision for a better future.<sup>164</sup> Santos describes the abyssal line as an invisible distinction and radical line that separates

social reality into two realms, the realm of “this side of the line” and the realm of “the other side of the line.” The division is such that “the other side of the line” vanishes as reality, becomes nonexistent, and is indeed produced as nonexistent. Nonexistent means not existing in any relevant or comprehensible way of being. Whatever is produced as nonexistent is radically excluded because it lies beyond the realm of what the accepted conception of inclusion considers to be its other.<sup>165</sup>

Santos’ description of the knowledges and movements threatened by the epistemicide against which *buen vivir* is situated is expansive and welcoming to diversity since the planes of the struggles Santos describes can take many shapes and arise in many places. While Santos

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<sup>162</sup> See e.g. Alberto Acosta, “El Buen Vivir, una oportunidad por construir” (2008) 75 Ecuador Debate 33. See also Quijano, *supra* note 141 at 62; Felix, *supra* note 155 at 362-63; Gudynas, “Necesario”, *supra* note 139 at 45, 46; Valverde, *Chronotopes*, *supra* note 10 at 19, 21-22.

<sup>163</sup> See e.g. Santos, *Epistemologies*, *supra* note 17 at 175

<sup>164</sup> Santos, *Epistemologies*, *supra* note 17 at ch 4ff. This approach, also visible within new social movements, subversively centers what to the “dominant world-view has appeared to be marginal” and resonates with deconstructive philosophy Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory*, 2nd ed (Sydney: Lawbook Co, 2002) at 337. See also Joel F Handler, “Postmodernism, Protest, and the New Social Movements” (1992) 26 Law & Soc’y Rev 697.

<sup>165</sup> Santos, *Epistemologies*, *supra* note 17 at 118. This approach, also visible within new social movements, subversively centers what to the “dominant world-view has appeared to be marginal” and resonates with Derrida-esque deconstructive philosophy.

emphasizes a macro-context of global binaries, his call for a decentering of dominant Eurocentric and Western epistemologies is also relevant at the city-level. As globalization embeds itself in the realities of city life and the migratory, mobile, and diverse demographics of urban-dwellers grows, many pockets, layers, and permutations of knowledges, cultures, and cultural practices are transported and transplanted. The reality of the terrain where struggles play out, where social movements arise, and where cultures and knowledges are negotiated on a daily basis is within the spaces of cities.<sup>166</sup> Where many of the city redevelopment and gentrifying processes underway within the urban cores of our cities are seen as a form of recolonization of the city,<sup>167</sup> then the emergence of *buen vivir* approaches “as expressions of decolonial efforts” also resonates in the city context,” especially where *buen vivir* “is not a static concept, but an idea that is continually being created.”<sup>168</sup>

On the ground, struggles against epistemicide on the streets and in the spaces of cities are exemplified within a number of legal geography oriented projects underway in Canadian cities like Vancouver and Toronto, which critically document unconventional cultural spaces—like those used during unconventional times such as spaces of nighttime culture.<sup>169</sup> Here, these

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<sup>166</sup> Helga Leitner, Jamie Peck & Eric S Sheppard, “Preface” in Helga Leitner, Jamie Peck & Eric S Sheppard, eds, *Contesting Neoliberalism: Urban Frontiers* (New York: The Guilford Press, 2007) vi at ix.

<sup>167</sup> Miles & Miles, *supra* note 71 at 62, 64; Robert J Foster, Karen Kain & Jim Prentice, *Creative Capital Gains: An Action Plan for Toronto* (2011), online <[www.torontoartscouncil.org](http://www.torontoartscouncil.org)>; Ute Lehrer, Roger Keil & Stefan Kipfer, “Reurbanization in Toronto: Condominium Boom and Social Housing Revitalization” (2010) 46:180 *disP: Planning Rev* 81 at 82; Laura Levin, “Performing Toronto: Enacting Creative Labour in the Neoliberal City” in Nicholas Whybrow, ed, *Performing Cities* (Hampshire, UK: Palgrave Macmillan, 2014) 159 at 172-73 (in terms of the colonization of night spaces, in particular); Talbot, *supra* note 74 at 132-33; Blomley, *Unsettling*, *supra* note 74 at 92. See also generally, Rowland Atkinson & Gary Bridge, eds, *Gentrification in a Global Context: The New Urban Colonialism* (London, UK: Routledge, 2005).

<sup>168</sup> Gudynas, “Today’s Tomorrow”, *supra* note 42 at 443.

<sup>169</sup> See e.g. Blomley, *Unsettling*, *supra* note 74 at 76; Valverde, “Land Use”, *supra* note 74; Valverde, *Everyday*, *supra* note 8. Valverde’s focus on space and use within rights discourse, rather than the individual, also resonates with the principles of *buen vivir* where the notion of an acceptable quality of life displaces the centrality of the individual in order to more significantly account for social context, space, and the extended community within which individuals are located and operate (*cf* Gudynas, “Today’s Tomorrow”, *supra* note 42 at 441, Gudynas, “Buen Vivir”, *supra* note 42 at 202).

struggles are also revealed as “geograph[ies] of injustice and oppression.”<sup>170</sup> In these geographies, a hierarchy of valuation places the plurality of interests and values of marginalized or subaltern knowledges or ways of knowing on a lower rung than other interests and values traditionally associated with dominant society.<sup>171</sup> Santos suggests that cognitive injustice serves as the basis for this social injustice.<sup>172</sup>

In order for city governance structures to more meaningfully engage with and equally treat different iterations of culture in the city, and to truly embrace the diversities of culture and cultural practices and spaces, *buen vivir* provides an approach through which law can undergo the “deep process of revision” that it requires.<sup>173</sup> Similar to globalization and international development, the struggle to become a global city and the responding strategies deployed, can ultimately marginalize or silence certain groups and individuals. But if cities can carefully construct and monitor the effects of their growth strategy towards global status, the city can also be a site of resistance and struggle and “places in which progressive alternative visions are being forged both beyond and outside the restricted modalities of neoliberalism.”<sup>174</sup>

### **VIII. THEORIES OF HERITAGE, PROPERTY, USE, AND SPACE, AND SUBALTERN COSMOPOLITANISM TO ACHIEVE MORE EQUITABLE TREATMENT FOR PEOPLE IN THE CITY\***

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<sup>170</sup> Santos, *Epistemologies*, *supra* note 17 at 4; Hae, *supra* note 7 at 5; Talbot, *supra* note 74 at 85, 132-33; Chatterton & Hollands, *supra* note 60 at 235.

<sup>171</sup> Santos, *Epistemologies*, *supra* note 17 at ix. Gudynas, “Today’s Tomorrow”, *supra* note 42 at 445.

<sup>172</sup> Boaventura de Sousa Santos, “Public Sphere and Epistemologies of the South” (2012) 37:1 *Africa Development* 43 at 57.

<sup>173</sup> Santos, “Beyond Neoliberal Governance”, *supra* note 138 at 60.

<sup>174</sup> Leitner, Peck & Sheppard, *supra* note 166 at ix.

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## A) Rights in Space and Use and Law's Governance of Space and Use in the City

Understanding space and the production and consumption of space is critical to understanding social relations, interaction, and power dynamics between different groups and individuals in the city.<sup>175</sup> I use the term “space” not in the material architectural sense, but interchangeably with “place”, and in the context of critical, legal geography scholarship.<sup>176</sup> More specifically here, “space” refers to the area within or outside of the walls of a place, building, or venue where intangible cultural heritage, use-value, and subcultural community wealth is generated.

With the emergence of law’s “spatial turn” brought about by growing scholarship engaging the field of legal geography, the nexus between law and space has been explored by several scholars, such as Nicholas Blomley, David Delaney, Andreas Philippopoulos-Mihalopoulos, Mariana Valverde, and so on.<sup>177</sup> The nexus between law and space is palpable. A city is designed, functions, and is governed through its legal complexes, which include “the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms, and forms of judgement.”<sup>178</sup> Where a city is shaped by, ordered, and functions through laws, the space of the city also provides law with the materiality to which it can be

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<sup>175</sup> See e.g. Robert P Fairbanks II, “A Theoretical Primer on Space” (2003) 4:1 *Critical Social Work* 6 <[www1.uwindsor.ca/criticalsocialwork/](http://www1.uwindsor.ca/criticalsocialwork/)>; Michel Foucault & Jay Miskowiec, “Of Other Spaces” (1986) 16:1 *Diacritics* 22. See generally Edward W Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London, Verso, 1989).

<sup>176</sup> See e.g. Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014). See also generally Lefebvre, *The Production of Space*, *supra* note 4 and especially *ibid* at 53.

<sup>177</sup> On law’s “spatial turn”, see especially Nicholas Blomley, David Delaney & Richard Fords, eds, *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell, 2001). See also Andreas Philippopoulos-Mihalopoulos, “Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space” (2010) 7:2 *Law, Culture and the Humanities* 187; Valverde, “Land Use”, *supra* note 74; Valverde, *Everyday*, *supra* note 8; Philippopoulos-Mihalopoulos, *Law and the City*, *supra* note 11. For excellent work pushing the boundaries of law’s spatial turn forward, see Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2015).

<sup>178</sup> Rose & Valverde, *supra* note 40 at 542. See also Hae, *supra* note 7 at 7.

applied,<sup>179</sup> and the legal complexes of a city ultimately shape the urban citizen's experience of the city.<sup>180</sup>

Within these “lawscape” where law and the city meet and intersect,<sup>181</sup> power dynamics and hierarchical treatment manifest. Even though well-designed urban law can provide order, predictability, and rules that can mediate and balance competing interests,<sup>182</sup> as John Chipman reminds us in his examination of the Ontario Municipal Board decision-making process and its development and application of provincial planning policies, “The law is not neutral, but is an expression of the values and interests of dominant groups.”<sup>183</sup> Property ownership and property law, for example, structure how things and places can be used and occupied, who can use them, and when they can be used.<sup>184</sup> As Allison Young describes:

[T]he streetscape is constructed as a conglomeration of places and things whose ownership is framed within the dominant paradigm of property ownership (based on the sovereignty and probity of the title deed and according others, at most, the licence to act in a range of permitted ways within spaces owned by others). The legislated city is thus a city of legible spaces and objects with singular owners, licensing some behaviours and criminalising others.<sup>185</sup>

In terms of redevelopment, the rezoning of space and zoning by-law amendments comprise the primary frameworks through which redevelopment processes are enacted.<sup>186</sup> Since

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<sup>179</sup> Sharron FitzGerald & Andreas Philippopoulos-Mihalopoulos, “Invisible Laws, Visible Cities” (2009) 17:2 Griffith Law Review 435. See also Young, *supra* note 12 at 240-41.

<sup>180</sup> Buckley, Cooke, Fayad, *supra* note 92 at 94-95. See also Young, *supra* note 12 at 240-41.

<sup>181</sup> See generally Philippopoulos-Mihalopoulos, *Law and the City*, *supra* note 11.

<sup>182</sup> See e.g. UN-Habitat, “Rules of the Game: Urban Governance and Legislation” in *World Cities Report 2016*, available online: <[wcr.unhabitat.org/main-report](http://wcr.unhabitat.org/main-report)>.

<sup>183</sup> John G Chipman, *A Law unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Policy* (Toronto: University of Toronto Press, 2002) at xi, 6.

<sup>184</sup> See generally Nicholas Blomley, “Landscapes of Property” in Nicholas Blomley, David Delaney & Richard Fords, eds, *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell, 2001) 118; Blomley, *Unsettling*, *supra* note 74; Damian Collins & Nicholas Blomley, “Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities” in Law Commission of Canada, ed, *New Perspectives on the Public Private Divide* (Vancouver: UBC Press, 2003) 40; Nick Blomley, “Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic” (2007) 22:2 Can JL & Soc’y 55.

<sup>185</sup> Alison Young, *Street Art, Public City: Law, Crime and the Urban Imagination* (Abingdon: Routledge, 2014) at 41.

<sup>186</sup> See e.g. Zukin, *Naked City*, *supra* note 71 at 23-24; Hae, *supra* note 7 at 27-28.

municipal-level law and governance structures focus on governing space and operate primarily through by-laws that regulate spaces and things through their “use” and the “activity” that occurs within them, the legal categories comprised of people, personhood, as well as group identity are only indirectly or secondarily governed within municipal governance structures.<sup>187</sup> In addition, the activities and use that occur within these spaces are not necessarily located within available avenues for constitutional protection.<sup>188</sup> As such, Mariana Valverde suggests that better accounting for human rights and equality in the city might be best approached within the language of space and things rather than people.<sup>189</sup>

**B) Subaltern Cosmopolitanism and Urban Law and Legislation: A Site for the Counterhegemonic Use of Hegemonic Legal Tools**

Santos identifies law, along with politics, as a site where “unequal exchanges and power relations are crystallized” but where struggles for alternative legal principles—or, what Santos terms subaltern cosmopolitan legality—reveal counterhegemonic processes at play.<sup>190</sup> Santos identifies eight broad theses that comprise a cosmopolitan legality/subaltern cosmopolitanism.<sup>191</sup> The second of these theses is “[a] non-hegemonic use of hegemonic legal tools.”<sup>192</sup> In dealing with the lack of neutrality that law can have, in addition to the inequitable effects of laws that may be technically neutral,<sup>193</sup> Santos suggests that “one way of showing defiance for law and rights is to struggle for increasingly inclusive laws and rights,” and that this may be accomplished by a non-hegemonic use of hegemonic legal tools.<sup>194</sup> Santos favours this counterhegemonic application of existing legal tools and frameworks, regardless of their

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<sup>187</sup> Valverde, “Land Use”, *supra* note 74 at 36-37.

<sup>188</sup> Hae, *supra* note 7 at 6.

<sup>189</sup> Valverde, “Land Use”, *supra* note 74 at 37.

<sup>190</sup> Santos, “Beyond Neoliberal Governance”, *supra* note 138 at 29-30.

<sup>191</sup> Santos, *Toward*, *supra* note 16 at 465.

<sup>192</sup> *Ibid* at 467.

<sup>193</sup> Chipman, *supra* note 183 at 6; Habitat III Issue Paper #6, “Urban Rules”, *supra* note 14 at 2.

<sup>194</sup> Santos, *Toward*, *supra* note 16 at 467.

hegemonic coding, as an alternative to completely altering existing frameworks through which knowledges, cultures, and cultural practices must be negotiated. Rather, the counterhegemonic use of hegemonic legal tool strives for a recalibration of these frameworks to establish a tolerance for the plurality of legal knowledges and diversity that can further level out inequitable treatment and injustice.<sup>195</sup>

This counterhegemonic strategy is particularly suited to the municipal context where the daily reality of city life can provide a bottom-up view of the law and legal frameworks as urban citizens pass rezoning by-law amendment announcements, face noise complaints, the ability to or prohibition from using a particular space, and so on.<sup>196</sup> Subaltern cosmopolitanism stresses the importance of social inclusion within the lived experiences of discrimination at the local level through a bottom-up approach and cross-border cosmopolitan support and solidarity in dealing with these experiences.<sup>197</sup> Where “the perspective of subaltern cosmopolitan studies of globalization aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter,”<sup>198</sup> this same study is useful at the local municipal level.

The addition of “subaltern” as a modifier to cosmopolitanism enables cosmopolitanism to be revised “by shifting the focus of attention to those who currently need it” and are “excluded from top-down cosmopolitan projects,” and who Santos and Rodriguez-Garavito define to include “victim[s] of local intolerance and discrimination,” “those who [live] in a world of

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<sup>195</sup> Santos, *Epistemologies*, *supra* note 17 at 42-43; Gudynas, “Today’s Tomorrow”, *supra* note 42 at 445.

<sup>196</sup> See also Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, “Law, Politics, and the Subaltern in Counter-Hegemonic Globalization” in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 1 at 6.

<sup>197</sup> *Ibid* at 14-15.

<sup>198</sup> *Ibid*.

wealth,” or those who are a “non- or second-class citizen of a country or the world.”<sup>199</sup> While they identify this shift as one from the North to the South, the South is not used in the sense of

a geographical location but [rather] all forms of subordination (economic exploitation; gender, racial, and ethnic oppression, and so on) associated with neoliberal globalization. The South, in short, denotes the forms of suffering caused by global capitalism. In this sense, the South is unevenly spread throughout the world, including the North and the West.<sup>200</sup>

Within the context of subaltern cosmopolitan struggles, Santos notes that a “subaltern cosmopolitan legality is never formulated as a legal strategy but rather as a political strategy that comprises legal components.”<sup>201</sup> Santos describes the legal components or strategy for moving forward: a strategy that emphasizes the potential of a counterhegemonic use of legal tools that works within currently available legal structures in order to transcend the current system that continues to favour dominant development perspectives globally but, for the present purposes, also at the local level. Rather than a complete alteration of the existing frameworks through which knowledges, cultures, and cultural practices must be negotiated, a recalibration of these frameworks is sought in order to better embody a tolerance that respects the plurality of legal knowledges and diversity and can also lead to the flattening of inequitable treatment and injustice.

As Santos explains, it is important to “[b]e aware of the danger of throwing out the baby with the bath water, counterhegemonic globalization struggles cannot afford not to use any non-violent means available to them against capitalist modernity, including those invented by capitalist modernity to betray its promises of freedom, equality, and non-discrimination.”<sup>202</sup>

Nonetheless, “In order to be successfully mobilized in a counterhegemonic context, law must

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<sup>199</sup> *Ibid* at 14.

<sup>200</sup> *Ibid*.

<sup>201</sup> Santos, “Beyond Neoliberal Governance”, *supra* note 138 at 61.

<sup>202</sup> *Ibid* at 62.

undergo a deep process of revision” and an inquiry into the potentiality of its counterhegemonic use despite its hegemonic nature.<sup>203</sup>

Echoing the spirit of Santos’ insistence on the utility of using hegemonic legal tools in a counterhegemonic manner, Rosemary Coombe stresses that

[i]f law is central to hegemonic processes, it is also a key resource in counterhegemonic struggles. When it shapes the realities we recognize, it is not surprising that its spaces should be seized by those who would have other versions of social relations ratified and other cultural meanings mandated. . . . Historically structured and locally interpreted, law provides means and forums both for legitimating and contesting dominant meanings and social hierarchies they support.<sup>204</sup>

## **IX. THE COMMODIFICATION OF CULTURE, REIFICATION OF EXCHANGE-VALUES, AND BARRIERS TO MEANINGFUL ACKNOWLEDGEMENT OF (INTANGIBLE) CULTURAL HERITAGE VALUE, COMMUNITY (SUB)CULTURAL WEALTH, AND USE-VALUE IN THE CITY \***

### **A) Culture as Commodity in City Rejuvenation and Redevelopment Strategies, the Desire for “Authenticity” in the City, and Gentrifying Effects**

“Rather than assembly lines, the new prize is to win a stunning concert hall or major museum.”<sup>205</sup> While UNESCO notes the economic and social resource potential that culture can carry, it also cautions that culture is “a source of wealth in ways that do not have price tags.”<sup>206</sup> A focus on art, culture, and heritage as commodity to be used as a redevelopment tool and the reification of particular kinds of “culture” and “authentic” culture in municipal policy and the legal complexes of the city can result in the prioritization of a market rationality that enables the

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<sup>203</sup> *Ibid* at 60.

<sup>204</sup> “Contingent Articulations: A Critical Cultural Studies of Law” in A Sarat & T Kearns, eds, *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 21 at 35.

\* © Sara Ross. Parts of Section IX were previously published in: Sara Ross, “Making a Music City: The Commodification of Culture in Toronto’s Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks” (2017) 27 *Journal of Law & Social Policy* 126.

<sup>205</sup> Logan & Molotch, *supra* note 1 at xix.

<sup>206</sup> UNESCO’s Contribution to Post-2015, “The Power of Culture for Development”, *supra* note 133. See also Labadi, *supra* note 154.

colonization of use-value with exchange-value where culture and art are considered first for their market potential, and second for their cultural and artist value.<sup>207</sup> In designing cities that provide culturally for all urban citizens though, one must consider the comparative weight placed on culture that carries a high exchange-value for redevelopment and tourism potential, and that which might have a comparatively lower exchange-value but a high use-value and important community cultural wealth.

As noted previously, equal valuation of the use-value and exchange-value embodied by spaces of culture in the city is needed in order to better account for, promote, and preserve all cultural spaces and the right to these spaces and cultural practices in the city.

In looking at the comparative valuation of different iterations of cultural spaces and practices, Zukin's urban sociology, which examines the gentrification of New York City, provides another lens to the tension between use-value and exchange-value in the city by considering the commodification of culture and the reification of authenticity as it relates to urban redevelopment and regeneration.<sup>208</sup> Applying Zukin's perspective helps to incorporate gentrification processes into the work of Logan and Molotch—especially in relation to what is considered to be a “desirable” place. Where Logan and Molotch see a high social status as an enabler in gaining access to a highly desirable place and space,<sup>209</sup> their work (written as it was in 1987) does not consider the gritty, ironic, and exotic attraction that traditionally undesirable spaces now carry for “an audience of investors not known for an interest in social justice, and

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<sup>207</sup> Miles & Miles, *supra* note 71 at 64. Foster, Kain & Prentice, *supra* note 167. Lehrer, Keil & Kipfer, *supra* note 167 at 82. See generally: Florida, *Rise*, *supra* note 120; Richard Florida, *Cities and the Creative Class* (New York: Routledge, 2005); Richard Florida, *The Flight of the Creative Class* (New York: HarperBusiness, 2005). See also Zukin, *Naked City*, *supra* note 71 at 18. See also Guido Licciardi & Rana Amirtahmasebi, eds, *The Economics of Uniqueness: Investing in Historic City Cores and Cultural Heritage Assets for Sustainable Development -- The Urban Redevelopment Series* (Washington: The World Bank, 2012); Novy & Colomb, *supra* note 23 at 14-15.

<sup>208</sup> See generally Zukin, *Naked City*, *supra* note 71; Sharon Zukin, *Loft Living: Culture and Capital in Urban Change* (New Brunswick, NJ: Rutgers University Press, 1982) [Zukin, *Loft Living*]; Zukin, “Cultural Strategies” *supra* note 118. See also Novy & Colomb, *supra* note 23 11

<sup>209</sup> See e.g. Logan & Molotch, *supra* note 1 at 49.

[for] aspirational consumers more interested in status and leisure” than in preservation interests and struggles against displacement.<sup>210</sup>

The desire of groups and individuals for “authenticity” and “authentic” spaces in the city, as described by Zukin,<sup>211</sup> adds to the city-situated use-value/exchange-value discussion pioneered by Logan and Molotch. In this context, the work of Logan and Molotch is open to this development through their identification of people as those who construct place and space and the relational dominance of particular groups and individuals, which provides comparably greater access to any kind of space—be it desirable or undesirable.<sup>212</sup> Groups, individuals, as well as private/public actors involved in entrepreneurial structural or spatial speculation, are able to acquire undesirable space and refashion it—while leveraging a sustainable grit, edginess, “authenticity”, and subversive quality that is embodied by the undesirable space—in order to generate desirability and a high exchange-value within the space, even though this space often simultaneously becomes less socioeconomically accessible.<sup>213</sup>

As a supplemental passing example, Lisa Alexander traces the commodification-as-culture within Chicago’s Pilsen neighbourhood, beginning in the 1960s, where the “authentic” cultural and artistic heritage generated by the socioeconomically marginal community became the focus of an “approach to urban redevelopment that sought to maximize the exchange value of Pilsen’s cultural assets for individuals external to the community, rather than its use value for current or future low-income Pilsen residents.”<sup>214</sup> A 1980s ethnographic study by Richard Handler of folk dances in Quebec, Canada, provides an additional detailed example of the

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<sup>210</sup> Miles & Miles, *supra* note 71 at 64-65. But see Novy & Colomb, *supra* note 23 at 11.

<sup>211</sup> See also John L Comaroff & Jean Comaroff, *Ethnicity, Inc* (Chicago: University of Chicago Press, 2009) at 140; Novy & Colomb, *supra* note 23 at 11-12.

<sup>212</sup> See e.g. Logan & Molotch, *supra* note 1 at 43-44.

<sup>213</sup> *Ibid* at 24, 30-31; Novy & Colomb, *supra* note 23 at 11-12, 14.

<sup>214</sup> Alexander, *supra* note 22 at 845-46

processes by which an element of cultural practice can be reified for its construed authenticity, objectified, and commodified in a manner by which national or local identity can be canonized and performed in order to cater to the cultural-consumption oriented touristic gaze.<sup>215</sup>

Reifying the exchange-value of “authenticity” and “authentic” spaces of a city for potential economic, development, or growth benefits tends to result in a monopolization of the use-value carried within the space for those who occupied the space prior to its refashioning and who may no longer be able to afford the cost of accessing the space once its authenticity has been harnessed and commodified.<sup>216</sup> In this way “authenticity” can become a powerful tool of displacement and appropriation as well as a commodifying element of culture that ultimately excludes those whose community cultural wealth connects most strongly with the space.<sup>217</sup> As Sophia Labadi and William Logan note in relation to programs for urban cultural heritage conservation and (re)development as well as the destruction and displacement of urban cultural heritage, local communities and people “for whom the heritage is a valued part of their living environment and a manifestation of their identity ... are left out of the discussions about the future of their places.”<sup>218</sup>

In a similar vein, Arjun Appadurai also takes up a discussion of use-value/exchange-value in order to apply this to his work on the commodification of things in the context of social life and “different regimes of value in space and time.”<sup>219</sup> Appadurai’s “aesthetic of diversion” touches on the interest in commodities or places and spaces that, when used in a different or

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<sup>215</sup> Richard Handler, *Nationalism and the Politics of Culture in Quebec* (Madison: University of Wisconsin Press, 1988); see especially *ibid* at 78-80.

<sup>216</sup> See also Comaroff & Comaroff, *supra* note 211 at 20, 24-29; Zukin, *Naked City*, *supra* note 71 at 102; Novy & Colomb, *supra* note 23 at 11-12.

<sup>217</sup> See e.g. Zukin, *Naked City*, *supra* note 71 at xi-xiii, 3-4.

<sup>218</sup> Labadi & Logan, *supra* note 18 at 2.

<sup>219</sup> Arjun Appadurai, “Introduction: Commodities and the Politics of Value” in Arjun Appadurai, ed, *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge, UK: Cambridge University Press, 1986) 3. See also Comaroff & Comaroff, *supra* note 211 at 29.

“ironic” manner, can intensify the value of the space.<sup>220</sup> This is also apparent in Appadurai’s “aesthetic of decontextualization” (“itself driven by the quest for novelty”) where authenticity and the resulting value of an object or space is measured through its link to everyday use.<sup>221</sup> The intensification of value brought about by a diversion in the original use of a place/space (an aesthetic of diversion), as well as the aesthetic of decontextualization, is based within its value as “authentic” due to its original use. A repurposing or appropriation of an authentic cultural space within the city context allows for this same process, along with an increase in the exchange-value of the space.

But where Appadurai ultimately focuses on material objects and the tangible, Brian Spooner’s discussion of the reification of authenticity underlying the valuation of certain objects usefully extends this notion of commodification to the intangible and experiential aspect of things and spaces/places.<sup>222</sup> Putting our focus on the city momentarily aside, Spooner considers the example of, as he wrote at the time, “Oriental carpets”, where value is derived from the illusive intangible element generated by perceived authentic aspects, such as the age and the process of formation of the carpet.<sup>223</sup> These, along with the physical characteristics of the carpet, are what signals different levels of authenticity.<sup>224</sup> These elements—similar to the gritty, local, ironic, and hip aesthetic of a neighbourhood ripe for commodification—comprise what Zukin would view as criteria within the “toolkit” for authenticity.<sup>225</sup> These criteria for authenticity—and *knowledge* of these criteria—thus influence the exchange-value assigned to the tangible object (or space) based on the intangible elements that inform its existence and context. While

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<sup>220</sup> Appadurai, *supra* note 219 at 28.

<sup>221</sup> *Ibid* at 28.

<sup>222</sup> Brian Spooner, “Weavers and Dealers: The Authenticity of an Oriental Carpet” in Arjun Appadurai, ed, *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge: Cambridge University Press, 1986) 195.

<sup>223</sup> *Ibid* at 196-97, 200, 228.

<sup>224</sup> *Ibid*. See also Comaroff & Comaroff, *supra* note 211 at 20, 24-29.

<sup>225</sup> Zukin, *Naked City*, *supra* note 71 at 121.

this commodification of the intangible aspect—or the authenticity of experience—of something or someplace allows for its presence on the market,<sup>226</sup> additional cultural or social capital, according to Zukin’s framework, is housed in what Appadurai describes as “the knowledge that goes into appropriately consuming the commodity.”<sup>227</sup>

Again turning back to Zukin, this commodification of the intangible aspect of something or someplace and of authenticity is also observable in Zukin’s discussion of a similar reification, valuation, and resulting consumption practices of “authentic” urban places in the city within the context of gentrification—where the aesthetic of diversion is rampant in the focus on remaking spaces such as factories and warehouses into housing and leisure spaces.<sup>228</sup> Similar to the perceived authentic aspects of Spooner’s oriental rugs, strategic culture-based redevelopment of the city space can also deliberately reference certain markers in order to generate an air of authenticity. In discussing gentrifying processes in New York City, Zukin describes the strategic construction of authenticity that, although generated by her New York observations, mirror the aesthetic reality of many large urban centers, such as Toronto, in the strategic construction of authenticity:

[I]t can also be deliberately made up of bits and pieces of cultural references; artfully painted graffiti on a shop window, sawdust on the floor of a music bar, an address in a gritty but not too thoroughly crime-ridden part of town. These fictional qualities of authenticity are not “real,” but they have a real effect on our imagination of the city, and a real effect as well on the new cafes, stores, and gentrified places where we like to live and shop.<sup>229</sup>

Nonetheless, for Zukin, where knowledge of authenticity feeds into social and cultural capital—thus becoming a tool for power—she also suggests that “[c]laiming authenticity can be

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<sup>226</sup> See also Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times*, 2nd ed (Boston: Beacon Press, 2001) at ch 6ff.

<sup>227</sup> Appadurai, *supra* note 219 at 41; Zukin, *Naked City*, *supra* note 71 at 3, 18, 244-46.

<sup>228</sup> *Ibid* at 3-4, 221, 228-29, 237.

<sup>229</sup> *Ibid* at xii-xiii.

a means of gaining ownership for *any* group.”<sup>230</sup> Yet, realistically, claims to a space by “any” group would still require an equal valuation of competing interests and cultural capital in order for a claim of authenticity to carry weight. This would also require the ability to effectively access, understand, and negotiate the relevant municipal legal and planning frameworks—such as rezoning and zoning by-law amendments—that structure and regulate city space.<sup>231</sup> The current enthusiasm, politics, and even fetishization within urban legal frameworks for the commodification and politics of the diversion of uses of spaces of culture, as well as with the value of exhibited authenticity within these spaces, leaves concerns for the use-value of a space and its community cultural wealth by the wayside.<sup>232</sup>

**B) Toronto’s Growth Machine, Culture and Heritage as Commodity: Reifying the “Authentic” and the “Beautiful” Elements of Culture in City Redesign**

As noted by Boudreau, Keil, and Young, the focus on the exchange-value and commodification of culture in Canadian cities is not a new development. The use of creative city rhetoric by the local growth machines of cities such as Toronto is part of a longer tradition of seeking to make gains in public perception through, as Boudreau, Keil, and Young describe, the use of “civic boosterism” strategies.<sup>233</sup> As the authors explain, “Growth machines try to build as wide a base of support as possible for the concept of ‘value-free development’ and to ‘connect civic pride to the growth goal.’”<sup>234</sup> Writing about Toronto, but picking up on the work of Logan and Molotch in relation to growth machines, the authors note that “[t]he overall ideological thrust is to deemphasize the connection between growth and exchange-values and to reinforce

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<sup>230</sup> *Ibid* at xiii, 3-4, 244-46

<sup>231</sup> See also *ibid* at 82 (where rezoning processes in Harlem “crystallized the community’s fears about losing Harlem’s cultural authenticity”); Hae, *supra* note 7 at 27-28.

<sup>232</sup> See also Novy & Colomb, *supra* note 23 at 14-15.

<sup>233</sup> Julie-Anne Boudreau, Roger Keil & Douglas Young. *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009) at 103. See also Novy & Colomb, *supra* note 23 at 10; Goldberg-Miller, *supra* note 26.

<sup>234</sup> Boudreau, Keil & Young, *supra* note 233 at 103.

the link between growth goals and better lives for the majority.”<sup>235</sup> As Toronto has globalized, and continues to do so, culture, and what is perceived as its “beautiful” elements, is reified by Toronto’s growth machine to not only promote itself, but also to quiet opposition to the commodification of these particular elements.<sup>236</sup>

The exchange-value potential of these elements is then utilized “in the interests of building the image of a global city and in turn, attracting footloose capital and knowledge workers, whom Torontonians are told are essential if the city is not to ‘fall behind’.”<sup>237</sup> Simultaneously, the “beautiful”, and “authentic”, elements of culture, as identified by urban development decision-makers, are reified for their “intrinsic qualities that, it is argued, will enhance the lives of all citizens.”<sup>238</sup> Civic boosterism is again deployed when, as Boudreau, Keil, and Young put it: “Torontonians are told that they will benefit from a massive wave of development if that development is beautiful, and if citizens are unable themselves to recognize beauty, experts will identify it for them.”<sup>239</sup>

### **C) Vulnerability and the Commodification of Subcultures and Nighttime Spaces**

Vulnerability is also a concern within the commodification of culture and nighttime cultural spaces that often occurs alongside an overvaluation of the exchange-value of a space over its use-value. As Laam Hae describes in relation to the neoliberal and post-industrial restructuring of the urban environment and its effect on spaces of nighttime cultural practices, it “has been reshaping the conditions in which the exercise of people’s rights to (spaces for) ‘experiential consumption’ (of night clubbing and social dancing) are thwarted, and

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<sup>235</sup> *Ibid*, referring to Logan & Molotch, *supra* note 1 at 32

<sup>236</sup> Boudreau, Keil & Young, *supra* note 233 at 110-11.

<sup>237</sup> *Ibid*. See also Novy & Colomb, *supra* note 23 at 8-12; Goldberg-Miller, *supra* note 26 at 13.

<sup>238</sup> Boudreau, Keil & Young, *supra* note 233 at 110-11. See also Novy & Colomb, *supra* note 23 at 14

<sup>239</sup> Boudreau, Keil & Young, *supra* note 233 at 110-11. Where redevelopment interests and replacement projects butt heads with the intangible and tangible cultural heritage interests of Toronto’s urban citizens, “Just as planners once claimed a privileged position in the planning process based on their self-professed expertise in rational comprehensive planning, today ‘starchitects’ now claim the unique ability to identify beauty” (*ibid*).

corporatized/gentrified forms of nightlife become the primary provider of nightlife to people.”<sup>240</sup>

In a parallel manner, Deborah Talbot would describe this as gentrification proper where there is “a reconfiguration of the parameters of inclusion and exclusion where subcultural products are colonised (and in the process sanitised) in localities whilst the poor, ethnic minorities (or majorities, for example in New Orleans) and the difficult or the marginal are excluded or spatially contained.”<sup>241</sup>

While Hae notes that subcultures are already vulnerable to commodification, night spaces for subcultures located in the urban cores of cities are particularly targeted for their exchange-value potential in attracting those deemed as creative class individuals and tourists looking for a particular aesthetic of authenticity.<sup>242</sup> But, as Hae explains, the deregulation of subcultural night spaces, in the context of attracting people, then experiences a subsequent reregulation once those who have begun to occupy the newly constructed residences in the gentrifying area face the noise and nuisance that unruly night spaces often produce.<sup>243</sup> The formerly loosely regulated “undesirable” nature of the space that afforded a lot less potential exchange-value to lose, can be marketed for its edgy grit such that is transformed into a space that (1) is now deemed desirable and leverages a high exchange-value in terms of the expenditure that the former subcultural night space is now able to command from attendees, and (2) also carries a high exchange-value generated by the newly constructed residences in the area. These new elements of value lead to an altered treatment of, for example, noise and nuisance complaints within a reregulated environment that now has significant potential exchange-value to lose, which—when viewed within redevelopment initiatives—now often weighs higher than the potential eroding effect on

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<sup>240</sup> At 13. Hae also notes the significant vulnerability of alternative cultures to commodification. See also Novy & Colomb, *supra* note 23 at 14.

<sup>241</sup> Talbot, *supra* note 74 at 132-33.

<sup>242</sup> Hae, *supra* note 7 at 29-30. See also Novy & Colomb, *supra* note 23 at 14.

<sup>243</sup> See e.g. Hae, *supra* note 7 at 30.

the intangible use-value of a space that closing or displacing an unruly venue, more rigidly regulating its noise and nuisance output, or pushing out unruly occupiers may have.

But where “[a]lternative marginal nightlife spaces also represent the importance of ‘use’ rather than the ‘exchange’ value of the society,”<sup>244</sup> a focus on the exchange-value of “corporatized/gentrified” night-occupied cultural spaces does not effectively account for a diversity of spaces of culture and creativity for which there is a high use-value but not necessarily exchange-value. This, again, can often have a disproportionately negative and marginalizing effect on transgressive subcultural communities and limits the access of urban citizens in post-industrial and rapidly redeveloping cities to diverse, transgressive, or experimental subcultures, subcultural practices, and subcultural spaces.<sup>245</sup> This echoes Hae’s observation, as well as Valverde’s observation, that populations deemed “undesirable” tend in fact to be regulated by a city’s legal frameworks in a manner that removes them from urban city space.<sup>246</sup> This also echoes the work of Steven Miles and Malcolm Miles who remind us that “[t]he symbolic economy may trade on place identity, but it has little use for the knowledges of the unempowered.”<sup>247</sup>

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<sup>244</sup> Chatterton & Hollands, *supra* note 60 at 238. See also Novy & Colomb, *supra* note 23 at 14-15.

<sup>245</sup> Hae, *supra* note 7 at 3, 5, 29-33; Chatterton & Hollands, *supra* note 60 at 19-44.

<sup>246</sup> Hae, *supra* note 7 at 5; Valverde, *Everyday*, *supra* note 8.

<sup>247</sup> Miles & Miles, *supra* note 71 at 65.

## **CHAPTER TWO: METHODOLOGIES**

### **I. OVERVIEW OF METHODS AND APPROACHES**

While the theoretical frameworks within which this project is shaped are discussed in greater depth in the prior chapter, broadly, this project approaches the application of municipal legal complexes and consultation practices in cultural heritage and urban redevelopment decisions through the lens of sociolegal inquiry as well as through schools of thought germinated from critical legal theory. More specifically, in seeking to accomplish this, I have also sifted my research and findings through a cultural studies approach that draws on decolonial and subaltern studies. Overarchingly, an urban-oriented form of legal anthropology, legal geography, institutional ethnography, and critical discourse analysis have structured the gathering, triangulation, and assessment of qualitative data sourced from participant observation within both the physical and virtual community spaces studied, semi-structured interviews,<sup>1</sup> attendance at Toronto City Hall, Toronto public community hearings, meetings, and consultations, as well as physical and virtual community-generated meetings and discussions, and an examination of the applicable texts—legal, strategic, policy, and otherwise—that shape the spaces and processes studied. I have also endeavored to incorporate a “transsystemic” legal assessment to the research and data gathered that moves beyond comparative approaches to examine the underpinnings of legal systems free of specific jurisdictions and systems.<sup>2</sup>

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<sup>1</sup> I also draw on DeVault & McCoy here in relation to institutional ethnography-oriented research and methods (Marjorie L DeVault & Liza McCoy, “Institutional Ethnography: Using Interviews to Investigate Ruling Relations” in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks: Sage, 2001) 751 at 756).

<sup>2</sup> See e.g. Irus Braverman, “Who’s Afraid of Methodology: Advocating a Methodological Turn in Legal Geography” in Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford Law Books, 2014) 120. On transsystemia, see e.g. H Patrick Glenn, “Doin’ the Transsystemic: Legal Systems and Legal Traditions (2005) 50 McGill LJ 863 at 867; Richard Janda, “Toward Cosmopolitan Law” (2005) 50 McGill LJ 967 at 981). For a discussion of transsystemic law as a method of deconstruction and of engaging with the work of Jacques Derrida, see generally *ibid* and especially *ibid* at 976. I have written elsewhere about the utility of a

## **II. THEORY AND METHODOLOGY OR METHODOLOGY WITH THEORY: INTERDISCIPLINARITY AND URBAN LEGAL ANTHROPOLOGY**

John Flood warns of the disconnect that can arise between theory and methodology in sociolegal research: “For much of the time, the empirical is ignored for the benefit of the abstract. The abstract becomes a palimpsest on which anything can be inscribed and argued about without recourse to social interaction. . . . Methodology needs to be brought back into the mainstream as an activity that is seen as central to the research enterprise.”<sup>3</sup> Rather than viewing theory as the starting point of a research process or the goal, theory should instead “be viewed as part of the research process.”<sup>4</sup> This approach of “doing” as part and parcel of theory—or as the theory itself—recalls the insights of scholars such as Valverde who suggest that the theories (or, “notions”, per Valverde) developed by writers like Foucault are best deployed as an inspiration or guiding framework for questioning rather than as cookie-cutter tools for research or methodological design.<sup>5</sup>

Further, in applying abductive analysis to the overarching research structure, “[c]ombining methodological expertise with an in-depth grounding of theories means that qualitative researchers must simultaneously engage in four intertwined activities: they must gather observations, read a broad range of theories, work systematically with their observations, and actively participate in a community of inquiry,” which can lead the researcher “into new

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transsystemic approach to legal research: see Sara Ross, “*Res Extra Commercium* and the Barriers Faced when Seeking the Repatriation and Return of Potent Cultural Objects: A Transsystemic Critical Post-Colonial Approach” (2016) 4:1 *American Indian Law Journal* 297.

<sup>3</sup> John Flood, “Socio-Legal Ethnography” in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005) 33 at 33. See also Braverman, *supra* note 2 at ch 5ff.

<sup>4</sup> Flood, *supra* note 3 at 33.

<sup>5</sup> Mariana Valverde, “Specters of Foucault in Law and Society Scholarship” (2010) 6 *Ann Rev Law Soc Sci* 45 at 47, 53-54 [Valverde, “Specters”]. For e.g., see also, *ibid* at 53: “One way of describing Foucault’s refusal of conventional theory is to say that for Foucault analytical terms are not only used to describe tactics of power but are themselves tactical.”

literatures or provide them with marching orders for gathering additional materials.”<sup>6</sup> In doing so, this project has sought to maintain a flexibility in development that has permitted the process to shape itself as well as the theory and methodology applied,<sup>7</sup> and has actively sought out dialogue with applicable communities of inquiry along the way, all of which eventually resulted in the crystallization of an overarching focus on the Toronto “Music City” case study as it is presented in this dissertation.

The goal of my project has been, and is, to use the theory, methodology, and research process of this project to demonstrate how the often-invisible governance of culture in the city can be thought about and examined in order to test for and unearth situations of lower value attribution and inequitable marginalizing treatment of particular iterations of culture and spaces of culture in the city over others. Concurrently, however, the goal has also been to show that this kind of project, in and of itself, can provide a mechanism for addressing these kinds of inequalities in cities. While the present project takes an in depth look at how a city’s legal complexes and urban law govern and interact with “culture”, cultural practices, and spaces of cultural practice in the city through the case study of Toronto’s redevelopment and rejuvenation policies where these intersect with Toronto’s music (sub)cultures and music spaces, and investigates the interaction and negotiation between affected groups and individuals with these legal frameworks that structure their experience and practice of culture in the city, the overarching intent, both at the outset of the project as well as presently, is to construct a framework for and demonstrate the merits of what an urban legal anthropology project can

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<sup>6</sup> Iddo Tavory & Stefan Timmermans, *Abductive Analysis: Theorizing Qualitative Research* (Chicago: University of Chicago Press, 2014) at 125.

<sup>7</sup> This kind of adaptability is also a key element in institutional ethnography methodology. See e.g. Nancy Taber, “Institutional Ethnography, Autoethnography, and Narrative: An Argument for Incorporating Multiple Methodologies” (2010) 10:1 *Qualitative Research* 5 at 10-11, 17 [Taber, “Institutional Ethnography”]; Timothy Diamond, “‘Where Did You Get the Fur Coat, Fern?’ Participant Observation in Institutional Ethnography” in Dorothy Smith, ed, *Institutional Ethnography as Practice* (Lanham: Rowman & Littlefield Publishers, 2006) 45.

provide for sustainable urban development, governance, and cultural policies that are more in line with the tenants of a *buen vivir* in the city as well as in line with the goals of the New Urban Agenda post-Habitat III.<sup>8</sup>

Further, as for the utility of ethnography, urban anthropology, legal anthropology in the local governance context, while this project sought to develop an urban legal anthropology that could be used to investigate and unearth gaps in equitable treatment of (sub)culture(s) in the city by a city's legal complexes, one of the principle findings is that a city's public consultation practices are not only one of the problematic gaps, but that these methods of public consultation would themselves be well served to apply an iteration of ethnographic methodology, such as REAP (Rapid Ethnographic Assessment Procedures) (see Chapter 8).

The importance I have placed on interdisciplinarity has also held primacy in guiding the development of the theoretical framework and methodology of this project. Even though interdisciplinary scholarship and research is often inevitably accomplished with a favourable weighting of the lens of one particular (or most comfortable and familiar) discipline or thought silo,<sup>9</sup> the present project has, I suspect, been approached through the prism of law first, and

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<sup>8</sup> *Draft Outcome Document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)*, HABITATIIIOR, Annex, Agenda Item 10, UN Doc A.Conf.226.4 (2016) [New Urban Agenda] (the New Urban Agenda was officially adopted in October 2016 at the United Nations Conference on Housing and Sustainable Development (Habitat III), which occurs only once every twenty years, and set a new framework for sustainable urban development for the next two decades); Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 219 [Santos, *Epistemologies*]. See also Eduardo Gudynas, "Buen Vivir: Today's Tomorrow" (2011) 54:4 *Development* 441 at 441 [Gudynas, "Today's Tomorrow"]; Eduardo Gudynas, "Buen Vivir: Un Necesario Relanzamiento" (2010) 13 *Revista Yachaykuna-Saberes* 40 at 43 [Gudynas, "Necesario"].

<sup>9</sup> As Mariana Valverde puts it (*Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) at 43):

All of us ... have particular intellectual habits and preferences; we privilege certain questions for no better reasons than our teachers or our friends ask those questions and not others. However, it is possible to put in question and try to undermine those habits and preferences that do nothing but reinscribe the quite arbitrary organization of the disciplines that emerged in twentieth-century universities.

anthropology second, while also attempting to disengage with the primacy of the latter and the former in order to avoid, as Valverde describes, simply “put[ting] new wine in rather old skins.”<sup>10</sup> This approach has required a project of delicate balancing of the merits of theoretical and methodological tools provided by other disciplines while seeking to avoid engaging in a “discipline (mis)appropriation” that steps on the toes of theorists from other disciplines—a balance that I am certain cannot be entirely perfected to satisfy all but has nonetheless been carefully constructed with this in mind.<sup>11</sup> For this I am grateful for the feedback of many generous minds from numerous disciplines via their thoughtful comments and criticisms at conferences, in discussions, and through peer review processes.

In the same way that theory is most pragmatically effective when used as a part of the research process and methodology,<sup>12</sup> this also applies to the critical legal pluralism accepted within the present project. Here, I began with the notion of a *de facto* legal pluralism at work in the city.<sup>13</sup> Based on the rationale that theory is best deployed via the questioning that occurs through methodology and the research process itself,<sup>14</sup> rather than placing too much focus on drawing out the critical legal pluralisms in the city, I have sought to simply work with the guidance of critical legal pluralism in mind,<sup>15</sup> move away from theorizing legal pluralism and the various debates about what is or is not “law”, whether social norms constitute law, at what point they constitute law, or debating the primacy of different iterations of what “law” is or could be,

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<sup>10</sup> Valverde, “Specters”, *supra* note 5 at 46. See also Flood, *supra* note 3 at 35.

<sup>11</sup> See also *ibid*: “One of the joys of ethnography is that it is not enslaved by a theoretical straitjacket. Therefore it does not encounter the definitional problems of ‘structural coupling’ or ‘habitus’. It opens the field to many interpretations. The essence then of ethnography is its liberating power. In the field of law, liberation is essential.”

<sup>12</sup> See *ibid* at 35. See also Valverde, “Spectre”, *supra* note 5 at 47, 53-54.

<sup>13</sup> See e.g. Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory” (2009) 18:2 Soc & Leg Stud 139 [Valverde, “Jurisdiction and Scale”]; Valverde, *Chronotopes*, *supra* note 9 at 5, 19, 21-22; Martha-Marie Kleinhaus & Roderick A Macdonald, “What is a *Critical* Legal Pluralism?” (1997) 12 Can JL & Soc 25; Sally Engle Merry, “Legal Pluralism” 22:5 (1988) Law & Soc’y Rev 869 [Merry, “Legal Pluralism”]; Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375.

<sup>14</sup> Valverde, “Spectre”, *supra* note 5 at 47, 53-54; Flood, *supra* note 3 at 33.

<sup>15</sup> Valverde, “Spectre”, *supra* note 5 at 47, 53-54.

and instead move towards engaging with the different iterations of “law” and norms and communities in order to think about a pluralistic equality of differences between them.<sup>16</sup>

### **III. AN URBAN LEGAL ANTHROPOLOGY AND ETHNOGRAPHIC METHODOLOGY FOR SUBALTERN COSMOPOLITANISM AND COUNTERHEGEMONIC LEGALITY**

Where “the perspective of subaltern cosmopolitan studies of globalization aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter,”<sup>17</sup> this same study is useful at the local city level. Ethnographic analysis of the micro-context of everyday lived experiences and community spaces of often-overlooked and under-theorized local struggles can serve to amplify systemic manifestations of inequality faced by urban citizens for a bottom-up view of inequality in city spaces.<sup>18</sup>

In applying subaltern cosmopolitanism to the local urban municipal level, its bottom-up “analytical focus on detailed case studies of counterhegemonic legal forms and its goal of furthering the potential of the latter” is aptly accomplished through an urban legal anthropology that inclusively considers legal, illegal, non-legal strategies to not only individual rights in the city but also moves beyond these to alternative iterations of rights in the city space, such as rights

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<sup>16</sup> See Sally Engle Merry, “Anthropology of International Law” (2006) 35 Annual Review of Anthropology 99 at 106; Merry, “Legal Pluralism”, *supra* note 13; Sally Falk Moore, “Law and Social Change” (1973) 7 Law & Soc’y Rev 719. Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 219; Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 473. C.f. Kleinhaus & Macdonald, *supra* note 13 at 38-39.

<sup>17</sup> Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, “Law, Politics, and the Subaltern in Counter-Hegemonic Globalization” in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) at 14-15.

<sup>18</sup> See Valverde, “Jurisdiction and Scale”, *supra* note 13; Mariana Valverde, “Taking Land Use Seriously: Toward an Ontology of Municipal Law” (2005) 9:1 Law, Text, Culture 34 [Valverde, “Land Use”]; Valverde, *Chronotopes*, *supra* note 9 at 19, 21-22 (where, in terms of scale and jurisdiction, narrowing in on local municipal lawmaking and regulatory frameworks, “law’s contradictory internal dynamics ... can be made visible”); Dorothy E Smith, *The Everyday World as Problematic: A Feminist Sociology* (Boston: Northeastern University Press, 1987) [Smith, *Everyday World*]; Dorothy E Smith, *Institutional Ethnography: A Sociology for People* (Lanham: AltaMira Press, 2005) [Smith, *A Sociology*]. See also Dorothy E Smith, *Institutional Ethnography as Practice* (Lanham: Rowman & Littlefield Publishers, Inc, 2006) [Smith, *Practice*].

in or to space, that may better speak to the current structure of municipal legal forms.<sup>19</sup> Where subaltern cosmopolitan legality focuses on the politicizing element of “law and rights as elements of struggles,”<sup>20</sup> an urban legal anthropology can accomplish an applicable study design by examining the views of and consulting the individuals and groups affected by these laws and rights. This might be deployed, for example, in attempting to determine the subaltern cosmopolitan contact zones and important spaces of subcultural practice that exist in a city in order to afford protection to particular spaces if they are unable to, and wish to, resist city redevelopment processes. In addition, Mariana Valverde notes the valuable incorporation of “time” and temporalization that legal anthropology has traditionally incorporated into analyses of legal systems and spaces, which usefully supplements analyses undertaken by legal geographers that focus primarily on “space” and spatialization.<sup>21</sup>

As John Flood asserts regarding the utility of ethnography as sociolegal methodology,

Ethnography takes us back to our roots where social interaction is at the base of our research ... Many research methods have been devised to cope with the problems of social research—social surveys, observation, interviewing, social experiments—but only one gives us insight into the richness of social life. Ethnography makes us simultaneously stand inside and outside the *mise en scène* as we research.<sup>22</sup>

Approaching the study of law through an ethnographic lens displaces the centrality of legal concepts, rules, and behaviours in order to view them as but another aspect of everyday life within the “network and interactions of persons dealing with ‘things legal’.”<sup>23</sup>

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<sup>19</sup> Santos & Rodriguez-Garavito, *supra* note 17 at 15. In terms of municipal-level law and governance structures that regulate space and things in the city through “use” and “activity”, which often results in an indirect and secondary governance of individuals, see Valverde, “Land Use”, *supra* note 18 at 36-37; Valverde, *Chronotopes*, *supra* note 9 19, 21-22.

<sup>20</sup> Santos and Rodriguez-Garavito, *supra* note 115 at 16.

<sup>21</sup> See e.g. Valverde, *Chronotopes*, *supra* note 9 at 43.

<sup>22</sup> Flood, *supra* note 3 at 33. See also Lynn M Maher, “Ethnography and the Study of Trial Courts” in John A Gardiner, ed, *Public Law and Public Policy* (Praeger, 1977) 52 at 53-55.

<sup>23</sup> *Ibid* at 53, with reference to the work of Laura Nader & Barbara Yngvesson, “On Studying the Anthropology of Law and its Consequences” in John J Honigmann, ed, *Handbook of Social and Cultural Anthropology* (Chicago: Rand McNally, 1973) 883. See also Smith, *A Sociology*, *supra* note 18. See also Smith, *Practice*, *supra* note 18.

As a process for describing a culture, ethnographic research is ideally suited to studying the cultural music spaces of a city and the intangible heritage merits, use-value, and generated (sub)cultural community wealth within them as it provides necessary insight into the richness of social life through thick description and thorough engagement within both the spaces and communities.<sup>24</sup> An ethnographic approach to the intersection of law, space, culture, and community in the city enables a “multi-textured, open-ended and discursive”<sup>25</sup> view that incorporates the broader, historic context alongside the social and political context “as a means of understanding contemporary sociocultural patterns and cultural groups ... [that] has the ability to predict local response to design and planning proposals accurately, and it can help evaluate complex alternatives through systematic cultural understanding.”<sup>26</sup> As Flood suggests, “It starts from a point of learning and enquiry that recognises we know little rather than supposing a state of knowledge which is subject to *ex post facto* ratification.”<sup>27</sup>

Ethnography and multi-sited ethnography (or anthropology) as methodological tools for urban legal anthropology enable the fabric of selected case studies from within the urban core to be amplified, examined, and deconstructed for simultaneous application of a critical theoretical framework in order to determine potential sites or processes of marginalized or undervalued cultural iterations.<sup>28</sup> Through a filter of *buen vivir* and a strategy of cosmopolitan legality, the thick analysis and description of the micro-context, specific case studies, the detailed interaction

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<sup>24</sup> Setha M Low, “Anthropological-Ethnographic Methods for the Assessment of Cultural Values in Heritage Conservation” in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 31 at 32; Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) [Geertz, *Local*]; Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) [Geertz, *Interpretation*]; Naomi Mezey, “Law as Culture” (2001) 13 *Yale JL & Human* 35.

<sup>25</sup> Flood, *supra* note 3 at 34.

<sup>26</sup> Low, *supra* note 24 at 32.

<sup>27</sup> Flood, *supra* note 3 at 34.

<sup>28</sup> See also Braverman, *supra* note 2 at ch 5ff, but see especially *ibid* at 127; Santos & Rodriguez-Garavito, *supra* note 17 at 4; George Marcus, “Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography” (1995) 24 *Annual Rev Anthropology* 95.

of the contact zones of municipal legal frameworks, and the diversities of lived cultural and subcultural iterations within high use-value spaces in the city is helpful in distilling where and how crucial change is needed in city redevelopment processes.<sup>29</sup>

Where, for example, zoning by-law amendments are one of the principle legal mechanisms that enable the fruition of development and redevelopment proposals that intersect with the everyday life and culture of urban citizens in the neighbourhoods that they live in, occupy, or spend time in, research and case studies tracing the development of these by-law amendments, their application, and the trajectory and sites of amendment negotiations is invaluable. The “statutory public meetings” advertised on the black and white square signs that introduce change in a neighbourhood, and that pop up whenever a development proposal begins to take hold, are an example of one of these constructed meeting sites between municipal legal decision frameworks and those who are affected. Here, ethnographic research of the process—of the negotiations themselves, the attendance or lack of attendance, and so on—yields fruitful information. Where these signs engage impersonally and statically, urban legal anthropology seeks to engage dynamically within the same neighbourhood space and everyday plane in order observe and assess the interplay between these signs designed within the applicable municipal legal framework and the cultural lives of the affected individuals, groups and communities.<sup>30</sup>

#### **IV. REFLEXIVITY IN ANTHROPOLOGY AND ETHNOGRAPHY AND INSTITUTIONAL ETHNOGRAPHY METHODOLOGY AS GUIDANCE**

“Fieldwork is a process where you become the research instrument.”<sup>31</sup> Here, I have sought to focus on how the everyday and everynight lives of people and their experience of

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<sup>29</sup> Geertz, *Local*, *supra* note 24; Geertz, *Interpretation*, *supra* note 24 at ch 1. See also Mezey, *supra* note 24 at 44; Valverde, *Chronotopes*, *supra* note 9 at 19-22.

<sup>30</sup> Flood, *supra* note 3 at 36.

<sup>31</sup> Interview of Sally Engle Merry [nd] in Simon Halliday & Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge, UK: Cambridge University Press, 2009) at 134

cultural spaces and practice of culture connect with and are affected by municipal legal complexes.<sup>32</sup> Working from the ground up, drawing on tenets of institutional ethnography, I first identified a space/experience/problematic as an insertion point.<sup>33</sup> The Government, its demolition, and my existing understanding of its role and importance as music space served this role. As Marjorie DeVault and Liza McCoy note, a common beginning point, or “first stage”, in institutional ethnography-oriented research is for the researcher to “begin from an experience that he or she knows something about, or where the problematic is already clear.”<sup>34</sup> Dorothy Smith, who initially developed the research methodology of institutional ethnography, has also acknowledged the value of a researcher beginning by drawing on their own everyday knowledge, experience, or problematic.<sup>35</sup> Similar to the way in which Paul Hodkinson began his research on goth subculture, my existing understanding, personal involvement, and access to the subculture(s) linked to Government’s space allowed for an intensification of existing interaction permitting me the position of “critical insider”.<sup>36</sup>

Corresponding with a common “second stage” for institutional ethnography-based research as identified by DeVault and McCoy, which “usually involves a shift in research site, although not in standpoint,” I then transitioned from Government as my initial site of investigation to other linked musical subcultures and corresponding spaces that were experiencing similar processes to that of the Government.<sup>37</sup> By initially identifying the processes

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<sup>32</sup> Smith, *Everyday World*, *supra* note 18; Smith, *A Sociology*, *supra* note for *People* (Lanham: AltaMira Press, 2005) [Smith, *A Sociology*]. See also Smith, *Practice*, *supra* note 18; Taber, “Institutional Ethnography”, *supra* note 7 at 10-11.

<sup>33</sup> *Ibid* at 11; DeVault & McCoy, *supra* note 1 at 755.

<sup>34</sup> *Ibid* at 755-76 See also Taber, “Institutional Ethnography”, *supra* note 7 at 16.

<sup>35</sup> Smith, *A Sociology*, *supra* note 18. See also Smith, *Practice*, *supra* note 18.

<sup>36</sup> Paul Hodkinson, “Translocal Connections in the Goth Scene” in Andy Bennett & Richard A Peterson, eds, *Music Scenes: Local, Translocal, and Virtual* (Nashville: Vanderbilt University Press, 2004) 1 at 132 [Hodkinson, “Translocal”]; Paul Hodkinson, *Goth: Identity, Style, and Subculture* (Oxford: Berg, 2002) at 4-6.

<sup>37</sup> DeVault & McCoy, *supra* note 1 at 766; Taber, “Institutional Ethnography”, *supra* note 7 at 17. See also Tavory & Timmermans, *supra* note 6 at 126.

and texts—legal, institutional, policies, municipal strategies, and so on—that were playing a role shaping the space and experience of Government, I was then led further to the next levels, texts, and further case sites for my inquiry.<sup>38</sup> As DeVault and McCoy suggest,

[T]here is no ‘one way’ to conduct an IE [“Institutional Ethnography”] investigation; rather, there is an analytic project that can be realized in diverse ways. IE investigations are rarely planned out fully in advance. Instead, the process of inquiry is rather like grabbing a ball of string, finding a thread, and then pulling it out; that is why it is difficult to specify in advance exactly what the research will consist of. IE researchers know what they want to explain, but only step by step can they discover whom they need to interview or what texts and discourses they need to examine.<sup>39</sup>

While texts play an important role in institutional ethnography methodology, which helped shape my own approach, since my dissertation project is primarily interested with the legal processes and legal texts implicated in shaping how culture and the practice of culture is governed in the city, the analysis of texts formed an even more important part of my research process.<sup>40</sup> In addition to the relevant international, national, provincial, and municipal legislation, by-laws, policy documents, reports, and studies that were canvassed, I have also drawn from timely news sources. While not necessarily free from bias, they aid in reconstructing the past not only in terms of events but also for providing a view of how past events were perceived and reacted to.<sup>41</sup> As for current events, popular news sources provide an array of local perspectives that range from formal to informal, neutral to opinionated, and represent the reality of everyday interactions and life in a city.

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<sup>38</sup> DeVault & McCoy, *supra* note 1 at 755; Taber, “Institutional Ethnography”, *supra* note 7 at 11.

<sup>39</sup> DeVault & McCoy, *supra* note 1 at 755.

<sup>40</sup> Dorothy E Smith, “Texts and the ontology of organizations and institutions” (2001) 7:2 *Studies in Cultures, Organizations & Societies* 159; Dorothy E Smith & Susan Marie Turner, eds, *Incorporating Texts into Institutional Ethnographies* (Toronto: University of Toronto Press, 2014); DeVault & McCoy, *supra* note 1 at 765.

<sup>41</sup> *Ibid* at 765. There are many examples, but for a related Toronto-specific case study that acknowledges the utility of these sources see e.g. Christopher Sanderson & Pierre Filion, “The Development of the Toronto Waterfront: Federal Presence, Institutional Complexity, and Planning Outcomes” in Michael C Ircha & Robert Young, eds, *Federal Property Policy in Canadian Municipalities* (Montreal: McGill-Queen’s University Press, 2013) 110 at 111-12. See also Phillip Gordon Mackintosh, “The Niagara Wine Festival’s Grande Parade: The Public Geography of a ‘Grape and Wine’ Controversy” in Michael Ripmeester, Phillip Gordon Mackintosh & Christopher Fullerton, eds, *The World of Niagara Wine* (Waterloo: Wilfred Laurier Press, 2013) 313 at 315, 322.

## **V. PARTICIPANT OBSERVATION, INFORMANT ENGAGEMENT, AND THE “WRITING UP” OF FINDINGS**

A particularly important element of the ethnographic approach that I have focused on is a responsiveness to “learn[ing] in the field the objects and behaviors that are culturally significant for the particular groups and (sub)cultures” as opposed to a prescriptive approach.<sup>42</sup> While my reconnaissance work at the outset of my fieldwork involved the gathering of as much relevant data—background documents, cultural and strategic city plans, news sources, and so on—I avoided identifying hierarchies of importance within these sources until I had spent a significant amount of time immersed in and with the subjects I write about.<sup>43</sup> The field notes taken both leading up to August 2017 as well as after my fieldwork period consisted of recording short notes and observations in the field and then subsequently expanding on these notes with a detailed field narrative in the days that followed. My field notes were then processed in dialogue with the literature relevant to my theoretical framework, and a close reading of the texts relevant to my case sites including the applicable municipal legal complexes engaged, relevant city, provincial, and national policy, strategic cultural plans, and heritage documents, as well as popular news sources and events.

Extending my intentions to avoid prescriptive assessment of the sites and situations I write about and in the spirit of participant observation, I have also tried to focus on the questions and answers of (sub)cultural community members themselves in relation to their treatment, valuation, displacement, and so on, rather than overly structured interviews that press these issues or my questions about them.<sup>44</sup> I have approached interviews carefully in order to try to

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<sup>42</sup> Lynn M Mather, Lynn M, “Ethnography and the Study of Trial Courts” in John A Gardiner, ed, *Public Law and Public Policy* (Praeger, 1977) 52 at 54.

<sup>43</sup> See also *ibid* at 54; DeVault & McCoy, *supra* note 1 at 755-76.

<sup>44</sup> See *ibid* at 756 in relation to institutional ethnography and interview methods:

decentralize the voice, values, and perspective of myself as the ethnographer in engaging with the spoken and written expressions of informants and decision-makers, and have greatly benefitted from observing the involved parties interact with each other and ask these questions of each other. DeVault and McCoy explain two general strategies for a researcher to present and “write up” engagement with informants in studies that draw on an institutional ethnography framework.<sup>45</sup> On the one hand, a researcher can use their own voice in rolling together a description, based on the data gathered and processes observed, of how the complex being studied (municipal legal complexes, in the case of this dissertation) are “working”.<sup>46</sup> On the other hand, data gathered from informants and sources can be used substantially throughout the final text to “speak” directly in providing this same description.<sup>47</sup>

There is an additional option to combine both strategies flexibly, depending on which one is most appropriate for the analysis or discussion underway in a given section of the final text. I have applied the flexibility of this combined strategy but, having found the first option to be more appropriate to most sections, have relied more heavily on it. In doing so, I have also taken into account the importance of evolving methodologies, their presentation, and the need to push methodological boundaries to more effectively account for and present research questions

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At one end of the continuum are planned interviews, where the researcher makes an appointment with someone for the purpose of doing a research interview. Then there is the kind of “talking with people” that occurs during field observation, when the researcher is watching someone do his work and asks him to explain what he is doing, why he did what he just did, what he has to think about to do the work, where this particular document goes, and so on.

DeVault & McCoy (*ibid* at 757) then acknowledge that

[b]ecause IE [“Institutional Ethnography”] researchers are investigating widespread institutional and discursive processes in which the researcher is located as well as the informants, opportunities to talk with people about institutional processes can arise for the researcher serendipitously, as it were, in her or his daily life of going shopping, talking with friends, seeking medical care, and so on, depending on the topic of the research.

<sup>45</sup> *Ibid* at 70.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

unsuited to the application of traditional methods.<sup>48</sup> Nancy Taber, for instance, demonstrates a compelling example of this through the application of autoethnography methodology and narrative analysis in both gathering her entry-point data as well as in the “writing up” of this research.<sup>49</sup>

In addition to attending and participating within the spaces (physical and virtual) that I write about, a particularly useful tool for me that arose a few years into my fieldwork came in the form of the newly formed Toronto Music Advisory Council (TMAC) and their quarterly meetings, specifically those that occurred after the rash of music venue closures in early 2017. Before that, TMAC meetings had taken place without the same level of (sub)cultural music community participation and attendance, although there had been a number of relatively well-attended initiatives organized by groups such as Wavelength—a Toronto-based non-profit grassroots music and arts organization—that had brought together Toronto’s newly minted Music Officer (Mike Tanner) and various other music advocates, such as Amy Terrill, who are part of the formal “music infrastructure” within Toronto and Ontario city governance. After the shockingly high number of grassroots music venue closures at the beginning of 2017, several the music communities that were deeply affected by these closures were mobilized to begin attending the quarterly TMAC meetings, giving deputations, and pushing to have their voices

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<sup>48</sup> Taber, “Institutional Ethnography”, *supra* note 7. The latter also speaks to Dorothy Smith’s recent call for more attention to the combining of methods and greater creativity in incorporating other approaches to institutional ethnography-oriented research that better seeks an understanding of the intersection between with peoples’ everyday/everynight lives and today’s organizing structures and institutions (Dorothy E Smith, “Keynote Address” (Institutional Ethnography Workshop, Conference of the Society for the Study of Social Problems, Institutional Ethnography Division at the Montreal Bonaventure Hotel, 14 August 2017) [unpublished]).

<sup>49</sup> Taber, “Institutional Ethnography”, *supra* note 7 at 20; Nancy Taber, “Learning How to be a Woman in the Canadian Forces/Unlearning it Through Feminism: An Autoethnography of my Learning Journey” (2005) 27:3 *Studies in Continuing Education* 289). On autoethnography, see also Deborah E Reed-Danahay: “[A]utoethnography is defined as a form of self-narrative that places the self within a social context” (“Introduction” in Deborah E Reed-Danahay, ed, *Auto/Ethnography: Rewriting the Self and the Social* (Oxford: Berg, 1997) 1 at 9).

heard and their disappearing and precarious music spaces acknowledged through legislative change and altered context-sensitive by-law enforcement mechanisms.

Many of the questions I had for (sub)cultural community attendees in terms of the effects of particular by-laws on their lives, practices, and spaces beyond what I had observed were now being brought up and discussed in public settings and, notably, were being deployed in confronting TMAC and Toronto's Music City initiative. Another element I had been interested in prior to the 2017 rash of closures that galvanized the community was the interaction between the machinery and frameworks being developed within Toronto's governance frameworks as part of the Music City initiative, and the interaction (and lack of interaction) between these structures and the actual fabric of the music scene and grassroots music spaces and communities in Toronto. Again, while minimal interaction had publicly occurred with panels organized by groups like Wavelength, the 2017 TMAC meetings became an incredibly rich resource where the developing Music City frameworks and segments of Toronto's grassroots music communities spoke directly to each other about the barriers to developing the idealized Music City envisioned in the formal Music City documents and strategic plans, the barriers that existed to sustaining existing music scenes, (sub)cultures, and communities in Toronto, and how potent community cultural music spaces and heritage were viewed by the different affected parties.

## **VI. CASE STUDY SITE SELECTION**

In terms of site selection for this project, while I was influenced by timeliness and access as well as my focus on engaging with reflexivity and adaptability in research processes in line with institutional ethnography-based methodologies, the sites chosen represent a range of cultural music spaces in Toronto that display a variety of iterations of (sub)cultural community wealth, use-value, and intangible cultural heritage, and which were all affected by city

redevelopment (through Toronto's municipal legal complexes) and are all relevant to Toronto's "Music City" strategy:

- 1) Brunswick House: a site listed for its tangible (built) cultural heritage many years before the beginning of this project, but for which no acknowledgement of intangible cultural heritage ever occurred, and which was ultimately subject to adaptive reuse during the middle-stages of my research period;
- 2) Silver Dollar Room: a site designated to be of cultural heritage value based on "read in" intangible cultural heritage merits during the early stages of my research period, which resulted in its protection as a live music venue, but which may or may not enable it to ultimately retain its current practicing community subsequent to the redevelopment of the Waverly Hotel (within which it was located) that began near the end of my research period;
- 3) Comfort Zone: a site within the same building (the Waverly Hotel) as the Silver Dollar Room, but which received no heritage treatment, assessment, or designation, where no engagement or consultation with the very active practicing community was ever attempted before displacement, and which presented an ongoing case study throughout the course of my research period but intensified in the later stages of the project as the practicing community was ultimately displaced and the venue closed, opened elsewhere, then maintained some simultaneous intermittent use of the original space until the new space ceased operating and Comfort Zone was able to temporarily return and operate exclusively out of its original location for a few more months even after the Waverly Hotel and Silver Dollar Room were shuttered, but then finally closed its doors in December 2017;

- 4) The Government: a site demolished at the outset of my research period, to be replaced with a master-planned, mixed-use development slated to supplement residential units with some arts-based and arts-education spaces (such as a few programs for George Brown College's Waterfront Campus) and where, like Comfort Zone, no attempts to engage with the displaced practicing community were made; and
- 5) The Matador: a site that has not yet received tangible heritage recognition despite its built heritage merits, which sought to reopen maintaining its original use as a music venue, but which continued to face city opposition as well as community clashes as to its reopening throughout the course of my research period.

While all sites were, or are, generally situated within Toronto's urban core,<sup>50</sup> Government can be distinguished based on its (now demolished) location near the waterfront and the resulting application of Toronto's area-specific waterfront rejuvenation plans.

## **VII. VIRTUAL COMMUNITIES, VIRTUAL NETWORKS, AND SOCIAL MEDIA**

In allowing the research process to remain flexible and be reshaped as required in order to best gather data in the context of how transgressive groups and (sub)cultures interact with and are affected by a city's legal complexes in their cultural practices and spaces, an openness to new ways of gathering ethnographic data was needed. This openness led to an approach to community gatherings and discussions that grew to seamlessly engage both virtual online community gatherings and discussions alongside physical gatherings and discussions. Sitting in a local café, attending local meetings, and semi-structured in-person interviews no longer present a holistic view of how many communities interact. Observations (and, often, complaints) about

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<sup>50</sup> While I have chosen to use the term "urban core" (see i.e. Sharon Zukin, "Gentrification: Culture and Capital in the Urban Core" (1987) 13 Annual Rev Sociology 129), it is certainly replaceable with numerous other descriptive terms (downtown, city center, and so on), but my intention is to distinguish this area of the city from the urban fringe and the rural fringe.

how specific demographics (often, younger, or some might code them as millennial) tend to constantly have their face in their phones, or spend more time interacting on social media than in person, necessitates a shift in spaces for participant observation and ethnographic methodology. Where communities and social life can be almost entirely created or sustained online via social media platforms like Facebook, and the integration of social media into our everyday lives has blurred divisions between offline and online, ethnographic methods must respond and recognize these platforms as crucial tools.<sup>51</sup>

For example, communities like the one that frequent(ed) the Toronto afterhours club Comfort Zone are very active online. Here, information is circulated about upcoming events, thoughts are shared about past events, tips are circulated for identifying and finding favourite tracks or mixes played by the DJ the past weekend, DJs from among the group share links to their music and recordings of their Comfort Zone sets, and announcements are shared about other related items of interest to the group along with more pragmatic posts about things both lost and found at Comfort Zone the prior weekend (most often cell phones). Especially as the closure of Comfort Zone's College and Spadina location neared, cherished memories of Comfort Zone were shared along with heartfelt testaments as to the importance the space had played in the lives of group members.

Many attendees who attended regularly every weekend to listen and dance to that weekend's DJs and congregate with other "Zoners"—sometimes for much or most of the weekend—supplemented their post- and pre-weekend time with this kind of online engagement, primarily via Comfort Zone's "Comfort Zone(I ❤️ CZ)" "closed" Facebook group (requiring

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<sup>51</sup> Steffen Dalsgaard, "The Ethnographic Use of Facebook in Everyday Life" (2016) 26:1 *Anthropological Forum* 96 at 96, 98-99; Dhiraj Murthy, "Digital Ethnography: An Examination of the Use of New Technologies for Social Research" (2008) 42:5 *Sociology* 837.

group “approval” to join, as opposed to a public Facebook group).<sup>52</sup> For others who could not attend the physical Comfort Zone space as often as others, the online community helped (and helps) them live vicariously through those attending via the various music clips posted, videos of DJ sets, pictures, and comments about time spent in the physical space.

In this way, individuals more physically remote to the central physical community space of Comfort Zone are provided a means of continued engagement with the core group of attendees and larger community and space that would otherwise dissipate overtime, or which would be hard to maintain with the same level of intensity that daily engagement with the online community provides. As a member of the closed group who received notifications each time a member posted in the group (there are about 5250 members), I received these notifications or updates almost daily—a constant reminder of the group, the community, and the central physical gathering space around which this virtual community was formed.

This kind of tight-knit community and network grown online on social media platforms both mirrors and supplements physical presence within the community’s central physical gathering space.<sup>53</sup> As I had noted leading up to the beginning of the research period, failing to acknowledge the virtual communities built out of connections to meaningful cultural and community spaces in the city would make it impossible to gain a full understanding of a cultural space’s “practicing community”.<sup>54</sup> Echoing my early observations, as Steffen Dalsgaard summarizes in his article on “The Ethnographic Use of Facebook in Everyday Life”:

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<sup>52</sup> *Comfort Zone* (I ❤️ CZ), online: <[www.facebook.com/groups/2205182781/](http://www.facebook.com/groups/2205182781/)>.

<sup>53</sup> See also Holly C Kruse, “Local Independent Music Scenes and the Implications of the Internet” in Ola Johansson & Thomas L Bell, eds, *Sound, Society and the Geography of Popular Music* (Farnham: Ashgate, 2009) 206 at 211; Hodkinson, “Translocal”, *supra* note 36.

<sup>54</sup> See Harriet Deacon et al, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage* (Cape Town: HSRC Publishers, 2004) for further discussion of practicing community as “a community that has created and/or practised an intangible cultural form” (at 42).

“[P]latforms such as Facebook are also becoming crucial tools for ethnographers because much social life now exists ‘online’.”<sup>55</sup>

Each community’s utilization of social media and the formation of their virtual network is of course unique. The same applies to the music communities within Toronto where I situated my fieldwork for the present project. As with most research endeavours, many of the spaces, communities, and data studied and gathered sadly do not ultimately find their way into the final product.<sup>56</sup> But, for the communities I studied that did find their way into these pages, Comfort Zone, for example, was defined by a smaller more tightly knit community that saw a lot of active community engagement due in part to its longevity and sustained community where, even if attendees had, so to speak, “moved on” with their lives, they would often still remain virtually “in touch” with the community—which became especially apparent as the closing date of May 28, 2017 neared and many posted notes to the Facebook group and, where possible, made sure to attend for “one last dance”.

Another aspect that appeared to play a role in the tightly knit community was Comfort Zone’s—along with its practicing community’s—marginal status within the margins. Whether or not this further marginalized marginalization was based on prejudiced narratives, within Toronto’s music communities, and even within the electronic dance community, Comfort Zone was (and is) often spoken about with a level of disdain. As summarized by a popular news article that ran the weekend of Comfort Zone’s final closing party before its displacement to a new location: “For more than 20 years, the Comfort Zone has been the after-party for the after-hours scene. It’s a role that in Toronto has won it little appreciation from the establishment. Even those who live and breathe dance music often sneer at the Zone’s reputation for debauchery and

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<sup>55</sup> Dalsgaard, *supra* note 51 at 96.

<sup>56</sup> See generally, for e.g., Halliday & Schmidt, *supra* note 31.

hedonism.”<sup>57</sup> The long-term existence of Comfort Zone and its attendees on the margins of the margins was (and is) also not unrelated to community memory of Operation White Rabbit—the 2008 police raid of Comfort Zone where attendees were rounded up en masse, cuffed, and forced to lay face down on the notoriously dirty floor of Comfort Zone for upwards of an hour.<sup>58</sup> While a similar virtual community model was also present for Government before it closed, it was less tightly knit due to segmentation based on music subgenre preference as Government played to a number of diverse subgenre musical tastes.

The Government Complex was also characterized by a number of different rooms—as opposed to Comfort Zone’s concentration in a single room supplemented with an outside smoking area/patio, and sometimes also supplemented with access to the Silver Dollar Room space upstairs. Government’s numerous rooms, as with the numerous musical subgenres it represented, also led to segmented community connections to some internal spaces over others. These room-based connections within the larger Government space, and the musical subgenre communities it represented within the larger electronic dance music community genres, could be seen during the numerous closing parties held leading up to Government’s demolition. Each space or room that had defined Government and its practicing community over the years—even spaces that were no longer in regular use—had their own closing party(ies). And each music subgenre—even some that were no longer as prevalent as they had been in the past—also had their own closing party. So, here, while social media engagement outside of physical attendance

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<sup>57</sup> Benjamin Boles, “Leaving the Comfort Zone: Looking Back on Toronto’s After-Hours Institution that Closes this Weekend”, *Torontoist* (25 May 2017), online: <torontoist.com>.

<sup>58</sup> Enzo Dimatteo, “Revisiting the Comfort Zone Raids”, *Now Toronto* (19 May 2009), online: <nowtoronto.com>; Kirk Makin, “Nightclub Sues City for Harassment”, *The Globe and Mail* (9 March 2009), online: <www.theglobeandmail.com>; Donovan Vincent, “Comfort Zone Dance Club Sues Over ‘Unfair Scrutiny’”, *thestar.com* (10 March 2009), online: <www.thestar.com>. Benjamin Boles, “Revenge of the Comfort Zone”, *Now Toronto* (12 March 2009), online: <nowtoronto.com>; Christopher Reynolds, “After-hours Club Sues Toronto Police, Alleging ‘Abuse of Power’”, *thestar.com* (3 January 2016), online: <www.thestar.com>; Sam Pazzano, “Cops Hit with Club Suit”, *Toronto Sun* (2 January 2016), online: <www.torontosun.com>.

was very active and made constant reference to Guvernment, a lot of it appeared in Toronto-based social media groups formed around the music subgenres that found a home within Guvernment.

Nonetheless, in time for the final closing party, the community as a whole came together via the TRC (Toronto Rave Community) closed Facebook group (with approximately 60,042 members), to organize and raise funds to buy a gift for the long time resident DJ Mark Oliver to thank him for the many years of music he had brought to Guvernment.<sup>59</sup> Also a member of TRC, Toronto DJ Joel Zimmerman (Deadmau5) got wind of the initiative and contributed generously to the gift (as well as providing some suggestions as to what would be a good gift). This allowed TRC to go all out and present Mark Oliver with a gold-plated record and brand-new Technics SL1200LTD turntables before his closing set at Guvernment.<sup>60</sup>

The same segmented virtual community model applied (and applies) to the Silver Dollar Room. The Toronto music communities that congregated within the Silver Dollar Room mirror and supplement their physical presence at shows with virtual network and social media involvement, also largely connected to subgenres. However, the Silver Dollar Room represents one physical node within the larger landscape of important physical cultural and music spaces within which the practicing community finds use-value and generates intangible culture. The same model applied, but to a far lesser extent, to Ye Olde Brunswick House.

Additionally, for the cases of the Silver Dollar Room and Brunswick House, their relative age in comparison to Comfort Zone and the Guvernment shapes the make-up of connected virtual communities as well as the connectedness of these virtual connections back to the spaces in question. Understandably, much of the community who have found importance in the Silver

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<sup>59</sup> *Toronto Rave Community*, online: Facebook <[www.facebook.com/groups/torontoravecommunity/](http://www.facebook.com/groups/torontoravecommunity/)>.

<sup>60</sup> See also Cody Blanchard, "Toronto Pays Tribute to Mark Oliver at #GuvFinale", *TRC* (26 January 2015), online: <[trc.daily-beat.com](http://trc.daily-beat.com)>.

Dollar Room and Brunswick House spaces did so before social media and virtual networks comprised so much of social and cultural life, and before they played a mirroring and supplemental role within the communities developed and sustained around music venues and similar community cultural space in the city. As such, social media-based communities are not as representative of the overall community that find (or found) meaning in and were generated out of the Silver Dollar Room and, especially, Brunswick House.

The case sites also demonstrated that there is a wealth and quality of data generated from social media and online platforms like venue review and recommendation sites like Yelp, for example, as well as blogs, Facebook, Twitter, and so on, and that this data is not something that is necessarily being replicated in the same way in face-to-face physical interactions with the same groups and individuals within the associated spaces in question.<sup>61</sup> While exploring these sources as a legitimate method for the data needed for my project—from real estate reviews, to neighbourhood listservs, blogs, reviews, and so on—I have tried to carefully document any reference to these sources. If this was where the data was, then I decided that an urban legal anthropology that engages with the communities and spaces I was engaging with needed to explore these sources as legitimate resources.<sup>62</sup>

My comfort with using these kinds of social media and informal online sources grew upon discovering other recent projects that grappled with using this kind of data, but also underlined its utility in engaging with current society and the central roles played by social media and virtual networks.<sup>63</sup> Zukin, Lindeman, and Hudson, for example, utilize Yelp reviews

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<sup>61</sup> See e.g. Dalsgaard, *supra* note 51 at 107-109.

<sup>62</sup> See also *ibid* at 97: “[I]f his or her interlocutors use Facebook, so should the ethnographer”; Murthy, *supra* note 51.

<sup>63</sup> As Dalsgaard correctly observes, “A discussion of Facebook in ‘everyday ethnographic practice’ may also put to rest some of the ... anxiety that novice ethnographers may feel when there are few publications to guide the management of field-relationships online.” But this dearth is now rapidly being filled, for e.g., *ibid* at 103-10; Sharon Zukin, Scarlett Lindeman & Laurie Hudson, “The Omnivore’s Neighborhood? Online Restaurant Reviews,

in Brooklyn, New York to investigate the contribution of Yelp reviewers to processes of gentrification and racial change driven by taste.<sup>64</sup> In this study, they also note what can be gathered from findings sourced from various other social media platforms and apps for discussions amongst virtual communities and networks.<sup>65</sup> There are now numerous other examples that use Facebook, Instagram, Tinder, and so on.<sup>66</sup> The freshness of the resource of social media platforms in studying social life may be seen by some as a novelty or lacking in quantifiable legitimacy, but as Dalsgaard notes, social media platforms, and Facebook especially, do not actually confront ethnographers with never-seen-before challenges for which they do not already have the requisite tools and do not already face in the offline context.<sup>67</sup>

Qualitative ethnographic methodology already requires “paying attention to detail through observation; immersion into a diversity of lived lives through participation; systematic modes of questioning through interviewing; and epistemologies for working with text, images, film and other media representations of self and other.”<sup>68</sup> Virtual ethnography is itself also nothing new in its examination of the Internet “as an object within people’s lives and as a site [where] community-like formations [are] achieved and sustained in the ways in which it is used, interpreted and reinterpreted”.<sup>69</sup> As Dalsgaard suggests, while many scholars have been using

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Race, and Gentrification” (2015) *Journal of Consumer Culture* 1, DOI: <10.1177/1469540515611203 >. See also Zachary Hyde, “Omnivorous Gentrification: Restaurant Reviews and Neighborhood Change in The Downtown Eastside of Vancouver” (2014) 13:4 *City & Community* 341; John D Boy & Justus Uitermark, “How to Study the City on Instagram” (2016) 11:6 *PLoS ONE* 1; Anya Evans, “#Tinder as a Methodological Tool”, *Allegra Lab: Anthropology, Law, Art & World* (2 May 2017), online: <allegralaboratory.net>; Murthy, *supra* note 51.

<sup>64</sup> Zukin, Lindeman & Hudson, *supra* note 63.

<sup>65</sup> See e.g. *ibid* at 6-7.

<sup>66</sup> Dalsgaard, *supra* note 51; Boy & Uitermark, *supra* note 63; Evans, *supra* note 63; Murthy, *supra* note 51.

<sup>67</sup> Dalsgaard, *supra* note 51 at 97, 103-10.

<sup>68</sup> *Ibid* at 97.

<sup>69</sup> Christine Hine, *Virtual Ethnography* (London, UK: Sage Publications, 2000) at 64. See also Arturo Escobar, “Welcome to Cyberia: Notes on the Anthropology of Cyberculture” (1994) 35:3 *Current Anthropology* 211 at 211, 215; Murthy, *supra* note 51 at 839-40; Sara Ross, “Your Day in ‘Wiki-Court’: ADR, Fairness, and Justice in Wikipedia’s Global Community” (Paper delivered at the International Conference on Negotiation: Dispute Resolution and Conflict Management in a Changing World, Center for Conflict Management, Kennesaw State University, 11 April 2014), (2014) 10:13 *Osgoode Legal Studies Research Paper* 56.

social media as a research tool and writing about its methodological relevance, especially in the field of anthropology and, as I also continue to encounter, in the fields of law and legal anthropology, “there is still much need for discussions of how fieldwork is facilitated both online and offline.”<sup>70</sup>

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<sup>70</sup> Dalsgaard, *supra* note 51 at 97. On this topic, Dalsgaard himself engages in a helpful discussion at 103-10, predominantly in relation to the use of Facebook. See also Murthy, *supra* note 51, which provided a good (and early) resource that critically examine[s] the possibilities and problems of four new technologies – online questionnaires, digital video, social networking websites, and blogs – and their potential impacts” (at 837). See also Zukin Lindeman & Hudson, *supra* note 63; Boy & Uitermark, *supra* note 63, for a detailed assessment of using Instagram to study cities to “help shed light on segregation, the formation of subcultures, strategies of distinction, and status hierarchies in the city” (at 1).

## **CHAPTER THREE: TORONTO - MUSIC CITY?**

### **I. CREATIVE-CITY INSPIRED REDEVELOPMENT FRAMEWORKS AND THE MUSIC CITY**

While many of Toronto's current redevelopment projects can be characterized as culture-based (or culture-led) regeneration/redevelopment initiatives, the Music City initiative falls squarely within this sphere and, as we will see, so do many of the redevelopment processes that intersect with the music venues and tangible and intangible heritage assets that this dissertation investigates.<sup>1</sup> As such, before examining to the notion of the "Music City" and the specific case studies this dissertation canvasses, it is helpful to first turn to a more general discussion of culture-based redevelopment initiatives, as well as the notion of the "Creative City" upon which many of these initiatives have grown, in order to understand the rationale behind the Music City, situate it in this wider redevelopment dialogue and recognize both the benefits that these redevelopment models can have as well as their drawbacks and critiques.

#### **A) Culture as a Strategy in City Rejuvenation and Redevelopment \***

Culture is taking an increasingly prominent role as cities turn to their potential cultural, artistic, and heritage attributes as strategic tools within their city redevelopment projects and as a key to resolving urban problems.<sup>2</sup> This has been documented as well as encouraged by United Nations' programs like UN-Habitat—which note that "in recent decades, cities ... have expressed a growing interest in placing culture at the core of urban development strategies"—

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<sup>1</sup> Sebastien Darchen & Diane-Gabriel Tremblay. "The Local Governance of Culture-led Regeneration Projects: A Comparison between Montreal and Toronto" (2013) 6:2 *Urban Research & Practice* 140 at 151; Shoshanah Goldberg-Miller, *Planning for a City of Culture: Creative Urbanism in Toronto and New York* (New York: Routledge, 2017).

\* © Sara Ross. Parts of subsections A and B were previously published in: Sara Ross, "Making a Music City: The Commodification of Culture in Toronto's Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks" (2017) 27 *Journal of Law & Social Policy* 126.

<sup>2</sup> See e.g. *ibid*; Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012) at 4-5, 19-20.

and “creative city” based redesign strategies, such as those currently favoured in cities like Toronto.<sup>3</sup> Culture has become such a preferred tool in city development that it has been identified as a global phenomenon where

[c]ities now routinely look to culture in its diverse manifestations—as the arts, group identity and heritage, and media and design-based industries (e.g., film, music, architecture)—as urban policy tools to address a broad array of urban issues. These range from neighborhood revitalization and community engagement to job creation, talent attraction, and achieving ‘world city’ status.<sup>4</sup>

Within the strategic toolkit that culture can provide for city reinvention, common zones one tends to find include “hipster districts, ethnic tourist zones, and other cultural spaces” ripe for cultural consumption.<sup>5</sup> But in turning to culture as a redevelopment strategy, urban cultural policy theorists, such as Carl Grodach and Daniel Silver, identify Richard Florida’s “creative cities” thesis as potentially the “dominant intellectual perspective that has legitimated the ascendancy of many urban cultural policy efforts.”<sup>6</sup>

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<sup>3</sup> UN-Habitat, Habitat III Issue Paper #4, “Urban Culture and Heritage” (31 May 2015) at 5 [Habitat III Issue Paper #4, “Urban Culture”]; Goldberg-Miller, *supra* note 1; Ute Lehrer & Andrea Winkler, “Public or Private? The Pope Squat and Housing Struggles in Toronto” (2006) 33:3 *Social Justice* 142 at 144. For the popular Richard Florida “creative city” notion, see e.g. *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002) [Florida, *Rise*]. See also Richard Florida, *Cities and the Creative Class* (New York: Routledge, 2005) [Florida, *Cities*]. See also Strategies for a Creative City Project, “Imagine a Toronto ... Strategies for a Creative City” (2006), online <web.net/~imagineatoronto> [Strategies for a Creative City, “Imagine a Toronto”]; City of Toronto, Culture Division, *Culture Plan for the Creative City* (Toronto: Culture Division, 2003); AuthentiCity, “Creative City Planning Framework—A Supporting Document to the Agenda for Prosperity: Prospectus for a Great City” (Toronto: City of Toronto, 2008) [AuthentiCity, “Creative City”]; *Central Waterfront Secondary Plan* (2003) (approved in full by the OMB in 2007). But Johannes Novy & Clair Colomb, who acknowledge that while this tendency towards the use of culture in redeveloping and marketing a city skews towards North American and European cities, this trend is indeed “increasingly influencing the trajectories of cities in other contexts as well, in part due to the global emulation between city elites and the globe-trotting travels of various forms of neoliberal urban policies” (“Urban Tourism and Its Discontents: An Introduction” in Johannes Novy & Clair Colomb, eds, *Protest and Resistance in the Tourist City* (Abingdon: Routledge: 2017) 1 at 9) [references removed].

<sup>4</sup> See Carl Grodach & Daniel Silver, “Introduction: Urbanizing Cultural Policy” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global Perspectives* (London, UK: Routledge, 2013) 1 at 2 [Grodach & Silver, “Introduction”].

<sup>5</sup> Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford: Oxford University Press, 2010) at 234, 236 [Zukin, *Naked City*]; Novy & Colomb, *supra* note 3 at 11-12, 14; Goldberg-Miller, *supra* note 1 at 13-16.

<sup>6</sup> Grodach & Silver, “Introduction”, *supra* note 4 at 4. For a discussion of the manifestations of these creative city initiatives in Toronto, see Lehrer & Winkler, *supra* note 3 at 144; Ute Lehrer & Jennefer Laidley, “Old Mega-

Within the creative city framework, specific iterations of “culture” and commodified cultural spaces are often strategically designed, preserved, or artificially generated in order to attract not only private investment and tourist dollars (both tourists from other cities and countries as well as intra-city tourists from other neighbourhoods within the same city),<sup>7</sup> but also to attract a particular “class” of people—the creative class or, according to Zukin’s terminology, the “hipperati”.<sup>8</sup> As urban sociologists John Logan and Harvey Molotch explain, “Developers and city officials believe that signals of creativity, like art galleries, espresso bars, and foreign magazine stands, can generate rent and revenues. The ‘arts’—in the most general sense of the word—have become a conscious strategy for growth.”<sup>9</sup>

The number of self-proclaimed “creative cities” as well as nationally or internationally designated “creative authorities” has increased steadily since 2000, both in Canada as well as globally.<sup>10</sup> These days many cities and towns see the culturally vibrant and artsy downtown or main street of another city or town, or a lively culturally developed and aesthetically pleasing waterfront, and they crave investment to make this same development possible.<sup>11</sup> At the outset of my research period, I traveled around Ontario to get a sense of how Toronto’s culture-oriented

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Projects Newly Packaged? Waterfront Redevelopment in Toronto” (2008) 32:4 Intl J Urban & Regional Research 786 at 794, 796. See also Florida, *Rise*, *supra* note 3; Florida, *Cities*, *supra* note 3.

<sup>7</sup> For an excellent overarching discussion of city redevelopment seeking to commodify culture and attract tourists, see generally Novy & Colomb, *supra* note 3; Goldberg-Miller, *supra* note 1 at 13-16.

<sup>8</sup> See e.g. *Culture Plan for the Creative City*, *supra* note 3; Authenticity, “Creative City”, *supra* note 3; City of Toronto, Ontario Municipal Board, *Official Plan* (Toronto: City of Toronto, July 2006) at 3.5.2; Strategies for a Creative City Project, “Imagine a Toronto”, *supra* note 3; Robert J Foster, Karen Kain & Jim Prentice, *Creative Capital Gains: An Action Plan for Toronto* (2011), online <[www.torontoartscouncil.org](http://www.torontoartscouncil.org)>; Ute Lehrer, Roger Keil & Stefan Kipfer, “Reurbanization in Toronto: Condominium Boom and Social Housing Revitalization” (2010) 46:180 *disP: Planning Rev* 81 at 82; Zukin, *Naked City*, *supra* note 5 at 7; Hae, *supra* note 2 at 4-5, 20; Julie-Anne Boudreau, Roger Keil & Douglas Young, *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009) at 36. See also George Morgan & Xuefei Ren, “The Creative Underclass: Culture, Subculture, and Urban Renewal” (2012) 34:2 *Journal of Urban Affairs* 127.

<sup>9</sup> John R Logan & Harvey L Molotch, *Urban Fortunes: The Political Economy of Place* (Berkeley: University of California Press, 1987) at xix.

<sup>10</sup> Simon Brault, *No Culture, No Future*, translated by Jonathan Kaplansky (Toronto: Cormorant Books, 2010) at 6.

<sup>11</sup> See also Sophia Labadi & William Logan, “Approaches to Urban Heritage, Development and Sustainability” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 1.

redevelopment strategies were perceived outside of Toronto, but within its spatial sphere of influence, as well as the influence these strategies were having on the development strategies being developed or underway in nearby small, middle-sized, and large urban centers. Here, the focus on culture as a key tool in rejuvenation was mirrored in the texts of the various city and town master plans, cultural master plans, official plans, waterfront master plans, cultural strategic plans, and so on, which I would read either before or upon arriving in each town or city I visited.

All of these towns and cities seemed to be looking to develop a unique local identity, attribute, or characteristic that they could leverage for tourism and branding purposes.<sup>12</sup> As the local “Collingwood – Blue Mountain Real Estate Blog” summarized in asking what ideas people might have for the future use of its historic grain terminals: “Wasaga has the Beach. Blue Mountain has the Escarpment. Collingwood has the Terminals.”<sup>13</sup> In Collingwood, for example, there was talk about how all that was needed to rejuvenate the city and attract tourists visiting the nearby Blue Mountain resort area was to “do something” with the waterfront and to make better use of the abandoned Collingwood Terminals that sit as an imposing reminder of an industrial past and a now underused and underdeveloped waterfront. Toronto’s ongoing waterfront, to be discussed further shortly, was habitually seen as a shining example for how a waterfront should be developed (although positive views about Toronto’s waterfront development were generally more critical within Toronto proper).<sup>14</sup>

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<sup>12</sup> See also *ibid.*

<sup>13</sup> Marg Scheben-Edey, “What Are Your Ideas for the Collingwood Terminals?”, *The Collingwood – Blue Mountain Real Estate Blog* (blog), online: <[blog.collingwood-bluemountain.com](http://blog.collingwood-bluemountain.com)>.

<sup>14</sup> See e.g. Matt Patterson & Daniel Silver, “Turning the Post-Industrial City into the Cultural City: The Case of Toronto’s Waterfront” in Kate Oakley & Justin O’Connor, eds, *The Routledge Companion to the Cultural Industries* (London, UK: Routledge, 2015) 268; Gene Desfor & Jennefer Laidley, eds, *Reshaping Toronto’s Waterfront* (Toronto: University of Toronto Press, 2011); Christopher Sanderson & Pierre Filion, “The Development of the Toronto Waterfront: Federal Presence, Institutional Complexity, and Planning Outcomes” in Michael C Ircha & Robert Young, eds, *Federal Property Policy in Canadian Municipalities* (Montreal: McGill-Queen’s University Press, 2013) 110; Ute Lehrer & Jennefer Laidley, “Old Mega-Projects Newly Packaged? Waterfront Redevelopment in Toronto” (2008) 32:4 *Intl J Urban & Regional Research* 786.

Turning back, however, to where this culture-based redevelopment creative city fever came from: Before Richard Florida came onto the scene championing his notion of creative cities and introduced his Bohemian Index, current Director and CEO of Canada Council for the Arts and a key figure in arts advocacy in Montreal Simon Brault traces the development of the creative city trend to the early 1990s in Great Britain. Parallel to what I read, observed, and chatted about across the towns and cities in Ontario, Brault explains that

We are more and more convinced that culture attracts, sells, brings people together, entertains, appeals, and impresses. It allows us to bridge the gap between local and international, the specific and the universal. It allows us to exchange and share, counting on the possibility of a dialogue that transcends language and imperfect translations, as well as codes, beliefs, religions, and differences of all manner. More and more money is invested right now in culture, from all sectors: all levels of government, corporations, and individuals. This is done out of self-interest, but also with determination, pride, ambition, and hope. What used to be desirable or of secondary importance for a city or region has today become imperative.<sup>15</sup>

Drawing on Article 27 of the *Universal Declaration of Human Rights* and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Brault reminds us that culture is not only a necessity, but that it is also a right.<sup>16</sup>

## **B) Creative City Aspirations and their Development in Toronto, and the Role of Music, Culture, and the Arts: Commodification and Cautionary Notes**

As Music Canada explains in its outline of a new direction for music in Canada and the economic potential that lies with music and culture:

Music and other cultural industries, and the people who work in them, are closely linked to the overall economic health of a region. In *The Rise of the Creative Class*, Richard Florida noted that, “The key to economic growth lies not just in the ability to attract the creative class, but to translate that underlying advantage into creative economic outcomes in the form of new ideas, new high-tech businesses and regional growth. ... Most civic leaders, however, have failed to understand that what is true

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<sup>15</sup> Brault, *supra* note 10 at 6-7.

<sup>16</sup> *Universal Declaration of Human Rights*, GA Res 217A (111), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 (entered into force 18 March 2007); Brault, *supra* note 10 at 41, 53ff.

for corporations is also true for city regions; *places that succeed in attracting and retaining creative class people prosper, those that don't, fail.*<sup>17</sup>

I replicate this passage because it reveals the fear of falling behind other cities, of failing to compete globally, and of missing the boat on the potential economic prosperity that harnessing its creative attributes that appears to be behind many city redevelopment plans that are increasingly turning desperately to culture to cure their urban ills.<sup>18</sup> This passage also demonstrates the pedestal upon which the elusive “creative class” is placed as cities consider their redesign strategies moving into the future.<sup>19</sup>

In this city planning context dominated by creative city rhetoric,

The arts, or so the argument goes in Toronto, are valuable because they contribute to urban development, city branding and tourism ... , artists are called upon to embody a set of neoliberal values: their innovative ideas attract corporate investment and thus help to boost a city's global competitiveness and economic successes.<sup>20</sup>

In a colonizing manner, the arts in the city are scoured for their potential market benefit to the city and artists are called upon for their gentrifying potential,<sup>21</sup> while simultaneously weathering Toronto and the Province of Ontario's ongoing history of disregard and underfunding of spaces for art and artists beyond those identified as carrying the highest potential economic and tourist-dollar value.<sup>22</sup> All iterations of art and culture within creative cities, such as Toronto, are boiled down to their potential contribution within “an index of an alluring ‘alternative’ culture,”<sup>23</sup> which works to the disadvantage of those whose iterations of art, culture, and “category of creativity

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<sup>17</sup> Music Canada, “The Next Big Bang: A New Direction for Music in Canada” (2013) at 5-6, online: *Music Canada* <musiccanada.com> [Music Canada, “The Next Big Bang”] [emphasis added]. See also Richard Florida, “The Rise of the Creative Class: Why Cities Without Gays and Rock Bands are Losing the Economic Development Race”, *Washington Monthly* (May 2002), online: <www.washingtonmonthly.com> [Florida, “Rise of the Creative Class”]

<sup>18</sup> See also Boudreau, Keil & Young, *supra* note 8 at 110-11; Patterson & Silver, *supra* note 14 at 272, 276; Goldberg-Miller, *supra* note 1 at 13.

<sup>19</sup> But see Morgan & Ren, *supra* note 8.

<sup>20</sup> Laura Levin, “Performing Toronto: Enacting Creative Labour in the Neoliberal City” in Nicholas Whybrow, ed, *Performing Cities* (Hampshire, UK: Palgrave Macmillan, 2014) 159 at 161.

<sup>21</sup> *Ibid* at 173.

<sup>22</sup> *Ibid* at 161.

<sup>23</sup> *Ibid* at 174.

and whose marginal status fails to register as a selling point for a hip urban future.”<sup>24</sup> It also works to the disadvantage of those who refuse cleansed spaces, oppose dominant cultural norms, avoid anything reminiscent of corporatization or commodification, and those whose cultural iterations and practices tend to be exclusively or just predominantly associated within nighttime and night spaces<sup>25</sup>—although the nighttime space and an alternative day/night life pattern may be nonetheless celebrated (or arguably colonized) once a year with city festivals, such as Nuit Blanche, for example.<sup>26</sup>

Toronto’s current preference for culture-based creative-city oriented redevelopment strategies is readily observable in the documents that guide Toronto’s plan for redevelopment. For example, the “Culture Plan for the Creative City”, which clearly states its creative city aspirations not only in its title, but also in how it underlines that “great cities of the world are all Creative Cities.”<sup>27</sup> This document latches on to the increasingly popular creative city model and the strategic commodification of both culture and (ethnic) diversity as that which must be deployed in order to emphasize Toronto’s uniqueness in marketing itself so as to effectively compete with other global cities.<sup>28</sup> It focuses in on and reifies the “creative class,” uncomfortably insisting that these are the “kind of people Toronto wants to attract.”<sup>29</sup> While this document holds up arts, creativity, culture, and heritage as the key to Toronto’s future, the purpose of the

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<sup>24</sup> *Ibid* at 175.

<sup>25</sup> *Ibid* at 172. But see also Brian J Hracs, “Working Harder and Working Smarter: The Survival Strategies of Contemporary Independent Musicians” in Brian J Hracs, Michael Seman & Tarek E Virani, eds, *The Production and Consumption of Music in the Digital Age* (New York: Routledge, 2016) 41.

<sup>26</sup> Levin, *supra* note 20 at 172. Nuit Blanche is an increasingly common annual nighttime (and usually all-night) arts and culture festival that many cities, including Toronto have begun to hold. Each year more cities across Canada announce the launch of their own iteration of a Nuit Blanche festival.

<sup>27</sup> *Supra* note 3; Goldberg-Miller, *supra* note 1 at 13.

<sup>28</sup> For a discussion of this process as commonplace in many cities following similar development strategies, see e.g. Novy & Colomb, *supra* note 3 at 11. Goldberg-Miller, *supra* note 1 at 13, 27-34.

<sup>29</sup> *Culture Plan for the Creative City*, *supra* note 3 at 1; Boudreau, Keil & Young, *supra* note 8 at 36. See also Ute Lehrer & Thorben Wieditz, “Condominium Development and Gentrification: The Relationship Between Policies, Building Activities and Socio-Economic Development in Toronto” 18:1 (2009) *Can J Urban Research* 10 at 148; Novy & Colomb, *supra* note 3 at 14; Morgan & Ren, *supra* note 8.

culture-oriented strategy is clearly geared towards an economic return—the exchange-value. Quality of life is mentioned but is predominantly presented as secondarily important in order to attract the particular kinds of individuals that enjoy a “high” quality of life.<sup>30</sup>

Extending beyond the documents that delineate Toronto’s cultural plans, Richard Florida’s creative city model is a common reference point within many of Toronto’s future-looking rejuvenation, regeneration, and marketing strategies. In a pointed fashion, creative city initiatives, such as Toronto’s plans to develop into a Music City, directly reference and quote from Florida’s body of work. For example, Music Canada’s recommendations regarding the by-laws and funding allocations necessary to create and deploy the Music City framework—such as a municipal Music Office, Music Officer, Music Industry Advisory Board, and so on—cite Florida as an authority to establish the “social benefits that come from supporting a vibrant music scene” where “[c]ommercial music is an accessible form of expression and entertainment that can be enjoyed by people of all ages, income levels and ethnicities. It cuts across language barriers and unites people of all backgrounds. Music is part of every neighbourhood, every corner of the city; every street could be a stage. Music is a cultural ally for the City of Toronto.”<sup>31</sup>

These strategic Music City recommendations further rely on Florida’s creative city vision, and focus on the “creative worker” by deploying a Florida soundbite asserting that,

Successful communities are those that are multidimensional and diverse; in addition to offering employment, they offer a wide range of lifestyle amenities and a climate that encourages and cultivates creative expression. Cultural offerings such as music, are a strong draw for creative workers ... a flourishing arts scene seems to suggest a region values and supports creativity in all its forms—technological and economic as well as artistic and cultural.<sup>32</sup>

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<sup>30</sup> *Culture Plan for the Creative City*, *supra* note 3.

<sup>31</sup> Music Canada, “Proposal to Councillor Thompson” (5 March 2013) *Toronto City Council and Committees*, online: <[www.toronto.ca/legdocs](http://www.toronto.ca/legdocs)> [Music Canada, “Proposal to Councillor Thompson”]

<sup>32</sup> *Ibid*; Florida, “Rise of the Creative Class”, *supra* note 17.

Minus the uncomfortable focus on the reified “creative worker”, these assertions sound fantastic, but as these plans begin to play out on the ground, it becomes clear that these statements tell a story of fictional inclusivity that does not effectively account for what music is, how it is practiced in various local cultural and subcultural iterations, and the complex reality of their associated spaces of local and grassroots music cultures.<sup>33</sup>

The focus Toronto currently places on culture, however, is striking considering that Toronto arrived comparatively late and quite suddenly into the mix of cities that place a focus on culture and have a history of being known as centers for cultural production—such as Paris or Los Angeles, for example.<sup>34</sup> The shift by Toronto’s municipal government towards its current interest in developing cultural policies and capitalizing on cultural production began as the late 1990s rolled around and really began to take off in the 2000s as Toronto’s uptake of culture as a redevelopment strategy took center stage.<sup>35</sup> In an emblematic twist, Richard Florida even moved to Toronto. Matt Patterson and Daniel Silver attribute Toronto’s relatively recent and sudden recourse to cultural policy development to an “identity crisis” that the city suffered in the late 20<sup>th</sup> century due to what was effectively the end of Toronto’s industrial economy alongside substantial social changes as the city shifted to an economy rooted in knowledge and service-based economies.<sup>36</sup>

Suddenly, city policymakers were faced with the need to alter their approaches to development in order to deal with the city’s new reality and decide how to shape Toronto moving forward.<sup>37</sup> As this identity crisis took hold, the seductive qualities of “cultural city”

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<sup>33</sup> Boudreau, Keil & Young, *supra* note 8 at 195

<sup>34</sup> Patterson & Silver, *supra* note 14 at 268.

<sup>35</sup> *Ibid* at 269-72; Goldberg-Miller, *supra* note 1 at 13-16, 94-125.

<sup>36</sup> Patterson & Silver, *supra* note 14 at 269-71.

<sup>37</sup> *Ibid*.

notions were touted by individuals within Toronto’s cultural sector while Richard Florida’s writings about the “creative class” began to gain international traction.<sup>38</sup> Florida’s urban planning model spoke to a desire for a vibrant city full of cafés, public art, studios, and so on—a potentially exciting cure for Toronto’s dwindling industrial economy and need for a new urban development strategy.<sup>39</sup> But as Patterson and Silver note, the cultural city coup that overcame Toronto policymakers and development plans was not uncontested and drew uneven support.<sup>40</sup> While downtown residents and those connected to cultural and knowledge industries tended to comprise the primary proponents, suburb residents were less enthusiastic about the cultural city vision.<sup>41</sup> Yet, the proponents of this vision “had the capacity to put this vision into practice and codify it in municipal policy.”<sup>42</sup>

## **II. WHAT IS A “MUSIC CITY” AND HOW DOES A CITY LIKE TORONTO BECOME ONE? \***

A “Music City” can be thought of and defined in a number of ways. In Canada, “The Mastering of a Music City: Key Elements, Effective Strategies and Why it’s Worth Pursuing”, is one of the key guiding Canadian documents related to growing as well as nurturing music and music spaces in a city in order to achieve Music City status.<sup>43</sup> This document, along with the other seminal Toronto Music City documents commissioned by Music Canada, such as “The

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<sup>38</sup> *Ibid* at 269; Goldberg-Miller, *supra* note 1 at 13. But see also Morgan & Ren, *supra* note 8.

<sup>39</sup> Patterson & Silver, *supra* note 14 at 269-71.

<sup>40</sup> *Ibid* at 269.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

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<sup>43</sup> International Federation of the Phonographic Industry & Music Canada, “The Mastering of a Music City: Key Elements, Effective Strategies and Why It’s Worth Pursuing” (5 June 2015), *Music Canada*, online: <musiccanada.com> [IFPI & Music Canada, “Mastering a Music City”].

Next Big Bang: A New Direction for Music in Canada”<sup>44</sup> and “Accelerating Toronto’s Music Industry Growth: Leveraging Best Practices from Austin, Texas”<sup>45</sup> have also been picked up by other cities, both nationally and internationally, as a resource for their “Music City” aspirations.<sup>46</sup> The “Mastering of a Music City” document explains that: “The term ‘Music City’ is becoming widely used in cultural communities and has penetrated the political vernacular in many cities around the world. Once identified solely with Tennessee’s storied capital of songwriting and music business, Nashville, Music City now also describes communities of various sizes that have a vibrant music economy which they actively promote.”<sup>47</sup> Within the quest for Music City recognition, there is also the elusive UNESCO City of Music status, which no North American city had achieved until Kansas City’s October 2017 designation received in recognition of its jazz history, influential swing style of jazz, and its current music scene.<sup>48</sup> Of the cities in North America thought of as music cities, Austin, Texas (though it has not received UNESCO City of

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<sup>44</sup> Music Canada, “The Next Big Bang”, *supra* note 17 at 5-6.

<sup>45</sup> Titan Music Group, “Accelerating Toronto’s Music Industry Growth: Leveraging Best Practices from Austin, Texas” (March 2012), Music Canada, online: <musiccanada.com>.

<sup>46</sup> “The Mastering of a Music City Music Cities Summit” (Canadian Music Week at the Sheraton Centre Toronto, 21 April 2017); Michael Rancic, “Music Cities’ Are for Sale but Who’s Buying”, *NOWToronto* (24 April 2017), online: <nowtoronto.com>. See e.g. London’s Music Industry Task Force, “London Music Strategy” (27 August 2014). See also Lynn Saxberg, “Mercury Lounge: Keeping it Fresh for 19 Years”, *Ottawa Citizen* (28 November 2015), online: <ottawacitizen.com>; Amy Terrill, “How Cities Benefit from Helping the Music Industry Grow”, *WIPO Magazine* (September 2015), online: <www.wipo.int/wipo\_magazine> [Terrill, “How Cities Benefit”].

<sup>47</sup> IFPI & Music Canada, “Mastering a Music City”, *supra* note 43; Canadian Chamber of Commerce & Music Canada, “Music Cities Toolkit”, at 3-4, online: <www.chamber.ca>.

<sup>48</sup> As of 2017, UNESCO’s designated “Cities of Music” included Adelaide, Australia; Almaty, Kazakhstan; Amarante, Portugal; Auckland, New Zealand; Brazzaville, Congo; Brno, Czechia; Chennai, India; Daegu Metropolitan City, Republic of Korea; Frutillar, Chili; Kansas City, United States of America; Kinchasa, DRC; Katowice, Poland; Morelia, Mexico; Norrköping, Sweden; Pesaro, Italy; Praia, Cabo Verde; Seville, Spain; Salvador, Brazil; Tongyeong, South Korea; Medellín, Colombia; Ghent, Belgium; Bogota, Colombia; Glasgow, Scotland; Mannheim, Germany; Hamamatsu, Japan; Bologna, Italy; Varanasi, Kingston, Jamaica; Idanha-a-Nova, Portugal; Liverpool, England; and Hannover, Germany (see UNESCO Creative City Network, online: <en.unesco.org/creative-cities/home>. See also “Kansas City Named First US Music City by UNESCO”, (1 November 2017) *KCOM.gov* (press release), online: <kcmo.gov/news>; “64 Cities Join the UNESCO Creative Cities Network”, (31 October 2017) *UNESCO Creative Cities Network*, online: <en.unesco.org/creative-cities/events>.

Music status) is the city that Toronto has characterized as the ideal example of a Music City within Toronto's Music City policy documents.<sup>49</sup>

While the City of Toronto appears to have its heart set on achieving this new Music City status, it is arguable as to whether a city can ever truly “become” an artificially generated Music City if it has not already grown a strong grassroots music identity. Toronto's Music City aspirations, however, appear to stretch quite far back. For example, in 1898 an author named C.S. Lewis (not the one of “Narnia” fame) somewhat caustically observed:

For many years our ancient and beautiful city has taken unto itself the title of ‘Musical Toronto’. I think the origin of this expression can be traced to the gushing description given by a young man on one of the city papers, in connection with the musical festival held some years ago. With a sarcasm beyond his years, and of which he was entirely unconscious, he praised to heaven everything connected with the festival, though it might be inferentially observed that he probably knew about as much about music as a child knows of metaphysics.<sup>50</sup>

Primarily stemming from documents and reports where municipal economic and development strategies have since turned to the music industry as a growth resource—such as, “Collaborating for Competitiveness: A Strategic Plan to Accelerate Economic Growth and Job Creation in Toronto” and “Creative Capital Gains: An Action Plan for Toronto”<sup>51</sup>—Toronto's official Music City plans are a recent development in its creative-city oriented rejuvenation strategy. Guided by documents such as the above-cited expansive report “The Mastering of a Music City” presented by Music Canada in conjunction with the International Federation of the

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<sup>49</sup> Titan Music Group, *supra* note 45; Austin-Toronto Joint Music City Alliance, Appendix C (3 October 2013), City of Toronto (website) online: <[www1.toronto.ca](http://www1.toronto.ca)>. See also Goldberg-Miller, *supra* note 1 at 201.

<sup>50</sup> CS Lewis, *Of Toronto the Good. A Social Study. The Queen City of Canada as it is* (Montreal: Toronto Publishing Company, 1898) at 191.

<sup>51</sup> “Collaborating for Competitiveness: A Strategic Plan to Accelerate Economic Growth and Job Creation in Toronto” (January 2013), *City of Toronto* (website): online: <[www1.toronto.ca/static\\_files/economic\\_development\\_and\\_culture/docs/Collaborating\\_for\\_Competitiveness\\_FINAL-v7.pdf](http://www1.toronto.ca/static_files/economic_development_and_culture/docs/Collaborating_for_Competitiveness_FINAL-v7.pdf)>; Foster, Kain & Prentice, *supra* note 8.

Phonographic Industry,<sup>52</sup> and inspired by studying the Austin, Texas Music City model,<sup>53</sup> a number of initiatives and elements of the strategy—such as the surprisingly brief existence of the 4479 Music City initiative and the establishment and ongoing activities of the Toronto Music Industry Advisory Committee as well as a Music Sector Development Officer—have already been implemented with the intention of giving a greater voice to Toronto’s music industry, one that suffers from underrepresentation within plans relating to cultural development and management in Toronto.<sup>54</sup>

The main recommendations for the successful transformation of Toronto into a sustainable Music City included the development of music and music friendly policies, a music office (achieved), music advisory council (achieved), broader community engagement, greater access to music- and musician-friendly spaces and places, audience development, and music tourism.<sup>55</sup> Other recommendations gesture towards logistical aspects like loading zones for musicians, planning laws that accommodate music and musician needs, and revamping transportation availability to music venues in order to facilitate and encourage attendance. However, probably the most important element of Toronto’s attention to the music community is

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<sup>52</sup> This report was “written principally for music community experts as well as political leaders and government officials,” see IFPI & Music Canada, “Mastering a Music City”, *supra* note 43.

<sup>53</sup> Titan Music Group, *supra* note 45. See also the Austin-Toronto *Joint Music City Alliance*, Appendix C (3 October 2013), *City of Toronto* (website) online: <[www1.toronto.ca](http://www1.toronto.ca)>, which is widely touted as the world’s first music city alliance agreement and established during Mayor Rob Ford’s tenure (Ben Rayner, “John Tory Gets a Great Vibe from Austin’s SXSW Music Fest”, *thestar.com* (21 March 2015), online: <[www.thestar.com](http://www.thestar.com)> [Rayner, “Great Vibe”]) and the *Austin-Toronto Music City Alliance Partnership Draft Framework & Terms of Reference*, Appendix B (November 2014), *Toronto City Council and Committees, By-laws and Codes*, online: <[www.toronto.ca/legdocs](http://www.toronto.ca/legdocs)>. Austin, Texas is often seen as the “live music capital of the world”: see e.g. Carl Grodach, “City Image and the Politics of Music Policy in the ‘Live Music Capital of the World’” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global Perspectives* (London, UK: Routledge, 2013) 98.

<sup>54</sup> Titan Music Group, *supra* note 45 at 79-80. See also the 4479 website (online: <[4479toronto.ca](http://4479toronto.ca)>), although the 4479 initiative has since ceased to operate, citing “confidence in the momentum Toronto is carrying forward” in becoming “one of the greatest Music Cities in the world.”

<sup>55</sup> See generally Titan Music Group, *supra* note 45.

the proposed removal of the numerous barriers that exist to music performance, creation, participation, and enjoyment.<sup>56</sup>

But considering the current track record of these plans in Toronto, along with the barriers that continue to affect the everyday operation of music spaces within its model of Austin, Texas despite its reified status,<sup>57</sup> as Toronto’s Music City strategies mature they must be further developed and better implemented within Toronto’s municipal legal structure—its by-laws and applicable legislation that ultimately govern the everyday of music in Toronto—such that these barriers will be worked out or removed.<sup>58</sup>

### **A) Cracks in Toronto’s Music City Vision, Strategy, and Legislation**

The most recent manifestation of the desire to push tenets of the Music City recommendations forward were presented in a motion put forward by Toronto City Councillor and (at the time) Chair of the Toronto Music Advisory Council Josh Colle and seconded by Toronto City Councillor John Filion, which was subsequently adopted by Toronto City Council on November 8<sup>th</sup>, 2016.<sup>59</sup> This motion sought specifically to address and curb the alarmingly rampant ongoing, displacement, or forced relocation of music venues, such as the Government (which will be discussed further in the Government case study), the Hideout, Holy Oak, Comfort

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<sup>56</sup> *Ibid.*

<sup>57</sup> See e.g. Titan Music Group, *supra* note 45 at 79-80; Grodach, *supra* note 53 at 102-103, 106.

<sup>58</sup> See e.g. *Toronto Municipal Code*, c 591, *Noise*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *City of Toronto, By-law No 569-2013, Zoning By-law* (9 May 2013); *Toronto Municipal Code*, c 363, *Building Construction and Demolition*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Toronto Municipal Code*, c 415, *Development of Land*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Toronto Municipal Code*, c 545, *Licensing*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Toronto Municipal Code*, c 629, *Property Standards*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Toronto Municipal Code*, c 632, *Property, Vacant or Hazardous*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Toronto Municipal Code*, c 767, *Taxation, Property Tax*, made under *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A; *Building Code Act*, 1992, SO 1992, c 23; *Ontario Heritage Act*, RSO 1990, c O.18; *Planning Act*, RSO 1990, c P.13. See also Rayner, “Great Vibe”, *supra* note 53.

<sup>59</sup> Toronto City Council, “Protecting Live Music Venues in Toronto - by Councillor Josh Colle, seconded by Councillor John Filion”, MM22.5, (adopted by City Council 8 November 2016) [Colle & Filion, MM22.5]. See also Toronto Music Advisory Council, “Measures to Protect Live Music Venues in Toronto – Update” (Motion) (adopted 13 February 2017).

Zone, among numerous other venues, and the ongoing threat that redevelopment and gentrification poses to venues like the Silver Dollar Room (discussed further in the Silver Dollar Room case study) with reference to progressive policies currently underway in London, England (see Chapter 7) in order to halt its own astounding loss of thirty-five percent of its live music venues between 2007 and 2015.<sup>60</sup>

Yet, despite this progressive motion adopted by Toronto City Council and despite the hard-fought and won battle for the Silver Dollar Room's heritage designation status, which we will look at in detail in the Silver Dollar Room case study, the beginning of 2017 brought with it the announcement that Silver Dollar Room was set to close in the Spring,<sup>61</sup> alongside a nearly simultaneous rash of closures of other key Toronto music institutions such as the Hoxton, an important electronic and dance music venue; Toronto DIY mainstay Soybomb HQ, which fell victim to the onslaught of "building code vigilantism" raids instigated by white supremacist alt-right groups across North America in the wake of the tragic December 2<sup>nd</sup>, 2016 fire that destroyed the Ghost Ship DIY in Oakland, California, killing thirty-six people.<sup>62</sup>

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<sup>60</sup> *Ibid.*

<sup>61</sup> See e.g. Carla Gillis, "The Silver Dollar, As You Know It, Is Closing", *Now Toronto* (31 January 2017), online: <nowtoronto.com> [Gillis, "Silver Dollar"]; Ben Rayner, "Silver Dollar Set to Close in the Spring", *thestar.com* (31 January 2017), online: <www.thestar.com>.

<sup>62</sup> Scott Glover & Susanna Capelouto, "Warehouse in Deadly Oakland Fire Hadn't Been Inspected in 30 Years," *CNN* (9 December 2016), online: <cnn.com/2016/12/08/us/oakland-fire-city-budget-cuts/index.html>; Benjamin Wallace-Wells, "What Happened, Exactly, in Oakland's Ghost Ship Fire," *The New Yorker* (13 December 2016), online: <newyorker.com/news/benjamin-wallace-wells/what-happened-exactly-in-oaklands-ghost-ship-fire>; Alene Tchekmedyan, Richard Winton & Paige St John, "Ghost Ship Fire Mystery: What Did Fire Officials Know and When Did They Know It?," *Los Angeles Times* (17 December 2016), online: <latimes.com/local/lanow/la-me-ghost-ship-fire-20161217-story.html>; Nastia Voynovskaya, "The Vanishing Underground: Oakland's Housing Crisis Is Also Displacing its Arts and Music Counterculture," *East Bay Express* (20 September 2016), online: <eastbayexpress.com/oakland/oaklands-housing-crisis-also-displacing-its-arts-and-music-underground/Content?oid=4979500>; Anonymous, "Do-It-Yourself Spaces Are Under Siege –And We Need to do Everything We Can to Protect Them," *CBC Arts* (18 January 2017), online: <cbc.ca/arts/do-it-yourself-art-spaces-are-under-siege-and-we-need-to-do-everything-we-can-to-protect-them-1.394173>; Sara Ross, "Transgressive DIY ("Do-It-Yourself") Spaces, Urban Redevelopment, and Place Management within a Music City" [unpublished]; Sara Ross, "Safety vs Safe Spaces: Striking a Balance Between Grit and Maintenance, Intergenerational Equity, and the Protection of Precarious Cultural Space in the Face of Building Code Vigilantism and Gentrification" (Paper delivered at the 8<sup>th</sup> Annual Meeting of the Association for Law, Property & Society at the University of Michigan Faculty of Law, 20 May 2017) [unpublished].

Double Double Land, another Toronto DIY mainstay that was forced to officially close shortly before Soybomb, also due to building code vigilantism that targeted alleged safety code violations; Hugh's Room closed, which would later manage to cobble together a relaunch as a community-based, not-for-profit initiative; Seven44 was locked out of its space and its lease terminated by the landlord due to breach of the lease; and a series of younger venues that had developed strong community followings over the past ten or so years also closed, like Populus, due to condo development; Holy Oak (DIY), due to a significant increase in their rent; the Central, due to the mass redevelopment of Toronto's Mirvish Village by Westbank Projects Corp; and Harlem (Richmond East location), an important space for Toronto's Black artists, musicians, community members, and community leaders, as well as Ratio (DIY), both closed their doors on their own terms.<sup>63</sup>

Beyond marginal and grassroots spaces, even music and performance spaces that seemed immune to gentrification processes fell victim to the next stage of exchange-value-centered development. While not necessarily considered within the same category as grassroots spaces for local music communities to congregate (although it did provide local musicians with some opportunities to perform on its stage), but an iconic venue nonetheless, the announcement of the upcoming closure of Toronto's Hard Rock Café at 279 Yonge Street downtown on Dundas

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<sup>63</sup> Carla Gillis, "Vanishing Music Venues: Three Months Into 2017 and We've Already Lost Seven," *NOWToronto* (1 March 2017), online: <nowtoronto.com> [Gillis, "Vanishing Venues"]; Matt Williams, "Canadian Music Venues Are Dropping Like Flies," *National Music Center* (16 January 2017), online: <nmc.ca>; Amy Carlberg, "Toronto's Most Unique Live Music Venue Shuts Down," *blogTO* (January 2017), online: <blogto.com>; Michael Rancic, "Toronto's Music Scene Reacts to Soybomb's Closure," *NOWToronto* (12 January 2017), online: <nowtoronto.com>; Kate McGillivray & Natasha MacDonald-Dupuis, "City of Toronto Joins Fight to Keep Music Scene Bumping in the Face of Closures," *CBC News* (19 April 2017), online: <cbc.ca>; Kate McGillivray & Natasha MacDonald-Dupuis, "Shuttered Music Venues Raise Fears of 'Homogeneous' Toronto Culture," *CBC News* (20 April 2017), online: <cbc.ca>; David Shum & Erica Vella, "Hugh's Room in Toronto Abruptly Shuts Down Amid Financial Troubles," *Global News* (9 January 2017), online: <globalnews.ca>; Kevin Ritchie, "Holy Oak to Close at the End of February," *NOWToronto* (9 February 2017), online: <nowtoronto.com>; Kevin Ritchie, "Live Music Venue The Central to Close After 10 Years," *NOWToronto* (20 January 2017), online: <nowtoronto.com>; Michael Rancic, "Two More Toronto Music Venues Close this Month," *NOWToronto* (16 May 2017), online: <nowtoronto.com>; *Commercial Tenancies Act*, RSO 1990, c L7; Michelle Da Silva, "Harlem is Closing its Richmond East Location in March," *NOWToronto* (27 February 2017), online: <nowtoronto.com>.

square (often considered to be Toronto's iteration of New York City's Times Square) raised the eyebrows of even those largely uninterested in, or unaware of, Toronto's Music City aspirations. Having itself taken over the space from Toronto's storied Friar's Tavern—one of Toronto's most popular Yonge Street nightclubs during Yonge Street music heyday, and a live music venue from 1963-76 that welcomed numerous jazz and rock legends, such as Bob Dylan—the lease for the space of the second oldest Hard Rock Café in the world (only eclipsed by London, England's Hard Rock Café) was set to nearly double what it was currently paying, to about \$2 million a year.<sup>64</sup>

As it turns out, even the Hard Rock Café could find itself in the same situation as a comparatively tiny and community-oriented music venue like Holy Oak in facing the susceptibility that non-ownership of a space brings, where displacement occurs as property values and taxes rise and areas redevelop. What appeared to alarm individuals the most was not just the displacement of the Hard Rock Café, but that it would be replaced by yet another outpost of a drugstore/pharmacy chain to add to the many already in the neighbourhood—a Shoppers Drug Mart. The identity of the new tenant sprinkled salt in the wound of those still digesting the recent closure of the Brunswick House music venue and its replacement with a Rexall Drugstore, which opened around the same time (March 2017) as the Hard Rock Café closure was announced. To quote a sound bite gleaned from TMAC member Spencer Sutherland in relation to the closure of the popular live music venue Hideout when it was displaced from its Queen

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<sup>64</sup> “Yonge Street Hard Rock Café to be Replaced with Flagship Shoppers Drug Mart,” *Retail Insider* (13 March 2017), online: <[retail-insider.com/retail-insider/2017/3/hard-rock-yonge](http://retail-insider.com/retail-insider/2017/3/hard-rock-yonge)>; James Cummins, *Elixir: Our Oldest Bars and Why They Matter* (TBA) at TBA [unpublished]; “The Friar’s Tavern,” *Heritage Toronto Historical Plaques Program* (plaque). See also Ellen Brait, “Hard Rock Café Closing its Doors at Yonge-Dundas Location,” *thestar.com* (13 March 2017), online: <[thestar.com](http://thestar.com)>.

West location to make room for a Taco Bell franchise: “Hey, if they can’t survive there, nobody can.”<sup>65</sup>

The Silver Dollar Room’s closure was also announced in early 2017. Although its closure was confirmed as temporary, only for the purposes of reconstruction, and its heritage designated status under the *Ontario Heritage Act* and the resulting By-law 57-2015 ensured that it continue, in some form, as a live music venue.<sup>66</sup> Nonetheless, worries about the ongoing character of the space endured. As members of Toronto’s music community expressed at the February 13, 2017 Toronto Music Advisory Council meeting at City Hall, concern remained in relation to the meaningful protection and preservation of the intangible values and heritage of the Silver Dollar Room space.<sup>67</sup>

At the meeting, several members of the music community pointed out in their deputations that the new iteration of the venue would not necessarily have the same operator, the same affordable nature, nor the same booker Dan Burke (who is synonymous with the Silver Dollar Room as it existed right before its temporary closure). As *Now Toronto* summarized, “The Silver Dollar without Dan Burke is not the Silver Dollar.”<sup>68</sup> Much to the delight of those in attendance, Burke himself also attended the February 13, 2017 Toronto Music Advisory Council Meeting and provided a short deputation. He expressed comparative resignation to the whole affair but agreed with the others that realistically the new iteration of the venue would not likely have the

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<sup>65</sup> Sutherland is also the owner and operator of Nocturne, a music venue and nightclub on Queen West as well as the executive director of the Queen West BIA and board member of the Toronto Association of BIAs. See also Gillis, “Vanishing Venues”, *supra* note 63.

<sup>66</sup> Joe Cressy, “Silver Dollar Will Return as a Venue”, Letter to the Editor, *thestar.com* (6 February 2017), online: <[www.thestar.com](http://www.thestar.com)>; *Ontario Heritage Act*, RSO 1990, c O.18; City of Toronto. By-law No 57-2015, *To designate the property at 484 Spadina Avenue (Silver Dollar Room) as being of cultural heritage value or interest* (11 December 2014).

<sup>67</sup> Toronto Music Advisory Council (meeting), 13 February 2017 at Toronto City Hall; Gillis, “Vanishing Venues”, *supra* note 63.

<sup>68</sup> *Ibid.*

same operator or himself as the booker, which would inevitably change the character of the space.

These deputations revealed the ongoing struggle and legislative and governance gaps within cultural heritage protection and management in Toronto in terms of intangible cultural attributes and values and living heritage. As Toronto City Councillor Joe Cressy—who had played a key role in not only heritage protection of the Silver Dollar Room, but also the particular attributes that were protected—summarized, “It’s an example of the challenges we’re facing and how despite all the best intentions we’re still failing. This is an example of the city using every belt and suspender, every tool we have available to protect a venue, but even then it shows you some of the challenges in the system.”<sup>69</sup>

The seemingly relentless sudden onslaught in venue closures did not go unnoticed in the context of the ongoing Music City project, evidenced when, in advance of the February 13<sup>th</sup> Toronto Music City Advisory Council meeting, Mayor John Tory and City Councillor and Chair of the Toronto Music City Advisory Council Josh Colle released a joint message in response that acknowledged the alarming rash of live music venue closures.<sup>70</sup> As their statement, entitled “Toronto Remains Committed to Supporting Live Music Venues,” expressed:

Toronto’s music community lost a number of live venues in 2016, and sadly, that trend has continued during the first month of this year. We and many of our Council colleagues and the Toronto Music Advisory Council are very aware of these closures.

We share the disappointment of musicians, music fans, and the music community at these recent announcements. Most of all, we would like the music community to

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<sup>69</sup> Toronto Music Advisory Council (meeting), 13 February 2017 at Toronto City Hall; Carla Gillis, “Vanishing Venues”, *supra* note 63.

<sup>70</sup> Statement from Mayor John Tory and City Councillor Josh Colle. “Toronto Remains Committed to Supporting Live Music Venues”, (2 February 2017). For a copy of the full statement see Kate Robertson, “Mayor John Tory Releases a Statement on the Number of Toronto Venues That Have Closed”, *NOWToronto* (2 February 2017), online: <nowtoronto.com>.

know that we take the matter extremely seriously and are actively taking steps to address it.

The Toronto Music Industry Advisory Council (TMAC) will discuss the issue of music venue closures at its next meeting on February 13, and will provide expert suggestions and recommendations to City Council about how the City can best support music venues a now and in the future.

City of Toronto elected officials and stage have been constantly looking at strategies and actions that might be taken to help our music venues and the musicians and wider communities they support. Some of the measures taken already include:

- Council has passed a motion aimed at protecting live music venues
- The City with the help of local Councillor Joe Cressy has taken steps to protect the Silver Dollar Room so it continues to be a music venue in perpetuity
- Council has asked staff to focus on helping the city's nighttime economy
- Part of the TOCore planning study will look at how to create, maintain music spaces, including pop-up music spaces
- Ongoing discussions with venue owners about how the City can help them succeed

We understand that it has become more difficult for music venues to find and hold onto affordable, accessible spaces, especially in Toronto's downtown neighbourhoods. Together with TMAC and other partners, the City is already considering a number of recommendations addressing music venue protection, pop-up venues, and the overall health of the nighttime economy. In doing so, we are continually studying how any success stories from other cities might work in Toronto – because the same difficulties our music sector is experiencing here are also being seen across the world in many other cities, including our music alliance partner city of Austin, Texas ...

We recognize how important music venues and the communities they nurture are to the social, cultural, and economic fabric of Toronto – from long-standing institutions like Hugh's Room, the Hoxton, and the Silver Dollar, to the DIY and alternative spaces so important to the artistic grassroots in our city. Together with the Toronto Music Advisory Council, we are committed to a complete exploration of how to support our music venues. As we deeply miss those venues already lost, we are also hopeful that in 2017, bringing the City together with the music community to generate solutions will help Toronto turn a corner and make progress toward a healthier future for music venues and music in general.<sup>71</sup>

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<sup>71</sup> *Ibid.*

But venues still continued to close after the February 13<sup>th</sup>, 2017 TMAC meeting, the lack of meaningful momentum in addressing the above issues persisted, and progressive city-backed initiatives like 4479 Music City (intended to promote and support Toronto’s “music assets” as a “vibrant economic sector”) even ceased operations, with its website essentially proclaiming “our job here is done” with a pop-up closure announcement that read: “Since 2013, 4479 has worked to position Toronto as one of the greatest Music Cities in the world. With confidence in the momentum Toronto is carrying forward, we will be ceasing operations.”<sup>72</sup> Nonetheless, acknowledgments, such as the one above from Mayor Tory and City Councillor Colle, of the struggles facing Toronto’s grassroots music spaces and communities, are not insignificant.<sup>73</sup> Despite the ongoing struggles for meaningful progress in preserving these music spaces, it is at least clear that the Music City campaign and guiding policy, and strategy documents like the “Mastering of a Music City” report, have at minimum somewhat garnered the attention of Toronto City Hall.

In terms of influence outside of Toronto, where its Music City campaign also resonates with and has piqued the interest of other cities around the world in addition to other Canadian cities looking for guidance as to how they might also “tap into the power of music,” as Mayor Tory and City Councillor Josh Colle alluded to, these cities also face the challenges of music venue displacement and closure.<sup>74</sup> Even in Canada’s smaller centers there are several illustrations. Edmonton, Alberta, for example, seeks to remedy the disappearance of many music spaces and edify the grassroots live music scene through progressive grant provision and

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<sup>72</sup> See the 4479 website, online: <4479toronto.ca>.

<sup>73</sup> See Chapter 7 and 8 for a further account of TMAC developments and legislative initiatives subsequent to the February 13<sup>th</sup>, 2017 meeting.

<sup>74</sup> Canadian Chamber of Commerce & Music Canada, *supra* note 47. This phenomenon is also observable in how many cities are becoming, or seeking to become, “creative cities”—whether this is through official designation or whether they are simply self-identifying (see e.g. Brault, *supra* note 10 at 6-7).

potential liquor licensing policy revisions.<sup>75</sup> Ottawa, Ontario is beginning to acknowledge obstacles, such as public transportation, that it faces in becoming a Music City where good transportation links have been identified as an essential element in supporting audience development en route to becoming a Music City.<sup>76</sup>

### **III. MUSIC CITIES, HERITAGE PRESERVATION, AND TENSIONS BETWEEN USE-VALUES AND EXCHANGE-VALUES \***

While cities are enthusiastically grasping onto the Music City model, the Toronto initiative exemplifies that this is certainly not being done solely for the vibrant cultural boon music provides to their urban citizens. As one of the directors for one of Toronto's major annual music and arts festivals North by Northeast ("NXNE") explains, "What everyone's getting ... is that not only is music essential for the soul and the imagination, spiritual aspiration of a city, it makes cities money. Like, tons of it."<sup>77</sup>

However, while cities across the world are latching onto attaining this sought-after moniker of a "Music City" and the ability to harness the potential housed within a vibrant music economy, the other roles that music, music heritage and its associated spaces play can receive less consideration where an economic benefit is not as immediately obvious. As we saw in Chapter 1, music spaces are an example of a cultural and subcultural space of high community cultural wealth and intangible cultural heritage that have a high use-value for production,

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<sup>75</sup> See Sandra Sperounes, "Live Music Initiative Hopes to Help Edmonton Venues" *Edmonton Journal* (13 October 2015), online: <edmontonjournal.com>; "It was a Rough Year for the Local Music Scene, but a New Venue has Opened its Doors", *Edmonton Journal* (18 November 2015), online: <edmontonjournal.com>.

<sup>76</sup> See e.g. Saxberg, *supra* note 46; Terrill, "How Cities Benefit", *supra* note 46.

\* © Sara Ross. Parts of Section III were previously published in: Sara Ross, "Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value" (2017) 24:1 *International Journal of Cultural Property* 31; Sara Ross, "Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping" (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>77</sup> Interview of Michael Hollett in Dave Morris, "Toronto's Music City Dream Hindered by Red Tape", *The Globe and Mail* (16 June 2015), online: <www.theglobeandmail.com>.

consumption, and cultural flourishing within the city space. From a predominantly exchange-value perspective, a developed music culture(s) and music spaces in a city can certainly create jobs and investment opportunities.”<sup>78</sup> But, more importantly, as the VP Public Affairs at Music Canada Amy Terrill also notes, “[T]here is merit in preserving and protecting heritage, not just for the purpose of explaining where we came from, but also, in order to ensure a vibrant and healthy future. Music brings vitality and diversity to our cities. It bridges cultures and languages.”<sup>79</sup> Director of Programming at Heritage Toronto Kaitlin Wainright further notes in relation to Toronto’s desire to tap into the powerful potential music has in its quest to become a “Music City” that we each have our own unique musical experiences that we remember in relation to places or events in the city, which contribute to the rich value that music and its history has for so many of us.<sup>80</sup> In this sense, music is an invaluable and intangible resource that adds value not only to our cultural heritage but also to our daily lived experiences in the city.<sup>81</sup> All the same, similar to what Amy Terrill flags, Kaitlin Wainright cautions that it is rare for cities to both treat their current music culture as well as their past music culture and history well.<sup>82</sup>

However, spaces such as those for dance and music are important intercultural contact zones where culture in the city is generated, other cultural adherences are transcended, and where transgressive intercultural translation is facilitated through the common use and interest in a space and the cultural practices occurring within the space.<sup>83</sup> As a Toronto journalist Shawn

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<sup>78</sup> Amy Terrill, “Making Music History Work for the Present”, (21 December 2015) *Huffington Post* (blog), online: <[www.huffingtonpost.ca](http://www.huffingtonpost.ca)> [Terrill, “Music History”].

<sup>79</sup> *Ibid.*

<sup>80</sup> See *ibid.*

<sup>81</sup> See also *ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 227 [Santos, *Epistemologies*]. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 472 [Santos, *Toward*]. Contact zones, for

Micallef describes in relation to Toronto's disappearing music and dance venues and nightclubs, "Social barriers fall away as people dance" and clubs provide the spaces where people can dance, meet, intersect, and define and redefine themselves culturally and transgress cultural identities.<sup>84</sup> Perhaps most importantly though, in the words of Shawn Micallef in relation to Toronto: "A city where you can't dance is a city not worth living in. We need places where people can let loose, a release value from the daily drudgery."<sup>85</sup> But in addition to this, as we will see through the various descriptions of music spaces that will follow, these music spaces and clubs also function as artist spaces where the many DJs and performers from Toronto and those who now live in Toronto can display and hone their art.<sup>86</sup>

Music, and the spaces and venues it takes up in the city, contribute value not only to a city's intangible cultural heritage, but also to the lived experience of the city. This extends beyond the music scene of a city, and taps into the question of what is being valued within urban redevelopment projects and the city governance frameworks and legal complexes within which urban redevelopment must navigate.<sup>87</sup> As Laam Hae asserts in relation to disappearing spaces for music and dance, "The disappearance of spaces for transgressive and alternative subcultures implies a serious decline of people's rights; that is, people's rights to appropriate urban space and participate in producing it for the purpose of use-value, play, diverse social interactions,

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Santos, are "social fields in which different normative [and cultural] life worlds meet [negotiate] and clash" (*ibid*; Santos, *Epistemologies*, *supra* note 83 at 218), and where "rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, and subvert each other, giving rise to hybrid legal and political [and cultural] constellations in which the inequality of exchanges are traceable [and may be either reinforced or reduced]" (Santos, *Toward*, *supra* note 83 at 472; Santos, *Epistemologies*, *supra* note 83 at 218). See also Shawn Micallef, "With Clubs Disappearing, Where Will Toronto Dance?", *thestar.com* (11 April 2013), online: <[www.thestar.com](http://www.thestar.com)>; Hae, *supra* note 2 at 6.

<sup>84</sup> Micallef, *supra* note 83.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* (quoting Denise Benson).

<sup>87</sup> "Legal complexes" include "the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms, and forms of judgement" (Nikolas Rose & Mariana Valverde, "Governed by Law?" (1998) 7:4 *Social & Leg Studies* 541 at 542; see also Hae, *supra* note 2 at 7).

alternative community-building and the radical re-imagining of urban society.”<sup>88</sup> It is within the legal processes at the city level, and sometimes provincial level, that decisions are made that affect and ultimately determine what is deemed valuable enough to protect and promote, and what (and who) is allowed to be replaced, redeveloped, and/or pushed out. As Hae argues, “[I]t is important to take seriously the suppression and disappearance of particular urban activities and their spaces, as these are invaluable in establishing the normative ideal of cities.”<sup>89</sup>

**A) The Dual Character of Municipal Legal Frameworks, Creative-City Policies, Inter- and Intra-City Tourism, and Sustainable Diversity \***

Drawing again on the warning issued by the Habitat III issue papers, where urban law ultimately governs the framework and implementation of these creative-city oriented policies within the nuanced diversities of cultures housed within the close-quarters of a city’s dense urban core, law “often has a dual character with an apparently neutral technical nature accompanied by a complex social aspect including the potential for differential impact on different groups within the urban environment.”<sup>90</sup> In capitalizing on and promoting culture, arts, music, and so on, municipal legal complexes can carry a differential impact within these very same artistic and cultural spheres—although the negative effects of the differential impact are usually most

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<sup>88</sup> *Ibid* at 6.

<sup>89</sup> *Ibid* at 10. In relation to Toronto’s desire to tap into the powerful potential music has in its quest to become a “music city”, the Director of Programming at Heritage Toronto Kaitlin Wainright notes that “music adds value to our cultural heritage and lived experience. She points out that everyone has their own stories relating to a place or event. There is no single story line, which is what makes music history so compelling and so rich, to so many people. And yet, Wainright says, there are few cities that do current and past music well” (see Terrill, “Music History”, *supra* note 78).

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, “Making a Music City: The Commodification of Culture in Toronto’s Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks” (2017) 27 *Journal of Law & Social Policy* 126.

<sup>90</sup> UN-Habitat, Habitat III Issue Paper #6, “Urban Rules and Legislation” (31 May 2015) at 2 [Habitat III Issue Paper #6, “Urban Rules”].

prevalent at the margins of the spheres—where there is a stifling effect on diverse iterations of culture due to a number of conscious or unconscious oversights.<sup>91</sup>

Some examples of these oversights include backwards legislation that has ill effects on certain iterations of culture and the attached adherents; a lack of consideration of those who produce the particular cultural iteration in question in comparison to those who consume it; and disregard for the use-value of these cultural iterations, the diversity of these iterations, and what is needed for the *sustainability* of the many diverse iterations of urban culture in Toronto to flourish now and into the future.

In line with the Habitat III issue papers' warning and similar to what Laam Hae suggests in relation to the undervaluation of spaces of nighttime cultural practice in New York City, the Floridean “creative city” culture-led redevelopment policies favoured in Toronto “can ironically turn destructive towards creative sub-cultural formation in cities.”<sup>92</sup> This can be seen in Toronto's quest to become an established Music City—a quest that illuminates the tension between the cultures and tastes that define both ourselves and our experience in the city space where different kinds of music cultures flourish and a balance between the interests of diverse citizens must be struck within the ways in which municipal legal frameworks ultimately regulate these differences.<sup>93</sup> This Music City quest also demonstrates the disconnect between promoting culture—music culture in this case—for the sake of culture, community cultural wealth, and its use-value versus promoting culture strategically for its profit potential and exchange-value. This tension amplifies a larger one: within cities not all people and not all groups are heard equally, or able to make themselves heard, and even where heard, their voices are not necessarily equally accounted for.

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<sup>91</sup> Hae, *supra* note 2 at 5-6.

<sup>92</sup> *Ibid* at 32. See especially, Novy & Colomb, *supra* note 3 at 11-12, 14-15.

<sup>93</sup> Morris, *supra* note 77; Titan Music Group, *supra* note 45. See also Zukin, *Naked City*, *supra* note 5 at 27.

While UNESCO acknowledges the economic and social resource potential that culture can carry, it also cautions that culture is “a source of wealth in ways that do not have price tags.”<sup>94</sup> “Culture”, as eagerly deployed within redevelopment and tourism strategies and creative-city oriented strategies can have many positive benefits, but these strategies are not without their pitfalls and are certainly no cure-all.<sup>95</sup> Along the same lines as UNESCO’s cautionary note, the Habitat III issue papers highlight the use of creative city strategies and culture as a mechanism for better including culture in the city space and within city governance, while also cautioning that the relevant policies must be vigilantly implemented to ensure respect for diversity and an equal treatment of the diversity of cultures, even where cultural iterations are contrary to or contest “dominant norms and values within the communities.”<sup>96</sup>

Where the potentials for urban tourism—both from non-city residents as well as intra-city tourists from other neighbourhoods and outlying suburbs—is one of the goals in Creative City and Music City initiatives, the Habitat III issue papers note some downsides.<sup>97</sup> They warn that where tourism is concerned, “Urban cultural practices – traditional and contemporary – can be weakened by globalization processes, exploitation of economic resources and promotion of

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<sup>94</sup> UNESCO’s Contribution to Post-2015, “The Power of Culture for Development”, online: <[en.unesco.org/post2015/power-culture-development](http://en.unesco.org/post2015/power-culture-development)>.

<sup>95</sup> See e.g. Deborah Leslie & Norma M Rantisi, “Creativity and Urban Regeneration: The Role of La Tohu and the Cirque du Soleil in the Saint-Michel Neighborhood in Montreal” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global perspectives* (London, UK: Routledge, 2013) 83; Carl Grodach & A Loukaitou-Sideris, “Cultural Development Strategies and Urban Revitalization” (2007) 13:4 *International Journal of Cultural Policy* 349; A Markusen & A Gadwa, “Arts and Culture in Urban or Regional Planning: A Review and Research Agenda” (2010) 29:3 *Journal of Planning Education and Research* 379; H Mommaas, “Cultural Clusters and the Post-Industrial City: Towards the Remapping of Urban Cultural Policy (2004) 41:3 *Urban Studies* 507. See also Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (London, UK: Routledge, 1996) at ch 2ff. But cf Sharon Zukin, “Cultural Strategies of Economic Development and the Hegemony of Vision” in Andy Merrifield & Erik Swyngedouw, eds, *The Urbanization of Injustice* (New York: New York University Press, 1997) 223 at 229: “[C]ultural strategies are often a worst-case scenario of economic development”; Novy & Colomb, *supra* note 3.

<sup>96</sup> Habitat III Issue Paper #4, “Urban Culture”, *supra* note 3 at 4-5,7.

<sup>97</sup> *Ibid.* See also generally Novy & Colomb, *supra* note 3.

tourism.<sup>98</sup> Tourism can potentially harm the ability of communities to safeguard and transmit their cultural practices and sites, or tend to encourage standardized features where minority cultural expressions can be at risk of marginalization.”<sup>99</sup>

The Habitat III issue papers also note how the trend towards greater urbanization can disrupt intangible cultural practices and local cultural values, and lead to a “loss of community memory, cultural impoverishment and homogenization.”<sup>100</sup> With regard to the preservation of important cultural spaces and urban heritage preservation, the issue papers go on to acknowledge that “[g]entrification processes in historic areas can also lead to exclusion of the vulnerable communities who are the historic dwellers of these areas and the repositories of their memory.”<sup>101</sup> Related to the displacement of the originate inhabitants of a neighbourhood or space, or those who use the space regularly but do not live there (or cannot live there, as is the case with former industrial zones that enter into gentrifying processes),<sup>102</sup> as UN-Habitat has noted, with reference to the 2004 “State of the World Cities Report”, when forms of local city culture and cultural practices are deployed within city redevelopment and tourism strategies, there is a danger that “‘cultural accountants’ [will] forget to plan for the future of those who helped give these cities their flavour in the first place.”<sup>103</sup> This effect displaces not only the

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<sup>98</sup> Habitat III Issue Paper #4, “Urban Culture”, *supra* note 3.

<sup>99</sup> *Ibid.* Novy & Colomb, *supra* note 3 at 11, 15. See also Kristal Buckley, Steven Cooke & Susan Fayad, “Using the Historic Urban Landscape to Re-Imagine Ballarat: The Local Context” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 93; Sophia Labadi, “The Impacts of Culture and Heritage-Led Development Programmes: The Cases of Liverpool (UK) and Lille (France)” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 137.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 4. See also, generally, Zukin, *Naked City*, *supra* note 5.

<sup>102</sup> See Novy & Colomb, *supra* note 3 at 14. Further, rather than the term “original,” I use the term “originate community” to indicate the community or communities that have grown out of a space, flourish in a space, or carry a strong attachment to a particular space. The term “original” imports the idea of the first or earliest claims to space or land, which is not necessarily the correct claim for the sites and venues I am discussing, especially since Toronto is built on traditional Indigenous lands.

<sup>103</sup> UN-Habitat, “Trading on Culture: Planning the 21<sup>st</sup> Century City”, 2004, UN Doc SOWC/04/F/04 (2004) at 3, online: UN-Habitat <[mirror.unhabitat.org/documents/media\\_centre/sowc/Featuretrade.pdf](http://mirror.unhabitat.org/documents/media_centre/sowc/Featuretrade.pdf)>. See also UN-Habitat,

originate cultural producers, but also those that populated and supported the events and spaces that were created when they are priced out of continued attendance and participation, find themselves to no longer be welcome and become an undesirable presence, or find the new versions of a creative or artistic deployed to attract expenditure to be a shell of what they once were a part of.

As Boudreau, Keil, and Young describe, “The problem with the creative competitiveness consensus is that economic growth becomes the sole definition of prosperity and quality of life, just as ‘creative communities’ exclude the majority of Torontonians who see culture valorized only to be commercialized.”<sup>104</sup> Ultimately, as noted by city-based human rights charters that situate themselves within the “right to the city” framework—such as the *European City Charter*—a balance must be struck between the exchange-value potential of culture and cultural spaces within city redevelopment projects and the use-value of originate spaces and use-value interests of those who use those spaces within which community cultural wealth and intangible urban cultural heritage is generated and flourishes.<sup>105</sup> In the words of Article XXI of the *European City Charter*, municipal authorities must strike a balance between sustainable city tourism on the one hand and “the social and ecological wellbeing of the citizens on the other.”<sup>106</sup>

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“State of the World Cities 2004/2005: Globalization and Report” (New York: Routledge, 2005). See also Novy & Colomb, *supra* note 3 at 11, 14.

<sup>104</sup> Boudreau, Keil & Young, *supra* note 8 at 195.

<sup>105</sup> *European Charter for the Safeguarding of Human Rights in the City*, 2000, online: UCLG Committee on Social, Inclusion, Participatory Democracy and Human Rights <[www.uclg-cisd.org/en/right-to-the-city/european-charter](http://www.uclg-cisd.org/en/right-to-the-city/european-charter)> [*European City Charter*]; *Draft Outcome Document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)*, HABITATIIIOR, Annex, Agenda Item 10, UN Doc A.Conf.226.4 (2016), point 11 [New Urban Agenda]. See also *ibid.*, points 8, 9, 47-48, 51, 85-92, 163; Labadi & Logan, *supra* note 11 at 1; *Recommendation on the Historic Urban Landscape*, GC Rec, UNESCO, 36th Sess (adopted on 10 November 2011); *The Florence Declaration on Heritage and Landscapes as Human Values: Declaration of the Principles and Recommendations on the Value of Cultural Heritage and Landscapes for Promoting Peace and Democratic Societies*, ICOMOS, 18<sup>th</sup> GA (adopted October 2014), online: ICOMOS <[www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA\\_2014\\_results/GA2014\\_Symposium\\_FlorenceDeclaration\\_EN\\_final\\_20150318.pdf](http://www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA_2014_results/GA2014_Symposium_FlorenceDeclaration_EN_final_20150318.pdf)>.

<sup>106</sup> UN-Habitat, “Trading on Culture”, *supra* note 103. See also, generally, Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016). See also the need for “cities for

While city governance of culture and culture-led redevelopment in cities such as Toronto may superficially answer the Habitat III issue papers' dictate that "[a]ccess to culture and participation in cultural life should be an integral part of all urban policies,"<sup>107</sup> cultural diversity within cities like Toronto is often reified and seen for its profit potential.<sup>108</sup> Here, not all iterations of culture or what culture is, music or what music is, art or what art is, receive equal regard or valuation. There is an unfortunate tendency, where cities function as commercial entities viewing culture and art for the potential profit value, for the consumption of culture to be considered before the production of culture and for the exchange-value of culture and cultural spaces to be valued above the use-value of culture and cultural spaces.<sup>109</sup>

Those affected disproportionately and under-consulted tend to be in a non-dominant social, cultural, political, or economic position.<sup>110</sup> Their lack of equal inclusion and consultation neglects the call by the Habitat III issue papers for

[t]he representation and participation of communities in the design and implementation of culturally-sensitive urban policies should be promoted, to fully respect the freedom of individuals to participate, access cultural heritage and contribute to the creation of culture, including through the contestation of dominant norms and values within the communities.<sup>111</sup>

While Toronto's Music City documents tend to hold up Austin, Texas as a shining example of a Music City, Austin, Texas itself is far from free of counteractive policies and redevelopment forces that threaten the displacement of music spaces due to redevelopment and zoning changes,

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people, note for profit" (Neil Brenner, Peter Marcuse & Margit Mayer, eds, *Cities for People, Not for Profit: Critical Urban Theory and the Right to the City* (London, UK: Routledge, 2012); Novy & Colomb, *supra* note 3 at 15).

<sup>107</sup> Habitat III Issue Paper #4, "Urban Culture", *supra* note 3 at 4-5.

<sup>108</sup> See generally, Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 20; Goldberg-Miller, *supra* note 1 at 101, 114.

<sup>109</sup> See e.g. Grodach & Silver, "Introduction", *supra* note 4 at 2; Leslie & Rantisi, *supra* note 95 at 83.

<sup>110</sup> See e.g. Grodach & Silver, "Introduction", *supra* note 4 at 2; Labadi & Logan, *supra* note 11. UN-Habitat, Habitat III Issue Paper #6, "Urban Rules", *supra* note 90.

<sup>111</sup> Habitat III Issue Paper #4, "Urban Culture", *supra* note 3 at 4-5. See also the New Urban Agenda, *supra* note 105, points 124. 125.

increasing property values, rent costs, and property taxes.<sup>112</sup> New noise issues, noise conflicts, and complaints resulting from newly designated mixed-use zones and encroaching residential developments into Austin’s downtown, including the Waller Creek floodplain area, have “exacerbated the conflict between two key policy objectives and components of the city image – sustainable redevelopment and live music.”<sup>113</sup> In addition, even though

live music and the arts became resources of growth management by serving as a symbol of the city’s “unique culture” in downtown redevelopment and as a defense against fears of homogenization and corporatization of the urban core ... [i]ronically, the success of these investments in attracting redevelopment has led to increasingly unaffordable living and work space for many artists and musicians in the center city.<sup>114</sup>

A parallel situation is being replicated in Toronto, exemplified by the case studies that follow, where the closure of longstanding music venues has been brought about by a cocktail of zoning by-law amendments, redevelopment forces, and ineffective assessment of the cultural, heritage, and use-value of potent sites of Toronto’s music culture and music history. Their replacement with mixed-use development projects, chain stores, parking lots, and so on, gradually edges out marginal gritty spaces of subcultural practice, grassroots cultural spaces, and established use-value in the urban core of the city as these authentic bits that escape reification and commodification are instead simply replaced with cleansed spaces of top-down defined “art” and “culture” valued for their projected exchange-value growth machine potential.<sup>115</sup> In the

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<sup>112</sup> See e.g. Titan Music Group, *supra* note 45 at 79-80. Grodach, *supra* note 53 at 102-103, 106.

<sup>113</sup> See e.g. Titan Music Group, *supra* note 45 at 79-80. Grodach, *supra* note 53 at 102-103, 106. See also Hae, *supra* note 2 at 5-6.

<sup>114</sup> Grodach, *supra* note 53 at 100 [references omitted]. See also Zukin, *Naked City*, *supra* note 5 at 102.

<sup>115</sup> On this topic, which will be explored further throughout this project, see generally Logan & Molotch, *supra* note 9; Heather E McLean, “Cracks in the Creative City: The Contradictions of Community Arts Practice” (2014) 38:6 *International Journal of Urban and Regional Research* 2156; Heather E McLean & Barbara Rahder, “The Exclusionary Politics of Creative Communities: The Case of Kensington Market Pedestrian Sundays” (2013) 22:1 *Canadian Journal of Urban Research* 90; Katharine N Rankin, Kuni Kamizake & Heather McLean, “Toronto’s Changing Neighborhoods: Gentrification of Shopping Streets” in Sharon Zukin, Philip Kasinitz & Xiangming Chen, eds, *Global Cities, Local Streets: Everyday Diversity from New York to Shanghai* (New York: Routledge, 2016) 140; Zukin, *Naked City*, *supra* note 5.

example that follows, a strong and nationally known subculture and music community was displaced by a City of Toronto-supported redevelopment project at the exact same time that its existence was highly contributing to Toronto's agenda for making itself a Music City.

## **CHAPTER FOUR: CASE STUDY - WATERFRONT DEVELOPMENT, THE GOVERNMENT, AND DRUM 'N' BASS**

### **I. BACKGROUND: A (VERY) BRIEF HISTORY OF DRUM 'N' BASS, ELECTRONIC DANCE MUSIC, AND "LIVE" ELECTRONIC MUSIC**

As a basic frame of reference, electronic dance music and the scene as it exists today was derived from disco club and discotheque culture<sup>1</sup> of the late 1970s and early 1980s, as well as the warehouse and house music of the 1980s,<sup>2</sup> in addition to European music groups like Kraftwerk and Tangerine Dream that arose during the early 1970s.<sup>3</sup> This evolution was intimately linked to nightclubs, afterhours clubs, legally and illegally appropriated post-industrial warehouse spaces, and other alternative venues, as well as being linked to underground raves, rave culture, all-night dance parties, and music festivals.

Bass and its amplification are an essential characteristic of electronic dance music. Drum 'n' bass music is even more bass-heavy and generally within the range of 150-180 beats per minute (BPM). Growing out of the breakbeat subgenre and the rave scene in the United Kingdom, drum 'n' bass took a step away from the steady, repetitive rhythm characteristic of most electronic dance music to instead focus on a syncopated, yet often driving, rhythmic bass instead of treble; and the incorporation and manipulation of noises and effects in order to create a

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<sup>1</sup> As one of the first managers to ever represent a DJ, Marilyn Green-Fisher distinguishes: "Disco is the club, discotheque is a library, the DJ mixes the library" (interview in James Cummins, *Ambrosia About a Culture: An Investigation of Electronica Music and Party Culture* (Canada: Clark-Nova Books, 2008) at 2.

<sup>2</sup> *Ibid* at 3-6. Warehouse music moved away from disco with its focus on the bass line rather than the melody when transitioning between tracks (see e.g. *ibid* at 3-4).

<sup>3</sup> *Ibid* at 6.

new sound that had a dark, grimy, aggressive yet funky aesthetic.<sup>4</sup> Within the category of drum ‘n’ bass there are further sub-subgenres that cultivate a different sound while maintaining the recognizable and essential bass, BPM, and cadence of drum ‘n’ bass. The music itself also developed alongside a subculture of aficionados and concert attendees that focused their interests heavily on this form of music over others, creating a specific and differentiated community.

Apart from perhaps in the UK, even though drum ‘n’ bass has seen its popularity reach many countries, compared to other more traditionally mainstream forms of electronic dance music—such as house, trance, and so on—drum ‘n’ bass still largely exists on the margins. Although, it does manage to seep into some surprisingly mainstream areas—i.e. if you listen carefully, car commercials tend to feature a smooth downtempo drum ‘n’ bass in the background.

Electronic dance music itself already sits in an interesting marginal space when it comes to initiatives that seek to develop friendly legislation that enables, promotes, commodifies, or celebrates music. Oftentimes, as we will see with Toronto, these initiatives have a focus on what is termed “live music” and “live music” venues. While electronic dance music does not necessarily fall cleanly into the category of live music created on stage with an instrument (though some is, either through musical instruments or a turntablist, even if electronic mixing is not considered live music by some), it is nonetheless generally mixed live on stage in transitions from track to track through the matching of beats and with an additional level of creation that moves beyond a simple transition between tracks through the interweaving of samples and layering and manipulating of other sounds into the curated mix being played.

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<sup>4</sup> See e.g. *ibid* at 16-17: Although many argue over the precise origins, clubs, and sounds associated drum ‘n’ bass and when it officially “became” drum ‘n’ bass, based on over a hundred interviews conducted with DJs, producers, electronic music enthusiasts, and other key figures in the history electronic dance music, see *ibid* for a good overview of, not only the origins of drum ‘n’ bass, but also electronic dance music in general.

Nevertheless, a focus on defining music through a certain lens can lead to the overlooking of different genres of music—even if they have a significantly developed following and community-base within a city. In this context, electronic dance music is a relatively new music genre compared to what is often more traditionally seen as live music. But in the same way that early forms of other genres of music, such as jazz and its associated venues, were not necessarily seen for the cultural import and cultural heritage relevance they would one day have, more nascent but well-entrenched forms of music such as electronic music culture, and even drum ‘n’ bass, and their associated venues are following in these footsteps. These are important considerations if we want to work towards an environment of equal valuation and exchange among differing and sometimes divergent iterations of culture—an equality of differences—in the city.

In the words of the cultural heritage scholar Laurajane Smith:

At one level heritage is about the promotion of a consensus version of history by state-sanctioned cultural institutions and elites to regulate cultural and social tensions in the present. On the other hand, heritage may also be a resource that is used to challenge and redefine received values and identities by a range of subaltern groups. ... Heritage is not necessarily about the stasis of cultural values and meanings, but may equally be about cultural change. It may, for instance, be about reworking the meanings of the past as the cultural, social and political needs of the present change and develop, or it may be about challenging the ways in which groups and communities are perceived and classified by others. Heritage is about negotiation – about using the past, and collective or individual memories, to negotiate new ways of being and expressing identity.<sup>5</sup>

Cultural economist David Throsby has also asserted that sustaining and preserving cultural diversity is valuable as, pragmatically, we do not know which current cultural manifestations

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<sup>5</sup> Laurajane Smith, *Uses of Heritage* (London: Routledge, 2006) at 4.

will have economic and cultural value in the future despite whether, or not, this value is currently evident.<sup>6</sup>

In a city with a very diverse number of cultures and subcultures, from jazz to classical music to drum ‘n’ bass, the following question arises: what kinds of culture do we protect, why, and how do we decide? What role does the notion of intangible culture (versus tangible) play in all of this? And what role do legal mechanisms play in protecting culture and heritage in this context? These kinds of concerns and questions in relation to urban cultural heritage conservation can be traced as far back as the mid-nineteenth century, in response to the ancient and medieval buildings destroyed as a result of the French Revolution as well as other revolutions occurring in Europe.<sup>7</sup> The exclusion of local communities in conservation processes, the exclusion of what they may have deemed as meaningful and culturally valuable, and the lack of value accorded to more vernacular city spaces were also a symptom of (re)development, or “civic cleansing”, at that time.<sup>8</sup> Where exchange-values and commercial interests led to the destruction of medieval zones of cities that culminated in the irreversible loss of invaluable intangible cultural heritage and vernacular city spaces, concern with these processes can be observed in the writings of well-known intellectuals at the time, most specifically in Victor Hugo’s paper “La Guerre aux Démolisseurs”, penned in 1832, which condemned the developers and speculators of that time for their actions.<sup>9</sup>

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<sup>6</sup> David Throsby, *The Economics of Cultural Policy* (Cambridge: Cambridge University Press, 2010) at 172. Toronto, in particular, has a history of focusing on “diversity” as part of its cultural (re)development strategies, see e.g. Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 20; Shoshanah Goldberg-Miller, *Planning for a City of Culture: Creative Urbanism in Toronto and New York* (New York: Routledge, 2017) at 14, 101.

<sup>7</sup> Sophia Labadi & William Logan. “Approaches to Urban Heritage, Development and Sustainability” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 1 at 2.

<sup>8</sup> *Ibid* at 2-4.

<sup>9</sup> Victor Hugo, « La Guerre aux Démolisseurs », 1(5) *Revue des Deux Mondes* 607; Labadi & Logan, *supra* note 7 at 3

These are also the questions, concerns, and considerations that set the stage for my dissertation and the case sites I explored within the context of Toronto's efforts to become a "Music City".

**A) My Introduction to Drum 'n' Bass Music and Culture the Government**

Early in my adulthood, while getting my music legs under me and finding my own music community, there was one club in Canada—at least in my own local musical drum 'n' bass node in Edmonton, Alberta—that held mythical and particularly pilgrimage-worthy status: The Government in Toronto. I will always remember the first time someone I knew visited Toronto, attended a show at Government, and came back chock full of descriptions of the venue and the experience. I remember listening with rapt attention as he recounted his night there, that there was this huge space full of people dancing to drum 'n' bass; a place where our subcultural community had thousands of people, rather than a few dozen. The idea that a space as huge as Government could be dedicated purely to a night of drum 'n' bass and be so packed was incredibly exciting to me.

While the rave scene, electronic dance music scene, and afterhours club scene had quite a few members, in many cities like Edmonton, drum 'n' bass would usually be on offer only in one of the side rooms, or basement rooms, while the largest room at a rave or club would usually have someone spinning an iteration of trance or house music. Even when a big-name drum 'n' bass DJ had been secured for the event, they would never be listed first on the flyer advertising the event, and they would still be relegated to the side or basement room. This was fine, of course, because the drum 'n' bass community consisted of a small but very securely embedded and tightly-knit portion of the larger rave scene and community of electronic dance music enthusiasts in the city.

There were formal and informal events—from the drum ‘n’ bass DJ line up at raves and local afterhours clubs to weekly and bi-weekly drum ‘n’ bass nights at whatever club or bar would have us, to weekend nights, afterparties, and Sunday mornings spent in someone’s apartment as groups of the local DJs, producers, and aspiring DJs shared tips, news, and tracks from UK and US drum ‘n’ bass heavyweights, alongside a few of the Canadian DJs, primarily from Toronto, who had (relatively) made it big in the scene.

Everyone in the drum ‘n’ bass scene knew each other. Even if no words were exchanged, there were knowing nods between us during our escape into that shared devotion to the music and its flourishing within the city, and plenty of company on the dance floor as everyone brought out their signature dance moves within a loosely bounded repertoire where the way one moved worked to signal belonging and cultural capital within the community. Physical signifiers that included how one moved and danced, spoke, dressed, and understood and referenced the music and different drum ‘n’ bass DJs were developed and curated over one’s time in the community. These, in addition to facial recognition but still even without it, served as a kind of “membership card” that enabled inclusion not only into the local drum ‘n’ bass scene, but also into others across the country.

To this day, as long as a city’s drum ‘n’ bass community, venue, or an event can be located, these physical signifiers provide instant acknowledgment of a shared understanding and appreciation for drum ‘n’ bass music and the drum ‘n’ bass scene. There was comfort in knowing that if you knew where community members were, you could safely show up by yourself, even as a young female, at all hours of the night. Even now I still find comfort in knowing that nearly wherever I go, at least the kernels of a drum ‘n’ bass scene, or even an electronic dance music scene and afterhours club scene, can provide a path into a familiar community and a shared

knowing appreciation of that 150-180 BPM range of bass-heavy music or love of blissfully dancing at all hours of the night/day to waves of music as they wash over you when most of the world is asleep.

There were, and remain, different roles that one can have within the drum ‘n’ bass community and, more broadly, within electronic dance music culture. These roles can be loosely divided into dancer/enthusiast/attendee, DJ/performer, and promoter/facilitator/curator. Depending on how you self-identify at a given moment, there are different ways of indicating your role, and different ways to inhabit the role—what time you arrive at shows, how late you stay, if you only attend for the headliner, if you go to the shows that have only the local DJs spinning, how you dress, whether or not you dance and if you do dance, how you dance, whether you help to promote the party and sell tickets (including in person meet-ups to sell tickets so that attendees (a) can avoid the service charge they are charged at retail locations, (b) for those who cannot make the trip downtown to one of the shops selling tickets, and (c) for those who do not have a credit card to buy tickets online).

### **B) Subcultural Capital and Drum ‘n’ Bass Culture**

In applying Pierre Bourdieu’s notion of cultural capital to subcultural spaces like the drum ‘n’ bass community, Sarah Thornton introduced the concept of “subcultural capital” as the alternative forms of cultural capital that exist within these spaces. The membership signifiers (described previously) within the drum ‘n’ bass community function in this way as a form of Thornton’s description of subcultural capital.<sup>10</sup> Critics, however, have asserted that the way in which Thornton applies cultural capital does not maintain the term in the manner that Bourdieu

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<sup>10</sup> Sarah Thornton, *Club Cultures: Music Media and Subcultural Capital* (Cambridge, UK: Polity Press, 1995). See also Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (London, UK: Routledge & Kegan Paul, 1984) at 114-16, 118-19. See also Ken Gelder, ed, *The Subcultures Reader*, 2nd ed (London: Routledge, 2005); Ken Gelder, *Subcultures: Cultural histories and social practice* (London, UK: Routledge, 2007); Ken Gelder & Sarah Thornton, eds, *The Subcultures Reader* (London: Routledge, 1997).

intended.<sup>11</sup> Rather, Thornton's use of "alternative cultural capital" and "subcultural capital" appears to address what Bourdieu refers to as "non-certified cultural capital".<sup>12</sup> As noted in Chapter 1, LatCrit and Critical Race scholar Tara Yosso most effectively addresses alternative or subcultural forms of capital that exist within subcultural spaces such as the drum 'n' bass community and avoids the errors that Thornton is seen to have made by instead *extending* the traditional boundaries of cultural capital to include "alternative cultural capital" instead of placing it within a separate subcategory.<sup>13</sup>

While fashion and clothing might provide more immediate visual indicators of belonging in the drum 'n' bass community, dancing plays particularly pivotal role and is a good example of what Thornton and Yosso are getting at. It's hard to dance to drum 'n' bass: it isn't really something—no matter how good of a dancer you are—that you just pick up instantly. There is generally a leaping characteristic to the way in which people move to the music, and a twisting quality to how you move and pivot your lower body. A bit of a background in hip hop or b-boy/girl style up-rocking can help as an excellent starting point, as can a background in dance improv(isation), however most attendees do not have a background in formal or informal dance training.

There are various bounded and generally acknowledged styles and ways of dancing to drum 'n' bass—mostly these revolve around stepping or skanking, cross-stepping, variances of up-rocking, and so on. You also must decide where you are going to place your weight or carry

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<sup>11</sup> See e.g. Alan O'Connor, "The Eagle and the Hummingbird: Questions for Cultural Studies" (2001) 10:1 *Pretexts: Literary & Cultural Studies* 93 at 98-99.

<sup>12</sup> Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, translated by Richard Nice (London, UK: Routledge & Kegan Paul, 1984) at 358. Lise Bernard has taken this approach in describing the non-certified cultural capital within the real estate agent community—i.e. skills in negotiating social contexts or articulately using the right kind of language—that can take the place of a strong "certified cultural capital" that would traditionally result in a high placement within middle/upper class society ("Le capital culturel non certifié comme mode d'accès aux classes moyennes : L'entrent des agents immobiliers" (2012) 1 *Actes de la recherche en sciences sociales* 68).

<sup>13</sup> Tara J Yosso, "Whose Culture has Capital? A Critical Race Theory Discussion of Community and Cultural Wealth" (2005) 8:1 *Race Ethnicity and Education* 69.

your center—as one would describe it to a formal dance class. You can focus on staying upright and not moving too much or moving mostly laterally with your legs kept predominantly straight; or you can place your weight back a bit where your leg movements will then be mostly in front of you, again with predominantly straight legs, and a bit reminiscent of a reverse version of the running-man; or you can place your weight forward, curve your upper body over slightly, and keep your knees bent for the most part. The latter is my preference as it provides you with the greatest flexibility in speedy access to transitions between movements and movement patterns as well as the greatest stability and ability to quickly adapt to a changing dance floor—keep in mind that the floor can be slippery, cluttered with discarded cups or other objects, people often dance or jump into you (either by accident or on purpose), and sometimes you find yourself suddenly in an impromptu pathway that has opened up as a group of people travel to the front of the crowd, or off to the sides or back of the crowd to access the bar or washrooms. Oftentimes you might also be dancing with an open container of liquid, so this particular stance with dancing is optimal for being able to keep your upper body relatively stable, if you so wish, while still dancing.

Then there is the matter what to do with your arms and hands, but this is more of a matter of personal style. It is nonetheless important that you do something with them while dancing. The particular strategy you choose for dancing will also depend on your footwear for the evening. Most attendees wear flat shoes or sneakers/runners/trainers that are suitable for dancing—which is also an indicator of belonging as it at least partially demonstrates that you understand that the scene is largely premised on vigorously dancing to the music. But sometimes life happens, and one will wind up attending in heels, which will completely alter how you will be able to dance. Jumping, for example, and fast leg movements will be minimized, which will lead to the need to compensate with your upper body and arms. So, there won't be much use in

placing your weight forward in this context—holding it in the center or slightly back will be a better strategy.

Of course, footwear differences are less extreme if you are a male or prefer male-oriented fashion choices, so it might then be possible to develop a more permanent strategy for dancing to drum ‘n’ bass.

To dance “properly” to drum ‘n’ bass, or better yet, to dance well, is a form of capital within the drum ‘n’ bass scene and a signifier of belonging. The difficulty of comfortably, casually, and successfully dancing to drum ‘n’ bass while not appearing to be trying too hard is layered further by the increased credibility, or “capital” that can be achieved by a dancing member within the scene if they are able to effectively introduce their own particular style or signature “moves” into the mixture of well-honed and recognizable movement patterns within the loosely bounded drum ‘n’ bass movement framework.

### **C) Subcultural Spaces and Youth**

While spaces like those of the drum ‘n’ bass community may appear as primarily youth-oriented to the uninitiated society at large, decision-makers, and even those favourably oriented towards “Music City” initiatives, as, sociologist and scholar of youth sub/cultures Patrick Williams succinctly explains,

Go to a subcultural venue in almost any city and you’ll probably see more teenagers than anyone else, but there *are* other people to be seen as well. Subcultural affiliation is most likely to begin during adolescence, but its significance can last a lifetime. The concept of “youth subcultures,” so commonly used in social-science writing, theoretically denies the continuing significance of subcultural participation to those of us who have accidentally grown up and grown older over the years.<sup>14</sup>

But even if we were to discount the correct observations of Williams, the importance of intergenerational equity and intertemporal distributive justice, as we will see in Chapter 7, should

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<sup>14</sup> Patrick J Williams, *Subcultural Theory: Traditions and Concepts* (Cambridge, UK: Polity, 2011) at viii-x.

not dissuade decision-making processes and policy developments from actuating, or preventing the development of friendly legislation and intangible heritage recognition of these spaces of subcultural community wealth.

An approach that more effectively acknowledges the varied cultural and subcultural actors within the city space is also intimately connected to how cities, provinces, and nations, choose to treat, define, and value their intangible cultural heritage as it is deployed through the various legal complexes that shape the cityscape.

## **II. THE GOVERNMENT: HISTORY, COMMUNITY, SPACE, AND USE**

“RIP Guv”, read the graffiti tag that remained nearly until the end as Government was slowly demolished over a three-month period in the Winter of 2015 by Pro Green Demolition.<sup>15</sup> Its passing not only signified a loss to the electronic dance music community, but also a further reduction in the pool of available live music venues and spaces for attending events as well as for production companies looking for space to host their music events.

Not without irony, Government’s history and relevance is succinctly summarized on the sales website for the Daniels Corporation’s new mixed-use condo development that is replacing it:

The club unfortunately finally closed its doors on January 31st, 2015. Formerly the RPM nightclub for about 10 years which brought legends like the Beastie Boys and made former Jamaican born Canadian DJ Chris Sheppard into a superstar in the dance music world. Now currently the Government nightclub which opened its doors in 1996 where superstars such as Lady Gaga and the Rolling Stones played and where DJ Deadmau5 got his start. Charles Khaboth [*sic*], owner of INK Entertainment [*sic*] tried to buy the building with his partners but were unsuccessful as Daniels Corp. has bought it to turn the site at Queens Quay and Lower Jarvis into residential and commercial properties known as the Daniels Waterfront Condos.<sup>16</sup>

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<sup>15</sup> See e.g. Chris Kotsy, “Demolition at The Government/Kool Haus Nearing Completion”, *urbantoronto.ca* (2 April 2015), online: <[urbantoronto.ca](http://urbantoronto.ca)> [Kotsy, “Demolition”]; Chris Kotsy, “The Government/Kool Haus: Its History/It’s History”, *urbantoronto.ca* (23 April 2015), online: <[urbantoronto.ca](http://urbantoronto.ca)> [Kotsy, “Government”].

<sup>16</sup> “Waterfront Condos by Daniels Corp”, *Daniels Waterfront Condos*, online: <[danielswaterfrontcondos.ca](http://danielswaterfrontcondos.ca)>.

In the days following its final night of operation on January 25, 2015, the demolition of Government began with the loss of the “m” in its sign that stretched out along the length of the complex in big block letters, and it was only a matter of days after the new developer had taken over the space for the main entranceway to be unceremoniously gutted.

During the three-month period that it took to demolish Government in the winter of 2015, many loyal past attendees watched with a sinking feeling of dismay and documented the slow destruction online with shared photos and comment threads lamenting the sad state of Government as it was taken apart, commenting on the different parts of its anatomy as they were slowly exposed to the elements as demolition progressed through the building, and the memories that the exposure of these different spaces conjured up.<sup>17</sup> As an unintentional ode to the facelifts Government had received over the years, its slow demolition returned portions of the space to past iterations of themselves before their final destruction, further calling to mind memories of days, nights, and concerts spent at Government.<sup>18</sup>

Opening in 1996, Government was known as the longest-running and largest indoor nightclub in Canada, and, over the years it served as an entry point for a number of generations into the world of electronic dance music and DJ culture in Toronto.<sup>19</sup> It was characterized by a number of maze-like divided performance spaces of various sizes—such as Haven, the Gallery, Surface, Chroma, and Skybar—that could host a number of diverse shows in order to simultaneously cater to different subgenres of musical tastes.<sup>20</sup> Its audio capabilities and

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<sup>17</sup> See e.g. Kotsy, “Demolition”, supra note 15; Kotsy, “Government”, supra note 15.

<sup>18</sup> See e.g. Kotsy, “Demolition”, supra note 15; Kotsy, “Government”, supra note 15.

<sup>19</sup> There are countless anecdotes and stories that attendees have about Government, but see e.g. Benjamin Boles, “The Beat Finally Stops at the Government”, *Now Toronto* (25 January 2015), online: <nowtoronto.com> (written on the last day that Government would be open) [Boles, “The Beat Finally Stops”].

<sup>20</sup> Denise Benson, *Then & Now: Toronto’s Nightlife History* (Toronto: Three O’Clock Press, 2015) at 513. See also Kendra Mangione, “Government Nightclub Shutting its Doors”, *CTV News* (2 May 2014), online: <Toronto.ctvnews.ca>; Benjamin Boles, “A Brief History of the Government Nightclub”, *blogTO* (6 June 2014), online: <www.blogto.com> [Boles, “A Brief History”].

construction ensured that these different acts could play the various rooms without sound leakage from one room to the next. These numerous smaller rooms functioned as mini-clubs and were also one of the reasons for Government's success as it could cater to so many musical tastes at once.

The Government portion of the space was the heart of the whole complex. It was especially known for its cutting-edge sound system and custom-made light design and production displays for shows that could be adapted to cater to the nuances of the musical subgenre being performed. While some preferred the smaller rooms, the extremely high-quality sound system and the production values of the shows hosted in this main space were what made the Government a favourite space in the complex.<sup>21</sup> Installed in order to optimize the soundscape, the Government's suspended and fastidiously cared for wooden dance floor was also known for its required upkeep and yearly need to be redone. Less known for its acoustics, which have been fondly compared to that of an airplane hanger, the size of the no-frills Kool Haus (formerly called the Warehouse) warehouse-style portion of space filled an important gap amongst Toronto music venues with an ability to accommodate 2000-3000 attendees—an ideal capacity for large indoor music events as it is larger than what a large nightclub can hold but not as huge as a stadium.<sup>22</sup>

Government was often open until 7am or later, well-past last call when the venue would transform from a bar/nightclub scenario to an afterhours space reminiscent of a warehouse or community hall rave. Government was known for its well-attended music events, role in developing Toronto's local electronic dance music and electronic dance music scene, and for its prolific nearly twenty-year contribution to Toronto and Canada's international music reputation.

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<sup>21</sup> See also *ibid.*

<sup>22</sup> Benson, *supra* note 20 at 496. See also Boles, "The Beat Finally Stops", *supra* note 19.

Government was a key venue specifically in the continuing development of Toronto's and Canada's drum 'n' bass musical subculture and existing minority music community characterized by the bass-heavy 150-180 BPM range.<sup>23</sup> Government's history saw a plethora of key modern performers give concerts in its space—a list much longer than that of the Silver Dollar Room, which will be discussed in the next case study.

While Government itself opened in 1996, a similar venue, RPM and its sister venue Warehouse, had operated in the space since 1985. RPM was itself important within Toronto's electronic dance music history and, like Government, served as an entry point into the scene for many with its all-ages parties—not to mention the live-to-air DJ sets by Chris Sheppard that were played there and reached beyond Toronto to the late Saturday night programming of radio stations in other Canadian cities, like Edmonton, Alberta.<sup>24</sup> I still remember that one Sunday afternoon weekly track and field practice when one of my friends passed me a tape she had made the night before of *Chris Sheppard's Pirate Radio Show*. It was my very first exposure to this kind of music. I fell in love with it instantly and began religiously listening to the broadcast of his show every Saturday night and recording the show myself when I could. These early personal experiences provide an example of how the cultural value of this space emanated well outside the boundaries of the City of Toronto itself.

But even before RPM, the space had operated for a few years as Fresh Restaurant and Nightclub, which connects us to Chapter 7 where Twilight Zone will be discussed as it was the Assoon brothers who opened both Twilight Zone in 1980 and then Fresh in 1984.<sup>25</sup> Although Fresh was not open for long and experienced nowhere near the following that Twilight Zone

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<sup>23</sup> For just one example of the tours that came through Toronto and the extremely well-attended, high-quality, drum 'n' bass events that Toronto was able to populate and accommodate at Government, see Handlebar Films, "Andy C Nightlife 5 Tour Toronto.mov" (9 April 2012), online: <[youtu.be/jjM2gaWDgTI?list=RD1tghlmNxQPM](https://youtu.be/jjM2gaWDgTI?list=RD1tghlmNxQPM)>.

<sup>24</sup> See also Boles, "The Beat Finally Stops", *supra* note 19; Boles, "A Brief History", *supra* note 20.

<sup>25</sup> Benson, *supra* note 20 at 159, 495.

would eventually become known for, the Assoon brothers were the first to begin instigate the legacy of the space that would become RPM and then the Government.<sup>26</sup>

As a large warehouse-reminiscent music complex, Government was the precise kind of space that spoke to the burgeoning Toronto rave scene when it opened in the second half of the 1990s.<sup>27</sup> Electronic dance music was beginning to enter the mainstream in Toronto, and Toronto was becoming internationally renown as a center for electronic dance music culture and drawing visitors who came to experience the scene. All of this required venues that were both suitable in size as well as in the music featured. Government met both needs in addition to the ability to ensure that subgenres of electronic dance music that catered to different tastes, like drum ‘n’ bass were also represented within the space. The kind of space Government provided was also ideal as the city soon began to crackdown on illegal warehouse raves that were widespread at the time, and production companies had to increasingly look for large, legal, and licensed venues to hold their events.<sup>28</sup>

### A) The “Rave Ban” Years

Government also managed to weather then-Mayor Mel Lastman’s Bill 73—the infamous “rave ban”—introduced by City Councillor Sandra Pupatello, which had been spurred by the drug-related death of twenty-year-old rave-goer Allan Ho in October of 1999 at a rave in an

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<sup>26</sup> *Ibid* at 83.

<sup>27</sup> There are a lot of popular sources that document the development of the rave scene and electronic dance music culture in Toronto during those years. Many of them disagree with each other on minor points such as the key figures involved, the most important events, and so on. But, for a sampling of these sources, see e.g. the excellent website *The Communic8r: A Chronological Trip Through the Golden Age of Raving in Toronto*, online: <[www.thecomunic8r.com](http://www.thecomunic8r.com)>; Denise Benson’s book on Toronto’s nightlife history, *supra* note 20.

<sup>28</sup> Bill 73 (*Raves Act*, 1st Sess, 37th Leg, Ontario, 2000 (first reading 3 May 2000)) defined raves as “an event with all of the following attributes”:

1. Any part of the event occurs between 2 a.m. and 6:00 a.m.
2. People must pay money or give some other consideration to participate in the event.
3. The primary activity at the event is dancing by the participants.
4. The event does not take place in a private dwelling.

See also. Kotsy, “Demolition”, *supra* note 15.

underground parking garage. Bill 73 sought to prohibit the performance of electronic music after 3am.<sup>29</sup> In the backlash, protests were organized by those who felt that their ability to attend their preferred cultural events and outlets—the dance music or electronic music subculture—was being unjustly compromised and that the police were “being used as an arm of the state to shut down cultural expressions that some [didn’t] like or understand, and to shut up and put out of business organizations that challenge[d] the provincial government.”<sup>30</sup>

The Party People Project (P3), for example, was formed to organize a coordinated response to the rave ban/Bill 73 by the Toronto rave and electronic dance music community. In conjunction with the efforts of the Toronto Dance Safety Committee and the Toronto Rave Information Project, work was put into fighting the rave ban by educating the public as to what the rave and electronic dance music scene was all about and in order to dispel a lot of the myths and negative public perceptions and press that came about after Allan Ho’s death.<sup>31</sup> One notable event was a protest attended by about 12,000 people in Nathan Phillips Square in front of Toronto City Hall on September 2, 2001, the day before the vote to reverse the rave ban by City Council would be cast.<sup>32</sup> Along with a few other city councillors who stopped by the protest,

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<sup>29</sup> Bill 73, *Raves Act*, supra note 28 and see City of Toronto, “Establishment of Late Night Entertainment Event Protocol (Including Raves) and Co-ordinated Response to Inquest Recommendations into the Death of Allen Ho” (adopted December 1999).

<sup>30</sup> See e.g. their “Press Release to Battle the Bill” that was workshopped with Toronto’s electronic dance music community on the *Tribe Magazine* forum: Kit-Kat, “Press Release to Battle the Bill” (13 June 2000), posted in *Roll Calls*, online: Tribe <[www.tribemagazine.com/board/threads/press-release-to-battle-the-bill.3128/Tribe Magazine](http://www.tribemagazine.com/board/threads/press-release-to-battle-the-bill.3128/Tribe%20Magazine)>. See also, for example, Rinaldo Walcott, “Everyone has the Right to Party”, *The Globe and Mail* (26 July 2000), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>31</sup> ioppi29, “idance - a documentary (temp.) PART 1 of 2” (13 December 2006), online: YouTube <[/youtu.be/iI6La8iBrOk](http://youtu.be/iI6La8iBrOk)>; ioppi29, “idance - a documentary (temp.) PART 2 of 2” (12 December 2006), online: YouTube <[youtu.be/XzDsV1t\\_2NA](http://youtu.be/XzDsV1t_2NA)>.

<sup>32</sup> Gay Abbate & Ravi Ubha, “Ravers Rally on Eve Before Council Vote”, *The Globe and Mail* (2 August 2000), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>; “Thousands Dance at Rave Protest”, *CBC News* (2 August 2000), online: <[www.cbc.ca](http://www.cbc.ca)>.

City Councillor Olivia Chow (who would run for Mayor years later) was also in attendance and spoke in support of the protestors' cause.<sup>33</sup>

Bans like Bill 73 were also introduced or considered in other cities across Canada in the years that followed, inspired part by the inquest into the death of Allen Ho and the 147-page report recommendations generated after the inquest.<sup>34</sup> Protests against these kinds of restrictions on electronic dance music culture were not limited to Toronto either. There were similar protests for similar reasons occurring around the same time in, for example, Edmonton, Alberta, where the Right to Dance Coalition organized a protest dance in front of Edmonton City Hall for June 24, 2001 to protest Edmonton's proposed "rave by-law" that limited all-ages electronic dance music events and raves by banning those under 18 years of age from attending even where no alcohol was being served or for sale.<sup>35</sup>

Less than a year before Government would be destroyed, the electronic dance community again under threat as the city faced pressure for a new ban on raves. In April 2014 a motion was introduced by City Councillor Giorgio Mammoliti to ban electronic dance music events from Toronto's city-owned buildings on Canadian National Exhibition (CNE) grounds, something that again drew on the inquest into the death of Allan Ho.<sup>36</sup> The CNE's board had voted in favour of

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<sup>33</sup> Abbate & Ubha, *supra* note 32; "Thousands Dance at Rave Protest", *supra* note 32.

<sup>34</sup> Office of the Chief Coroner, Ontario, "Report on the Inquest into the Death of Allen Ho" (October 2001); Phil Fearon, Edmonton Planning and Development, "Report for Executive Committee" (Report on Proposed Rave Bylaw and Recommendations for Amendments to License Bylaw 6124) (12 March 2001) [Fearon, 2001]; Phil Fearon, Edmonton Planning and Development, "Report for Executive Committee" (Report on the Status of the Proposed 'Rave Bylaw' (B Smith)) (31 July 2000) at 6 [Fearon, 2000]; Canada, "Raves – By-law Effectiveness" (July 2002).

<sup>35</sup> See e.g. Fearon, 2000, *supra* note 34 at 6; "Rave By-law Debate", *CBCNews* (15 June 2001), online: <[www.cbc.ca](http://www.cbc.ca)>.

<sup>36</sup> Anna Kinastowski, City Solicitor, "Electronic Dance Music Concerts – Supplementary Report – Appendix F", *Staff Report Action Required* (17 June 2014); Jane Gerster, "City Bans Electronic Dance Music Events from Exhibition Place", *thestar.com* (11 April 2014), online: <[www.thestar.com](http://www.thestar.com)>; Clare Shrybman, "Toronto's Electronic Dance Music Community Calls Foul After Exhibition Place Ban", *National Post* (16 April 2014), online: <[news.nationalpost.com](http://news.nationalpost.com)>.

the ban, leading up to Councillor Mammoliti's introduction of the motion.<sup>37</sup> However the ban was overturned by City Council that same May when "[t]he vast majority on [city] council agreed that targeting a specific subculture is absurd,"<sup>38</sup> even though many of these same city councillors "have long encouraged a subtler and more systematic battle against dance music when it comes to venues in their own wards"—whether these battles have manifested as dance floor moratoriums, zoning by-law issues, noise restrictions and complaints, nearly insurmountable entertainment licensing hoops, and difficulty attaining liquor licenses or "Special Occasion Permits" for pop-up events in unconventional venues.<sup>39</sup>

### **B) Government's Closing Days and the Drum 'n' Bass Subculture Post-Closure**

The closure of Government took place over a few months with different closing parties to commemorate the end of the different nights hosted by the various groups and production companies from both the present and the past who had thrown events at Government as well as the various closing parties to commemorate each of the different spaces within the Government/Kool Haus complex. Each had a similar forlorn and emotional but defiant aesthetic. Many international DJs who had played Government over the years were brought in over the final months for one final set and they each paid their respects to the club, its sound system, and

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<sup>37</sup> Gerster, *supra* note 36; Jennifer Pagliaro, "Council to Hear Motion to Reverse Ban on Electronic Music Events at Exhibition Place", *thestar.com* (5 May 2014), online: <[www.thestar.com](http://www.thestar.com)>; James Armstrong & Mark McAllister, "Exhibition Place Ban on Electronic Music Events Prompts Backlash", *Global News* (17 April 2014), online: <[globalnews.ca](http://globalnews.ca)>; Ben Spurr, "Council Overturns Ban on Electronic Dance Parties", *Now Toronto* (8 May 2014), online: <[nowtoronto.com](http://nowtoronto.com)>.

<sup>38</sup> Benjamin Boles, "Fight for Your Right to Party", *NOWToronto* (15 May 2014), online: <[nowtoronto.com](http://nowtoronto.com)> [Boles, "Fight"]; Gerster, *supra* note 36; Pagliaro, *supra* note 37; James Armstrong & Mark McAllister, "Exhibition Place Ban on Electronic Music Events Prompts Backlash", *Global News* (17 April 2014), online: <[globalnews.ca](http://globalnews.ca)>; Ben Spurr, "Council Overturns Ban on Electronic Dance Parties", *Now Toronto* (8 May 2014), online: <[nowtoronto.com](http://nowtoronto.com)>.

<sup>39</sup> Boles, "Fight", *supra* note 38; Benjamin Boles, "Toronto's War on Dancing: DJ Culture Facing Attacks from Right and Left at City Hall", *HuffPost Music, Canada* (5 June 2014), online: <[www.huffingtonpost.ca](http://www.huffingtonpost.ca)>; Ben Spurr, "Parkdale Hit with Bar Ban", *Now Toronto* (2 November 2012), online: <[nowtoronto.com](http://nowtoronto.com)>; Anna Mehler Paperny, "Toronto Councillor Defends Move to Quiet Queen West", *The Globe and Mail* (23 December 2009), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>. See also Shawn Jeffords, "Vaughan in Legal Fight with Bar" *Toronto Sun* (10 October 2012), online: <[www.torontosun.com](http://www.torontosun.com)>; Kirk Makin, "Nightclub Sues City for Harassment" *The Globe and Mail* (9 March 2009, updated 10 April 2009), online: <[www.globeandmail.com](http://www.globeandmail.com)>.

the community that was generated within its walls, many noting how Government would be missed on the international DJ circuit as a favourite place to perform.<sup>40</sup> These DJs also explained to the attendees how they were lucky to have experienced a space like Government and a community like the one that was present within the space.<sup>41</sup>

As explained previously, the drum ‘n’ bass scene in Toronto that found a home at Government was an especially vibrant musical community full of new music and new DJs working to bring the sound from the UK to Canada, and growing exposure for the subgenre of music by cultivating a tightly knit following and community base for local events, shows, music stores, and radio shows that showcased drum ‘n’ bass.<sup>42</sup> The drum ‘n’ bass community was also successfully providing space for artists to develop and generating local drum ‘n’ bass DJs, a sound, and music that were being picked up and acknowledged around the world.<sup>43</sup>

Despite the blow the community suffered with the loss of Government and the Kool Haus space as one its primary venues and community spaces, along with countless other venues over the years, the scene has managed to stay afloat with many committed followers both new and old—newcomers to the scene who frequent the parties with no age restrictions and where no liquor is served as well as newcomers who frequent shows at licensed venues, in addition to those who have been in the scene for awhile but now maybe have children or other conflicting

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<sup>40</sup> See e.g. Gabriel & Dresden, Statement at “One Last Time: Boxing Day Party” (26-27 December 2014); MC GQ, Statement at “The Next Chapter” at Kool Haus (5-6 December 2014).

<sup>41</sup> *Ibid.*

<sup>42</sup> A short profile of the drum ‘n’ bass scene in Toronto was created in 1998 by City-TV’s “The New Music” (a weekly music and culture show that existed between 1979-2008) that featured DJs Marcus Visionary (who is still very active in the scene and remains a key driving member of the drum ‘n’ bass community in Toronto), DJ Freedom, Chocolate, Metro Breaks, Sniper (who still headlines Toronto drum ‘n’ bass events), Mystical Influence (Sniper’s brother and who still also DJs many Toronto drum ‘n’ bass shows), Dave Whalen, Medicine Muffin, among others: City-TV, “Toronto Jungle / Drum & Bass TV special featuring Visionary, DJ Freedom, Metro Breaks” (23 December 2011), online: YouTube <[youtu.be/1tghlmNxQPM?list=RD1tghlmNxQPM](https://youtu.be/1tghlmNxQPM?list=RD1tghlmNxQPM)>. This video captures what Toronto’s drum ‘n’ bass music, scene, and community were like during the time that it was flourishing and taking hold in Toronto.

<sup>43</sup> See e.g. *ibid* as well as the signing of Toronto’s Marcus Visionary to the well-known Digital Soundboy label by London, England drum ‘n’ bass DJ and producer Shy FX.

commitments that make it hard to attend events regularly, but will nonetheless still come out for Toronto's big drum 'n' bass events like the annual BassWeek festival.

As the organizers for BassWeek describe the event on their Facebook page:

Join us for the ... annual BassWeek and you will enjoy a week+ celebration of bass music and culture. Since the early 90's, Toronto has had the reputation for having the best drum & bass and break beat events in North America. The biggest names in the genres always ensured they had Toronto on their tours and constantly praised the dedication and energy of the fans. The recent rise of dubstep has only heightened and expanded this tradition. BassWeek is a chance to showcase the finest talent from around the world all in one week of dedicated bass-crazy parties in the city's best venues. It's also your opportunity to connect with thousands of bass music fans from around the region and enjoy what is quickly becoming THE bass music event in the world!<sup>44</sup>

While BassWeek used to be intimately connected to the Government space, like other drum 'n' bass production companies in Toronto, they have turned to holding their shows at a variety of smaller venues from concert halls, to mainstream nightclubs, to abandoned warehouse spaces where they are still available in locations like the Junction neighbourhood in Toronto, and so on. Key figures in the Toronto drum 'n' bass scene like Marcus Visionary, who were also central back when my teenage self had listened with fascination to the tales of Toronto's famed drum 'n' bass scene, are still involved in curating a vibrant grassroots environment for local drum 'n' bass DJs to flourish and have opportunities to perform as well as for the local drum 'n' bass community to continue to have spaces and events to attend while also bringing in a new generation of those who find a home dancing to, listening to, or spinning drum 'n' bass. International DJs who come through Toronto still remark on the vibrancy of the scene, how much they enjoy playing Toronto and the commitment and enthusiasm of the local drum 'n' bass community, and they will also often mention and reminisce about how, at one point, they had

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<sup>44</sup> BassWeek, "About", online: Facebook <[www.facebook.com/bassweek.ca/about/](http://www.facebook.com/bassweek.ca/about/)>.

played Government and lament its loss.<sup>45</sup> While the drum ‘n’ bass community continues to sustain itself, the capacity to hold large-scale events in an appropriately sized venue has decreased, and the significance of the space that a venue like Government provided for the growth and flourishing of the scene has affected the community’s capacity for growth in a manner contrary to that which would fit into Toronto’s Music City aspirations.

### **III. OTHER DISPLACEMENT THREATS AND THE IMPORTANCE OF NIGHTTIME MUSIC AND DANCE SPACES**

While nightclubs and music venues can often go unrecognized as a contributing or necessary component of a functioning city,<sup>46</sup> Government, and venues of this sort, provide a significant amount of employment opportunities in the entertainment and hospitality industry that is of interest to many of a city’s young urban citizenry.<sup>47</sup> Large cities attract people who are interested in nighttime culture and the nighttime economy—people who have aspirations of becoming involved in music, production companies, event promotion and curation, and nightclub promotion or ownership, skilled mixologists or bartenders, and so on. Many bartenders and others encountered in these industries reveal an identification with these kinds of professions as a future career trajectory, or migrate from surrounding areas to large centers like Toronto where the population base provides enough participants and a significant consumer base for vibrant nighttime economy.

Beyond musicians and DJs, nighttime venues provide employment for great deal of people—from performance art companies, dancers and circus artists, those interested in sound, stage, and light design and technology, bouncers and security staff, janitorial staff, in addition to

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<sup>45</sup> See e.g. Fabio, Statement at “Family Day Special” at Product Nightclub (15 February 2015); MC GQ, *supra* note 40.

<sup>46</sup> Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012) at 6-7

<sup>47</sup> See e.g. Shawn Micallef, “With Clubs Disappearing, Where Will Toronto Dance?”, *thestar.com* (11 April 2013), online: <[www.thestar.com](http://www.thestar.com)>.

the more visible servers, bartenders, hostesses and so on.<sup>48</sup> These employment scenarios and life patterns happen predominantly at night, in bars, with noise, and behaviour that can clash with dominant day/night use patterns, if forced to coexist with residential use within a mixed-use zone. As areas that were not previously zoned for residential use are rezoned as mixed-use areas, residential properties predominantly housing many property owners who adhere to dominant day-night life patterns, such as a job during the day, a bedtime no later than that which most noise curfews are set at, and who usually rise between the morning hours of 5 to 8 am, can clash with entertainment and music uses and employment within the same mixed-use zone.<sup>49</sup>

Without diminishing the relevance of dealing with these clashes and dissatisfied residents, noise, nuisance and other complaints are necessarily one-sided. Life patterns that require sleep during the day and work at night are unlikely to be able to successfully, for example, lodge a noise complaint against a loud activity happening at 2 pm. Like other shift workers or those who work unconventional hours—including doctors, nurses, cleaning staff, those who work in the 24-hour service context like call center workers, those who deliver late night food, or emergency and rescue service workers, and so on—noise that occurs during quiet-coded nighttime hours is less of a concern than it is to those who keep to dominant life/work daytime schedules. In this context, noise concerns and complaints are predominantly reserved, or only acceptable, for nighttime disturbances. As just one small example, construction noise in a residential zone in Toronto (subject to the results of the ongoing 2015-17 Chapter 591 Noise By-law Review) is generally allowed between the hours of 7am to 7pm on weekdays and 9am to 7pm on Saturdays.<sup>50</sup> This seems perfectly reasonable, but as a critical exercise, it is also

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<sup>48</sup> See also *ibid.*

<sup>49</sup> See also Hae, *supra* note 46 5-6.

<sup>50</sup> *Toronto Municipal Code*, c591, s 591-2.1(B)(1)(a), made under the *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A.

important to consider that many shift workers or those who work at night may work during the hours where quiet is imposed and then must sleep during the hours of acceptable noise. As Laam Hae asserts in her study of the gentrification of nightlife in New York, the right to the city, and the regulation of spaces of social dancing in New York City:

Cities that are supposedly culturally rich and diverse have become a site in which the rights of the privileged few whose property rights concerns and whose politicized claims to quality of life trump other rights central to the “normative ideals of urban life” such as democratic access to multiple urban spaces (including spaces of play and for use value), democratic participation by diverse individuals and groups for the production of urban space and enjoyment of diverse social/cultural life and the kinds of socialization that are unique to cities.<sup>51</sup>

Complaints about the nighttime use of venues and noise created by certain portions of the population take on a different meaning when one realizes that those whose jobs and businesses must navigate noise-creating restrictions and are threatened by noise complaints, are usually the same individuals who must sleep, with little recourse to protest, through daytime noise that is deemed acceptable by dominant society’s day/night continuum norms.<sup>52</sup> And as Hae notes in her thorough investigation of New York City’s experience, “Nightlife businesses have been targets of punitive policing, as popular rallying cries against the nuisance effects of nightlife, such as the noise, vandalism by drunk party-goers, crowding, etc. that threaten the quality of life of gentrifying, have increased.”<sup>53</sup>

While Government directly employed many people, it provided space for and served an important role for nascent, and often very young entrepreneurs, to try their hands at running a production company and curating a large musical event and production—whether they succeeded or sometimes met with failure, learned, and tried again. As we saw with the respected

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<sup>51</sup> Hae, *supra* note 46 at 6 [citations omitted].

<sup>52</sup> See also Mariana Valverde’s discussion of how dominant iterations of spatiotemporal logics in how the city is used and inhabited are reinforced by local municipal legal complexes (*Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) at 19-22).

<sup>53</sup> Hae, *supra* note 46 at 5-6.

performances within its walls and its design, it was the site of significant musical innovation, experimentation, and sound technology in honing the acoustics of the space. More importantly though, it was a space for decades for groups—for subcultural communities—to meet, to dance, and to leave social barriers behind in uniting through a common love of music. Where Iris Marion Young suggests that a socially progressive opportunity of city life arises with the “being together of strangers, diverse and overlapping neighbors,” she argues that the spaces of a city should be democratically accessible to divergent interests, communities, and individuals in order to facilitate the flourishing of diverse experiences, activities, and pleasure that take place in a city.<sup>54</sup>

The displacement of the kinds of venues where these jobs exist appears to also be at risk of what Laam Hae and Deborah Talbot identify as terms “subcultural closure” where “wilder and more experimental and culturally diverse venues” are even more likely to face displacement in the face of redevelopment projects and gentrifying processes than more orderly or more “gentrified” (or less noisy or unruly) forms of nightlife.<sup>55</sup> In examining New York City’s lost spaces for dancing and nighttime culture, Hae warns us here that:

In the gentrified streetscapes that seemingly represent the ideal of “authentic” mixed-use neighborhoods, the wilder version of nightlife often only remains as an image, as a simulacrum of the neighborhood’s sub-cultural history, wherein communities that produced this wilder nightlife and its spaces cease to exist. This again shows how Florida’s “creative city” type of policy development can ironically turn destructive towards creative sub-cultural formation in cities. This also has important consequence in social and cultural life in contemporary postindustrial cities, as citizens’ access to—and by extension, their right—diverse and experimental urban subcultures becomes increasingly limited.<sup>56</sup>

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<sup>54</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 239-40. See also Hae, *supra* note 46 at 34.

<sup>55</sup> *Ibid* at 32.

<sup>56</sup> *Ibid*.

Government attracted a different form of culture—a less orderly form—than that which is described in the planning documents for Toronto’s creative cultural waterfront and in the descriptions of the Daniels Corporation’s waterfront development and community that will replace it. As its days became numbered and online forums discussed its upcoming closure, in addition to those who were sad or upset about its closure, it also became clear that Government was increasingly no longer welcome in its space through the online comments on blog posts documenting Government’s demolition, some of which expressed in comments on the demolition posts about how it would be good when Government was gone, that surely the nearby Corus Entertainment workers did not need to see the “droves of tweakers” leaving shows at Government early the next morning, “vomiting in the parking garage and molesting your ears as you tried to leave for the day,” and that certainly there would also be less trash in the (East Bayfront) Precinct.<sup>57</sup>

Unlike noise-creating industrial companies like the Redpath Sugar Refinery across from Government (as we will see shortly), Government’s noisy, disruptive, nighttime character will have no place in the new waterfront. But the question remains then, where will the communities that frequented its space go next?

#### **IV. POST-GUVERNMENT AND THE ONGOING POST-INDUSTRIAL SHIFT: WHERE DO THE DISPLACED GO?**

##### **A) The Role of the Neoliberal and Post-Industrial Context**

In terms of how an overvaluation of the exchange-value potential of culture and cultural spaces can occur within culture-based regeneration and creative city strategies, Deborah Leslie and Norma Rantisi note that “[a]rts and culture-led regeneration efforts often privilege an

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<sup>57</sup> Jimmy (26 February 2015 at 5:28pm), comment on Derek Flack, “Demolition of Government Complex Gets Underway”, *blogTO* (26 February 2015), online: <www.blogto.com>.

instrumental understanding of culture and creativity, whereby the arts are valued mainly for their economic role.”<sup>58</sup> In this context, the neoliberalization of city planning frameworks within a post-industrializing setting has been identified as problematic in equitably balancing the exchange-value and the use-value within the city space and within spaces of culture.<sup>59</sup> As “cities have become crucial sites in the propagation of neoliberal projects, ... they expose some of neoliberalism’s most damaging flaws and contradictions.”<sup>60</sup> This can be seen within city struggles towards global city status where “Creative City” strategies are often favoured and deployed as part of post-industrial neoliberal city agendas.<sup>61</sup>

This globally identifiable trend towards a neoliberalization of city planning and regeneration strategies is certainly visible within Toronto, but it is also the case in numerous other Canadian cities.<sup>62</sup> Leslie and Rantisi explain that, by and large, “[t]he literature emphasizes

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<sup>58</sup> Deborah Leslie & Norma M Rantisi, “Creativity and Urban Regeneration: The Role of La Tohu and the Cirque du Soleil in the Saint-Michel Neighborhood in Montreal” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global perspectives* (London, UK: Routledge, 2013) 83 at 83.

<sup>59</sup> Hae, *supra* note 46 at 13; Ute Lehrer & Andrea Winkler, “Public or Private? The Pope Squat and Housing Struggles in Toronto” (2006) 33:3 *Social Justice* 142 at 144; Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 31; Ute Lehrer, “Re-Placing Canadian Cities: The Challenge of Landscapes of ‘Desire’ and ‘Despair’” in Trudi Bunting & Pierre Filion, eds, *Canadian Cities in Transition: Local Through Global Perspectives*, 3d ed (Toronto: Oxford University Press, 2006) 438 at 445-48; Ute Lehrer, “Urban Development and the Creative Class in a Neoliberal Age: Two Case Studies in Toronto” in Jenny Künkel & Margit Mayer, eds, *Neoliberal Urbanism and its Contestations: Cross Theoretical Boundaries* (Hampshire, UK: Palgrave Macmillan, 2012) 99 at 102; Martine August, “Social Mix and Canadian Public Housing Redevelopment: Experiences in Toronto” (2008) 17:1 *Can J Urban Research*, suppl. Canadian Institute of Planners 82.

<sup>60</sup> Helga Leitner, Jamie Peck & Eric S Sheppard, “Preface” in Helga Leitner, Jamie Peck & Eric S Sheppard, eds, *Contesting Neoliberalism: Urban Frontiers* (New York: The Guilford Press, 2007) vi at ix.

<sup>61</sup> See e.g. Leslie & Rantisi, *supra* note 58 at 83; Tom Hutton & Catherine Murray, “The New Cultural Economy and its Discontents: Governance Innovation and Policy Disjuncture in Vancouver” in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global perspectives* (London, UK: Routledge, 2013) 141 at 143ff.

<sup>62</sup> Toronto (and Ontario in general) presents is a good example of a thoroughly neoliberalized housing sector, see e.g. August, *supra* note 59 at 93. Cf Damaris Rose, who has argued that Montreal is unique among Canadian cities in its comparative escape from neoliberal influences in both its municipal policies as well as its regeneration initiatives (“Discourses and Experiences of Social Mix in Gentrifying Neighbourhoods: A Montreal Case Study” (2004) 13:2 *Can J Urban Research* 278 at 288-89). Although recent development around the Place des Arts arts district and St Catherine’s East, as well as more recently the St. Henri neighbourhood, indicate that the tides may also be taking a more significant neoliberal turn here (see e.g. Michelle Lalonde, “Tension Boils Over in St Henri”, *Montreal Gazette* (27 May 2015), online: <montrealgazette.com>; “St Henri Vandal Attacks Seen as a Response to Gentrification”, *CTV Montreal* (25 May 2015), online: <montreal.ctvnews.ca>). See also Anne Becker & Markus-

how creative city strategies fit into existing neoliberal agendas, promoting gentrification and the displacement of working class, ethnic, and racially marginalized populations, and in many cases the displacement of the creative ecology that gave rise to these areas in the first place.”<sup>63</sup> But Leslie and Rantisi importantly remind us that, in order to truly engage with city redevelopment and its current reliance on Creative City agendas, it is nonetheless “important to examine the range of objectives that inform creative city policies and interrogate their implications for local communities.”<sup>64</sup>

Even while “the literature emphasizes the mostly negative dimensions of creative city agendas, some authors point out that a variety of rationales underpin creative city agendas and suggest that there is potential for democratic and socially progressive outcomes.”<sup>65</sup> It is this kind of examination and interrogation that Toronto’s Creative-City oriented strategies and the legal frameworks within which they are structured and deployed that is needed in order to consider the effects of current and developing cultural management policies on Toronto’s local communities, non-dominant communities, subcultural and countercultural communities, and their community cultural wealth and the use-value of their associated cultural spaces.

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Michael Müller, “The Securitization of Urban Space and the ‘Rescue’ of Downtown Mexico City: Vision and Practice” (2013) 40 *Latin American Perspectives* 77 at 78-79.

<sup>63</sup> Leslie & Rantisi, *supra* note 58 at 83 [citations omitted]; Johannes Novy & Clair Colomb, “Urban Tourism and Its Discontents: An Introduction” in Johannes Novy & Clair Colomb, eds, *Protest and Resistance in the Tourist City* (Abingdon: Routledge: 2017) 1 at 9.

<sup>64</sup> Leslie & Rantisi, *supra* note 58 at 83. See also Goldberg-Miller, *supra* note 6.

<sup>65</sup> *Ibid* [citations omitted]. For a good example of a progressive and well-planned initiative, see e.g. Leslie & Rantisi’s study of “the role of La Tohu and the Cirque du Soleil in the Saint-Michel neighborhood of Montreal,” (*supra* note 58). Leslie & Rantisi also point to a number of other examples for reference. See also Carl Grodach & A Loukaitou-Sideris, “Cultural Development Strategies and Urban Revitalization” (2007) 13:4 *International Journal of Cultural Policy* 349; A Markusen & A Gadwa, “Arts and Culture in Urban or Regional Planning: A Review and Research Agenda” (2010) 29:3 *Journal of Planning Education and Research* 379; H Mommaas, “Cultural Clusters and the Post-Industrial City: Towards the Remapping of Urban Cultural Policy (2004) 41:3 *Urban Studies* 507. But also, cf George Morgan & Xuefei Ren, “The Creative Underclass: Culture, Subculture, and Urban Renewal” (2012) 34:2 *Journal of Urban Affairs* 127.

In this context, Toronto's waterfront redevelopment provides a good example of the society-wide transition from industrial space to post-industrial space within neoliberal-leaning city redevelopment strategies.<sup>66</sup> It also serves as an example of what this shift can look like, and who and what is displaced, when the shift is designed in a consumerist-oriented, albeit "creative", fashion where land uses along Toronto's waterfront may respond to consumer demand but, as Sanderson and Filion suggest, has also been "instrumental in the widespread adoption of consumerist lifestyles. Travel, culture, and recreation, towards which many of the new waterfront activities are oriented, figure prominently among features of spreading post-industrial lifestyles."<sup>67</sup>

### **B) Rebel on the Waterfront**

After the demolition of Government and Kool Haus, one other venue suited for large-scale music events remained nearby in the Port Lands Precinct. Sound Academy (formerly The Docks), with a capacity of over 3,000, was left as the only music venue of a similar size. The same individual behind the Government, Charles Khabouth and his company Ink Entertainment, held a majority stake in Sound Academy. Unlike Government though, Sound Academy had a much less desirable public reputation for the quality of its sound system, production capabilities, and bad sightlines for concerts. Also distinct from Government's situation, the redevelopment of the Port Lands Precinct is in a much earlier stage than the East Bayfront Precinct.<sup>68</sup> With the void Government left behind, and considering the popular negative perceptions of Sound Academy, Khabouth temporarily closed Sound Academy in January 2016, less than a year after

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<sup>66</sup> Christopher Sanderson & Pierre Filion, "The Development of the Toronto Waterfront: Federal Presence, Institutional Complexity, and Planning Outcomes" in Michael C Ircha & Robert Young, eds, *Federal Property Policy in Canadian Municipalities* (Montreal: McGill-Queen's University Press, 2013) 110 at 139.

<sup>67</sup> *Ibid* at 140.

<sup>68</sup> Toronto City Planning, "Port Lands Planning Framework: Land Use Direction" (5 June 2014) ["Port Lands Planning Framework"].

Government was demolished, in order to carry out substantial renovations and address some of Sound Academy's deficiencies.<sup>69</sup> The new club and rebranding effort, Rebel, opened in the Fall of 2016.<sup>70</sup>

Considering Government's eventual displacement by Toronto's ongoing waterfront development, along with the either existing or imminent redevelopment plans for the Port Lands and Don Lands, it remains to be seen how much longer Rebel has before it is also no longer welcome within the new neighbourhood it will eventually find itself.<sup>71</sup> Not only is Rebel's property attractive for mixed-use redevelopment interests as the other portions of waterfront redevelopment close in, and not only does it boast a stunning view of Toronto's skyline, but the music venue has a history of noise complaints, even though it currently has no residential neighbours in its immediate proximity.

From the mid to late 2000s, Rebel's former iteration as the Sound Academy, then known as the Docks, fought a series of well-publicized battles with residents of the relatively nearby (about just under a kilometer across the water) Ward's Island over about ten years of noise complaints.<sup>72</sup> While the club increased its soundproofing in response and changed the hours its

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<sup>69</sup> Kevin Ritchie, "Sound Academy Gets a Do-Over", *Now Toronto* (14 December 2015), online: <nowtoronto.com>; Nick Patch, "The Sound Academy has been Guttled to Serve You Better", *thestar.com* (17 June 2016), online: <www.thestar.com>.

<sup>70</sup> See e.g. Kevin Ritchie, "Goodbye Sound Academy, Hello Rebel", *Now Toronto* (25 August 2016), online: <nowtoronto.com>.

<sup>71</sup> "Port Lands Planning Framework", *supra* note 68; "Port Lands Acceleration Initiative", online: <www.portlandsconsultation.ca/node/16>; Director, Community Planning, Toronto & East York District. "Lower Don Lands Official Plan Amendments and Keating Channel Precinct West Zoning By-Law – Final Report", *Staff Report Action Required* (11 August 2010).

<sup>72</sup> Saeed Hydaralli, "What is Noise? An Inquiry Into its Formal Properties" in Michael Goddard, Benjamin Halligan & Paul Hegarty, eds, *Reverberations: The Philosophy, Aesthetics and Politics of Noise* (London, UK: Continuum, 2012) 219 at 228-32; Patch, *supra* note 69; Egle Procuta, "In the City: The Sound and the Frustration", *The Globe and Mail* (14 July 2000), online: <www.theglobeandmail.com>; Kevin Ritchie, "Rebel Resurrects Battle Over Noise on Toronto's Waterfront," *NOW Toronto* (3 February 2017), online: <nowtoronto.com/music/features/rebel-liquor-licence-waterfront-toronto>; Nicole Baute, "Island vs Club Feud Fizzles", *thestar.com* (4 July 2008), online: <www.thestar.com>.

music is played in 2007,<sup>73</sup> Ward's Island is nowhere near as close as the new mixed-use developments will be, such as the proposed redevelopment for the Victory Soya Mills<sup>74</sup> (the same area where Toronto's "Tent City", home to hundreds of homeless individuals, was located from the late nineteen-nineties until eviction by the then-property owner Home Depot in 2002).<sup>75</sup> And as responses to Government's presence within the newly recharacterized and rezoned mixed-use and residential East Bayfront Precinct demonstrated, it is not just the sounds from a nighttime establishment that can be problematic, it is the presence and activity of individuals in the space at night that leads to clashes with dominant day/night life patterns within the new close quarters these divergent life patterns now find themselves.

### **C) Put Them "Down by the Docks" or "Over by the Railroad Tracks"**

If music venues continue to be displaced, where should the members of a music community within a city like Toronto go if they want to listen to music or dance during the nighttime, evening hours of the day/night continuum? As marginal and unwanted spaces in the city, old industrial land, and underused Employment Industrial Zones are "retaken" by a city's redevelopment projects and spaces become desirable and commodifiable for commercial redevelopment and to those able to and interested in property ownership and commercial redevelopment in the area, there are increasingly less places in the city for subcultural music and dance spaces to exist. Decreasing availability and affordability of subcultural music, dance, art, and performance space is exacerbated by an unwelcoming environment within certain

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<sup>73</sup> Kenyon Wallace, "From Party Central to Good Neighbour," *The Globe and Mail* (21 December 2007), online: <beta.theglobeandmail.com>; Patch, *supra* note 69; Baute, *supra* note 72; "Liquor Licence Application Powerhouse Corporation currently operating as Polson Pier - 11 Polson Street - Licence Number 804501 by Councillor Pam McConnell, seconded by Councillor Paula Fletcher", Member Motion MM7.23 (2015), online: <www.toronto.ca/legdocs/mmis/2015/mm/bgrd/backgroundfile-81252.pdf>.

<sup>74</sup> See "Victory Soya Mills Silo Master Plan", SvN (website), online: <svn-ap.com/projects/victory-soya-mills-silo-master-plan/>

<sup>75</sup> For an excellent account of life in Tent City see Shaughnessy Bishop-Stall, *Down to This: Squalor and Splendour in a Big-City Shantytown* (Canada: Vintage Canada, 2005).

neighbourhoods, exemplified by NIMBY (Not-In-My-Backyard) sentiments, especially when a city's legal frameworks—liquor licensing, zoning, noise legislation, and so on—do not effectively balance, let alone encourage, protect, or value, the interests of a city's music venues and music communities. These types of sentiments tend to eschew the inconvenience of welcoming or maintaining a local music venue and music and dance subcultural community based on the rationale that they would be better placed elsewhere, within someone else's neighbourhood or space in the city. A scenario that exemplifies this played out at the February 13, 2017 meeting of the Toronto Music Advisory Council at City Hall.

As discussed previously in Chapter 3, the February 13<sup>th</sup> meeting was originally intended to focus on the rapid onslaught of music venue closures that took place at the beginning 2017 in order to discuss potential steps towards protecting these music venues and, at least, curb further losses. While many members of Toronto's music community had been mobilized to attend the meeting and make deputations, a few people also turned out to make deputations *against* the attempts to *reopen* one of Toronto's historic music venues—The Matador, which had been closed for seventeen years. While the meeting attendees—both members of the Toronto Music Advisory Council as well as members of displaced music communities—tried to discuss how to halt the increase in lost music venues, a large portion of the meeting ironically wound up being monopolized by a small galvanized group of individuals from the Dufferin Grove neighbourhood who consecutively spoke at length about how much they did not want this music venue to reopen in their backyard. That is, unless it were operate more akin to a low-capacity event center, preferably without a liquor license, and with closing hours safely shy of midnight. The owner of the (dormant) Matador music venue was also in attendance to provide a deputation that questioned the veracity of Toronto's Music City strategy and commitment to solving the

vanishing music venues problem when his efforts to reopen The Matador were consistently met with barriers and conditions via bureaucratic red tape, ongoing licensing and zoning issues, and the vocal protest of those who had moved into the area surrounding the Matador.

The Toronto Music Advisory Council had absolutely no role or power in the decision as to whether The Matador would ultimately open, so the vocal attendance of those opposing The Matador's reopening remained entirely counterproductive, and some Council members became noticeably frustrated with the ongoing depositions against The Matador, as they provided no contribution to the principle agenda item on the table regarding how to better protect existing music venues. At one point, well into the meeting when another public attendee from the neighbourhood surrounding The Matador again began to speak out against the venue, one of the Council members pointedly asked the speaker where nighttime music venues and their attendees should go. To this, the speaker responded that a good place for these people and spaces to go would be "down by the docks" or "over by the railroad on Dupont"—which caused a noticeable murmur of protest from music community members in attendance.

Beyond the prejudice underlying these kinds of comments, as we can see, "the docks" no longer accommodate the existence of venues like the Guvernment, or where venues like (formerly) The Docks (currently Rebel), which are located "down by the docks" have been shut down in the past due to noisy disruptive effects on communities that are no longer so distant. As for the "railroad" the speaker referred to, it is located in the Geary Avenue area, which had in fact been the site for a growing number of DIY (Do-It-Yourself) music venues and transgressive DIY music culture and community.<sup>76</sup> But the area continues to be zoned as an E2 Employment Industrial Zone (Zoning By-law 569-2013), and specifically, is zoned for "Performing Arts

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<sup>76</sup> See e.g. Stuart Berman, "Geary Ave: The Secret Life of an Ugly Street", *thestar.com* (4 February 2015), online: <[www.thestar.com](http://www.thestar.com)>.

Studios” for dance, theater, and show rehearsals—a zoning category that does not currently include music and music performance space and use.<sup>77</sup> Furthermore, this area “over by the railroad on Dupont” has also already felt the effects of encroaching residential developments via noise complaints.

These noise complaints in relation to a couple of Geary Avenue venues eventually led Municipal Licensing and Standards Officers to visit the area on March 17, 2015 and issue by-law infraction notices due to the particular zoning of the area noted above, which does not allow for “nightclubs” or “entertainment facilities”, which is what music output during evening hours with accompanying audience attendance (often supplemented with dancing) would appear to fall under.<sup>78</sup> This by-law effectively outlaws live music on the street “over by the railroad on Dupont”, has already led to the temporary or permanent closure of a number of the music venues located there, and has begun the dismantling of the nascent music community that had begun to grow there.<sup>79</sup> But no member of the Council was able to cite these situations in reply. While a few members of the Council commented in vague protest of this speaker’s comments, the comment were largely left hanging in the air as Council members tried to move on with the meeting and avoided commenting specifically on the remark—thus perpetuating the acceptance of marginalizing treatment of music and nighttime culture in Toronto even though the comments were made in the presence of the precise arm of Toronto’s Music City framework designed to champion the cause of music in Toronto and advocate for music community members.

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<sup>77</sup> City of Toronto, By-law No 569-2013, *Zoning By-law* (19 August 2014); Interview of Tammy Robinson (City of Toronto) in Aubrey Jax, “Geary Avenue Music Scene Under Threat Due to Red Tape” (17 April 2015), *blogto* (blog), online: <[www.blog.to](http://www.blog.to)>.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* Toronto Radio Project, “Music City Town Hall Meeting Streamed Live on TRP” (25 April 2015) TRP Archives, online: [Mixcloud <www.mixcloud.com/trparchives/music-city-town-hall-meeting-streamed-live-on-trp>](http://www.mixcloud.com/trparchives/music-city-town-hall-meeting-streamed-live-on-trp); Benjamin Boles, “Music City Town Hall Highlights Tension between Council and the Music Community: Could This be the Beginning of a Positive Dialogue”, *NOWToronto* (27 April 2015) online: <[nowtoronto.com](http://nowtoronto.com)>.

**D) Desiring the Undesirable: The Post-Industrial Shift, Creative Placemaking, and Zoning**\*

For years, musical subcultures were often able to sidestep a lack of acceptance or unequal treatment by municipal legal governance frameworks and related zoning by-laws and planning legislation by occupying unwanted and undesirable space—the areas of the city characterized by abandoned warehouses and factories, such as “the dock” and “railroad” areas mentioned by the speaker at the February 13<sup>th</sup>, 2017 Toronto Music Advisory Council meeting. While this worked for awhile and helped numerous groups establish rich communities, cultures, spaces, and practices, the post-industrial shift has put these formerly undesirable spaces back on the map of desirable space as cities strive to “reclaim” their industrial past. Cities seeking to “take back” zones formerly dedicated to industry and factory space are increasingly turning towards rezoning them to accommodate residential use and space for those able to afford the newly attractive commodified authenticity of post-industrial spaces transformed and branded by mixed-use development projects into urban playgrounds like that which is replacing the Government. This shift has placed those formerly using the abandoned, gritty, unwanted spaces at risk of being pushed out, priced out, and becoming again unwelcome.<sup>80</sup>

As San Francisco Cultural Affairs Director Tom DeCaigny explains:

The one thing we know is that urbanization is on the rise around the globe. So more and more people are moving into cities because they want the arts and culture the city has to offer, but land becomes more valuable. So it’s about how we create pathways of ownership for artists and arts organizations so they’re not forced to deal with the broader markets that tend to be more aggressive than artists can afford.<sup>81</sup>

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\* © Sara Ross. Parts of Subsection D were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 Western Journal of Legal Studies, art #5.

<sup>80</sup> Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford: Oxford University Press, 2010) at x-xiii, 3-4, 23-24, 111-12.

<sup>81</sup> Interview of Tom DeCaigny by Cy Musiker (27 November 2015) in “How to Keep a City’s Economic Growth from Destroying its Cultural Soul?”, *KQED Arts*, online: <[www.kqed.org](http://www.kqed.org)> [Interview of Tom DeCaigny]

While many of these transgressive or disruptive cultural spaces, and the use of these neglected spaces and warehouses of the city, may have been permanent or semi-permanent in nature even though the space was unowned, yet other subcultural community groups relied on the availability of these warehouse-type spaces on a temporary or rotating basis. These kinds of use patterns are even harder to protect or preserve due to their impermanence and transience, but nonetheless serve an important role in providing affordable space for production companies, young entrepreneurs, musicians, and other subcultural actors. In this context, it becomes even more important to preserve the remaining permanent types of welcoming and affordable music spaces—such as what Government provided—that can still be accessed for events by these groups.<sup>82</sup>

## **V. TORONTO'S WATERFRONT DEVELOPMENT**

Toronto's Lake Ontario billion-dollar waterfront redevelopment, which encompasses the area where Government was located, is a particularly fertile project for examining how cultural policy-making is designed and is playing out in Toronto,<sup>83</sup> and especially relevant to the present project in that it also engages (largely unintentionally and rather counterproductively) with Toronto's Music City initiative. It is also one of the largest post-industrial redevelopment initiatives in North America and illustrative of a bigger trend where post-industrial cities around the world are not only turning to culture to reconfigure their development plans and policies but also turning to waterfront spaces as ideal for newly developed culture-based redevelopment strategies.<sup>84</sup> As I noted in Chapter 3, this trend is not exclusive to larger cities, but also smaller

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<sup>82</sup> See also "World Cities Culture Report 2015", *World Cities Culture Forum*, online: <[www.worldcitiescultureforum.com](http://www.worldcitiescultureforum.com)> at 20.

<sup>83</sup> James Thomas White, *Pursuing Design Excellence: Urban Design as Public Policy on Toronto's Waterfront, 1999-2010* (PhD Thesis, University of British Columbia, 2013) at ii [unpublished].

<sup>84</sup> See also *ibid* at ii; Matt Patterson & Daniel Silver, "Turning the Post-Industrial City into the Cultural City: The Case of Toronto's Waterfront" in Kate Oakley & Justin O'Connor, eds, *The Routledge Companion to the Cultural Industries* (London, UK: Routledge, 2015) 268 at 268-69.

centers and towns in Ontario along lakes or rivers with old mills, grain elevators, and so on. As Matt Patterson and Daniel Silver describe, “Urban waterfronts have historically been important regional nodes of commerce, production, and public life and the subject of overlapping jurisdictions and intense political conflict. Their development or decline provides a window into how cities organize priorities, *mediate competing interest*, and define their collective identities.”<sup>85</sup> Of particular interest is how Toronto has mediated competing interests within the waterfront space.

The enthusiasm with which waterfront redevelopment has been approached in Toronto is apparent in *Our Toronto Waterfront!—The Wave of the Future*, the key document to accompany the launch of the renewal project in November 1999.<sup>86</sup> The document proudly announces Toronto’s waterfront as “The Place Where Magic Begins”, and further presents it as a panacea with exuberant declarations like: “Great cities dream great dreams. Great waterfronts make dreams come true.”<sup>87</sup> The document goes on to describe Toronto’s waterfront as “the most precious land in the city” and the potential it carries for being “transformed into the most dynamic area in North America”, and promises that “Toronto’s waterfront will offer something for everyone. A place to play, work and live.”<sup>88</sup> It also alludes to the post-industrial rebranding strategy that underlies the focus Toronto’s policies now place on culture: “With a renewed waterfront, ‘the city that works’ will be transformed into ‘the city that astonishes.’”<sup>89</sup>

**A) Mapping the History and Space of Government, Redpath Sugar Refinery, Corus Entertainment, and the Waterfront**

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<sup>85</sup> *Ibid* at 272 [emphasis added].

<sup>86</sup> City of Toronto. “Our Toronto Waterfront! The Wave of the Future” (1999).

<sup>87</sup> *Ibid* at 1. See also White, *supra* note 83 at 109.

<sup>88</sup> “Our Toronto Waterfront!”, *supra* note 86 at 1-2.

<sup>89</sup> *Ibid* at 3.

Toronto's waterfront redevelopment in this area is divided into three main sections: the Don Lands, the East Bayfront Precinct, and the Port Lands. The balance between public and private ownership within each precinct varies. The Don Lands are nearly 100% government controlled, while the Port Lands are 80% government controlled, and the East Bayfront is only 40% government controlled.<sup>90</sup>

Until its demolition in early 2015, Government was located in the East Bayfront Precinct along Toronto's Lake Ontario waterfront—an area currently in the midst of redevelopment as part of Waterfront Toronto's *East Bayfront Precinct Plan*,<sup>91</sup> which is administered by Waterfront Toronto,<sup>92</sup> incorporated into Toronto's *Official Plan*,<sup>93</sup> and governed by the *Central Waterfront Secondary Plan*.<sup>94</sup>

Waterfront Toronto (formerly known as the Toronto Waterfront Revitalization Corporation until early 2007) is an arm's length public corporation that was created in 2001 by the partnership of the Government of Canada, the Province of Ontario, and the City of Toronto—each party contributed \$500 million to the project.<sup>95</sup> The Toronto Waterfront Revitalization Corporation (TWRC) originally grew out of Toronto's failed bid launched for the 2008 Olympic

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<sup>90</sup> Toronto Waterfront Revitalization Task Force, "Toronto Waterfront Revitalization Task Force Report (Fung Report)" (2000) at 17.

<sup>91</sup> Toronto Waterfront Revitalization Corporation, (2005) City of Toronto, online: <[www1.toronto.ca](http://www1.toronto.ca)>.

<sup>92</sup> *Toronto Waterfront Revitalization Corporation Act*, SO 2002, c 28. See their website, online: <[www.waterfronttoronto.ca](http://www.waterfronttoronto.ca)>. Ute Lehrer & Jennefer Laidley. "Old Mega-Projects Newly Packaged? Waterfront Redevelopment in Toronto" (2008) 32:4 Intl J Urban & Regional Research 786 at 791.

<sup>93</sup> City of Toronto, Ontario Municipal Board, *Official Plan* (Toronto: City of Toronto, July 2006).

<sup>94</sup> City of Toronto, Ontario Municipal Board, *Central Waterfront Secondary Plan* (Toronto: City of Toronto, 2003) (approved in full by the OMB in 2007).

<sup>95</sup> Waterfront Toronto (website), online: <[www.waterfronttoronto.ca](http://www.waterfronttoronto.ca)>; *Toronto Waterfront Revitalization Corporation Act*, *supra* note 92. See also Christopher Sanderson & Pierre Fillion, "The Development of the Toronto Waterfront: Federal Presence, Institutional Complexity, and Planning Outcomes" in Michael C Ircha & Robert Young, eds, *Federal Property Policy in Canadian Municipalities* (Montreal: McGill-Queen's University Press, 2013) 110 at 135.

Games and now oversees and is the lead master planner for the waterfront redevelopment and revitalization program for its projected thirty year duration.<sup>96</sup>

The East Bayfront Precinct is the most central area of Toronto's waterfront rejuvenation plan and one of the first precincts undergoing this process. Overall, the redevelopment of Toronto's waterfront—and the rezoning that has occurred to alter the land from its industrial past to one that will accommodate mixed-use commercial and residential areas<sup>97</sup>--is one of the city's most talked about and heralded redevelopment mega-projects, and also a project where the arts, culture, and creative city redevelopment approaches in general have played and continue to play a formative and central role.<sup>98</sup>

The East Bayfront Precinct is located along the shores of Lake Ontario on its southern end. Its north side is formed by Lakeshore Boulevard and the Gardiner Expressway, and runs from Lower Jarvis Street on its western end to Parliament Street on its eastern end. These lands were initially formed through the landfilling policy carried out by the Toronto Harbour Commission, and the East Bayfront area was the final portion of the waterfront to be turned into part of the city's working port in this manner.<sup>99</sup> The objective for the waterfront at that point in time, as the Toronto Harbour Commission's 1912 Waterfront Plan expressed, was to create an

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<sup>96</sup> *Ibid* at 134-35. See further White, *supra* note 83 at 1ff. See also Jennefer Laidley, "Creating an Environment for Change: The 'Ecosystem Approach' and the Olympics on Toronto's Waterfront" in Gene Desfor & Jennefer Laidley, eds, *Reshaping Toronto's Waterfront* (Toronto: University of Toronto Press, 2011) 203.

<sup>97</sup> Lehrer & Laidley, *supra* note 92.

<sup>98</sup> Patterson & Silver, *supra* note 84 at 269, 273; Lehrer & Laidley, *supra* note 92. For additional information see the Waterfront Renewal page offered by the City of Toronto's website, online <<http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=8c48e26b1af51410VgnVCM10000071d60f89RCRD>>, the Waterfront Toronto website, online: <[www.waterfronttoronto.ca](http://www.waterfronttoronto.ca)>, and the site-specific plans for East Bayfront, online: <[www.buideastbayfront.com](http://www.buideastbayfront.com)>.

<sup>99</sup> Gene Desfor, Lucian Vesalon & Jennefer Laidley, "Establishing the Toronto Harbour Commission and its 1912 Waterfront Development Plan" in Gene Desfor & Jennefer, eds, *Reshaping Toronto's Waterfront* (Toronto: University of Toronto Press, 2011) 49; White, *supra* note 83, 184-85. See also Roy Merrens, "Port Authorities as Urban Land Developers: The Case of the Toronto Harbour Commissioners and Their Outer Harbour Project, 1912-68" (1988) 17:2 *Urban History Review* 92.

important industrial port.<sup>100</sup> While Toronto certainly held a role as a key port in North America for some time, by the second half of the 20<sup>th</sup> century, global shipping trends like containerization and increases in the size of container ships limited the international relevance of Toronto's port as the capacity of the locks of the St. Lawrence Seaway, which connects Toronto to overseas ports, could not (and still cannot) accommodate the size of modern container ships.<sup>101</sup> Even though larger vessels could be accommodated for shipping within the Great Lakes, this lessened overseas access eventually meant that by the time the 1970s came about, Toronto's port industry had moved away from the central waterfront area to the outer port and Port Lands area, or had closed, with the land becoming largely underutilized and neglected.<sup>102</sup>

To remedy this shift away from industry, a series of waterfront development visions, plans, and contentious initiatives came and went through the 1980s and 1990s, but negligible progress occurred and the East Bayfront and Port Lands remained in a state of disrepair while other portions of the waterfront became bombarded by high-density luxury condominium towers and expensive commercial office space.<sup>103</sup> The boom in this kind of development along the waterfront led to public concern and was largely halted by the City of Toronto via a moratorium as the 1990s came about, yet redevelopment along the waterfront continued to be mired in institutional and jurisdictional gridlock and remained at a standstill throughout the 1990s until

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<sup>100</sup> White, *supra* note 83 at 13; Toronto Harbour Commission, *Waterfront Plan*, 1912. See also Desfor, Vesalon & Laidley, *supra* note 99.

<sup>101</sup> White, *supra* note 83 at 13; Gabriel Eidelman, *Landlocked: Exploring Institutional Inertia on Toronto's Waterfront, 1960-2000* (Toronto: Institute of Municipal Finance and Governance, University of Toronto, 2011) at 6 [unpublished] [Eidelman, *Landlocked*]; Sanderson & Filion, *supra* note 66 at 115; "Port Lands Planning Framework", *supra* note 68.

<sup>102</sup> White, *supra* note 83 at 13; Laidley, *supra* note 96; Eidelman, *Landlocked*, *supra* note 101 at 6; "Port Lands Planning Framework", *supra* note 68.

<sup>103</sup> White, *supra* note 83 at 14-16. See also Lehrer & Laidley, *supra* note 92 at 789-91.

1999, when the tides began to turn with the launch of *Our Toronto Waterfront!—The Wave of the Future*, as mentioned above.<sup>104</sup>

The space occupied by Government was privately owned and found within the East Bayfront Precinct, although it is not part of the specific sections of land owned by Waterfront Toronto that are undergoing Toronto's planned rejuvenation. Rather, the new "Daniels Waterfront – City of the Arts" development that will replace Government is designed to complement Toronto's vision of newly rejuvenated and cleansed "creative" waterfront vision.<sup>105</sup> One must only look to the current mayor John Tory's statement at the unveiling of the plans for the new development, to see the excited blessing the private development (and developer) has received by the City:

The revitalization of our waterfront is one of Toronto's most exciting and challenging urban renewal projects. The Daniels Corporations [*sic*] vision for the former entertainment complex site [Government] is a groundbreaking project that will have a lasting cultural legacy. Not only will this site feature landmark residential and office towers, but it will also be home to student innovation and a hub for the creative industries. The project will complement the future East Bayfront community, further adding to the diversity of our waterfront while creating jobs that are central to our city's growth.<sup>106</sup>

Before its 2015 demolition, Government formed the top of what could be seen as a scalene triangle along with Toronto's waterfront at the foot of Lower Jarvis street, with the newly built Corus Entertainment building and Corus Quay almost directly across from it along

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<sup>104</sup> "Our Toronto Waterfront!", *supra* note 86; White, *supra* note 83 at 16-17; Eidelman, *Landlocked*, *supra* note 101 at 9-11, 13, 142-61.

<sup>105</sup> This includes increased mixed-use residential space, notably to attract nearby downtown office workers and creative industry workers, such as those seeking live/work spaces (see the City of Toronto's 2006 *Official Plan*, *supra* note 93, s 2.2.1). See also the City of Toronto, Culture Division, *Culture Plan for the Creative City* (Toronto: Culture Division, 2003); David Shum, "Daniels Corporation Unveils Waterfront Mixed-Use Condo Project", *Global News* (26 March 2015), online: <globalnews.ca>; Authenticity, "Creative City Planning Framework—A Supporting Document to the Agenda for Prosperity: Prospectus for a Great City" (Toronto: City of Toronto, 2008); Robert J Foster, Karen Kain & Jim Prentice, *Creative Capital Gains: An Action Plan for Toronto* (2011), online <www.torontoartscouncil.org>.

<sup>106</sup> "Groundbreaking Plans Unveiled for Daniels Waterfront – City of the Arts at Former Government Entertainment Complex" *Business Wire* (26 March 2015), online: <www.businesswire.com> ["Groundbreaking Plans Unveiled"]. See also the planning application for the Daniels Waterfront development: #14 249503 STE 28 SA for 142 Lake Shore Blvd East, online: Toronto Development Projects <app.toronto.ca>, Shum, *supra* note 105.

with Toronto's notorious Sugar Beach and its pristine white sand, lack of actual water access, and controversial thirty-six pink umbrellas/functional landscape public art pieces that cost about \$12,000 each that "creat[e] a whimsical feeling in an otherwise industrial space."<sup>107</sup>

**i. The Corus Entertainment Building**

The presence of the Corus Entertainment building along the water within the East Bayfront Precinct has a particularly troubled history, as Waterfront Toronto had previously allocated the space for a public cultural facility.<sup>108</sup> Despite an involving public consultation process and participation, and what appeared to be an effective collaboration and feedback loop between those who attended the consultations and the Toronto Waterfront Revitalization Corporation that resulted in a plan and design for the East Bayfront that seemed to address many of the ideas and concerns raised by participants, a last minute dispute over land ownership arose between the Toronto Waterfront Revitalization Corporation and the Toronto Economic Development Corporation (the City of Toronto development agency at the time) just as the Toronto Waterfront Revitalization Corporation was about to present its plans to the City of Toronto for its review in October 2005.<sup>109</sup>

As but another example of ineffective mediation between competing interests in the space, the jurisdictional overlaps and bureaucratic gridlock symptomatic of Toronto's history of waterfront redevelopment attempts,<sup>110</sup> while the City of Toronto had decided to transfer the land

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<sup>107</sup> Samantha Gileno, "It's More Than Just Umbrellas at Sugar Beach" (26 June 2014), *WATERFRONToronto* (blog), online: <blog.waterfront.ca>; Lise Rochon, "Sugar Beach: Pink Umbrellas, Green Cubes, Lingering Questions", *The Globe and Mail* (21 August 2010), online: <www.theglobeandmail.com>; Paul Maloney, "Costly Sugar Beach Umbrellas Defended", *thestar.com* (2 July 2014), online: <www.thestar.com>; Tess Kalinowski, "Sugar Beach Umbrellas Deconstructed", *thestar.com* (27 June 2014), online: <www.thestar.com>; Rosie Dimanno, "There's Nothing Sweet About Beach-less Sugar Beach", *thestar.com* (7 July 2014), online: <www.thestar.com>.

<sup>108</sup> Patterson & Silver, *supra* note 84 at 276-77.

<sup>109</sup> White, *supra* note 83 at 185-98, 222.

<sup>110</sup> *Ibid* at 16-17; Eidelman, *Landlocked*, *supra* note 101 at 9-11, 13, 142-61. See also Robert Young, "Multilevel Governance and Public Policy in Canadian Municipalities: Reflections on Research Results", (Paper delivered at the

in question from the control of the Toronto Economic Development Corporation to the Toronto Waterfront Revitalization Corporation in 2002, the terms of the land negotiation agreement between the two was still underway and threw a wrench into the development of the East Bayfront plans.<sup>111</sup> A particular sore point for the Toronto Economic Development Corporation was that the Toronto Waterfront Revitalization Corporation had gone ahead and begun developing its plans for the precinct before the resolution of the land negotiations between the two parties.<sup>112</sup> In response, the Toronto Economic Development Corporation hired a competing architectural firm to design an alternative development plan for the East Bayfront, which, as it would turn out, was very different than the one the Toronto Waterfront Revitalization Corporation had been about to present to the City of Toronto.<sup>113</sup> Instead, the Toronto Economic Development Corporation's alternative plan was based on design ideas gathered in 2002 prior to the Toronto Waterfront Revitalization Corporation's public forums and Stakeholder Advisory Committee meetings, and took no steps to engage with the information gathered during these public consultation processes.<sup>114</sup>

Ultimately, however, at the end of the day the Toronto Waterfront Revitalization Corporation was able to move forward with their plan for the precinct and present it to the City of Toronto for consideration and the City of Toronto approved the *East Bayfront Precinct Plan* on December 5<sup>th</sup>, 2005.<sup>115</sup> But, the controversy with the Toronto Economic Development Corporation was not yet over. The design of the commercial office building that now sits on

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Canadian Political Science Association in Victoria, Canada, 6 June 2013) at 7, available online: <[www.cpsa-acsp.ca](http://www.cpsa-acsp.ca)>.

<sup>111</sup> Sanderson & Filion, *supra* note 66 at 147; White, *supra* note 83 199-200. See also City of Toronto, *Toronto Waterfront Revitalization: Memorandum of Understanding between the City of Toronto, City of Toronto Development Corporation and Toronto Waterfront Revitalization Corporation* (Toronto: City of Toronto, 2006).

<sup>112</sup> White, *supra* note 83 at 200.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid* at 203-204.

Corus Quay, and was both funded and constructed by the Toronto Economic Development Corporation, wound up ignoring the key vision, principles, and one of the key design elements of the master plan for the precinct.<sup>116</sup> Further amendments were made to the zoning by-law to allow for an exclusively commercial and institutional structure, which counteracted previous amendments that allowed for mixed commercial-residential development.<sup>117</sup> In this way, the original intent for the building's design was compromised and eventually led to the Corus building as it exists today Corus Quay, and ultimately, a short-term economic development perspective was prioritized in attracting a major business into the space—the Canadian media company Corus Entertainment—over the longer term goals and interests of establishing a public cultural facility in the new space.<sup>118</sup> But at least in this case, as Matt Patterson and Daniel Silver observe, the overarching theme of culture was maintained despite the private nature of the development instead of the initial goal for a public space for culture.<sup>119</sup>

**ii. The Redpath Sugar Refinery**

The Redpath Sugar Refinery, an iconic reminder of the industrial past of this part of Toronto's waterfront, covers about 4.25 hectares and forms the farthest end of the Government/Corus/Redpath scalene triangle. Opened in 1958, it still comprises part of Toronto's working port despite the many slowly encroaching developments for the re-envisioned waterfront, and is the only marine terminal in Toronto operating outside of Toronto's main port that is located in the Port Lands Precinct (adjacent to the East Bayfront Precinct).<sup>120</sup> Redpath provides hundreds of unionized jobs and accounts for about half of the oceangoing vessels that use Toronto's port lands in a given year, in addition to comprising the majority of the

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<sup>116</sup> *Ibid* at 213-14, 219.

<sup>117</sup> White, *supra* note 83 at 213-14, 219. See also Sanderson & Filion, *supra* note 95 at 146.

<sup>118</sup> *Ibid* at 146. Patterson & Silver, *supra* note 84 at 276-77; White, *supra* note 83 at 219-20.

<sup>119</sup> Patterson & Silver, *supra* note 84 at 276-77.

<sup>120</sup> "Port Lands Planning Framework", *supra* note 68 at 7.

international cargo tonnage that passes through the port.<sup>121</sup> While Redpath operates throughout the day and night, the marine terminal itself is primarily active from about late March to December during Toronto's limited marine shipping season—the St. Lawrence Seaway as well as the Welland Canal partially freeze over during the remainder of the year. It also operates a sugar museum on the premises.

As described by a local news piece celebrating Redpath's emphatic continuation in the space, but warning of the threat posed by encroaching residential developments, like those replacing the Government:

On a waterfront teeming with condo developments and office buildings the Redpath sugar factory is hard to miss. It takes up a full city block on Queens Quay East, and giant ships from Guatemala or Brazil (it depends on the season) dock at its wharf every day to deliver thousands of tonnes of raw sugar. The hot, sweet scent of sugar processing wafts from the factory onto nearby streets, giving it a palpable presence in the area even when it's out of sight.<sup>122</sup>

Redpath is one of the stakeholders in the East Bayfront Precinct area with a history of resisting the incorporation of residential space into redevelopment plans for the precinct.<sup>123</sup> Currently, however, the industrial grit and live theater of industry that Redpath's operations provide are viewed as an attraction for developing a vibrant mixed-use community in the area,<sup>124</sup> and the East Bayfront Precinct is projected to include about 6,000 residential dwellings and 279,000 square meters of retail space.<sup>125</sup> But the close proximity of mixed-use and residential zones to active industry is not without conflicts, such as the inevitable noise of ships docking and unloading at night and, specific to the Redpath, the cloyingly sweet smell of molasses that is

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<sup>121</sup> MariNova Consulting Ltd, *Ontario Marine Transportation Study: Phase I Final Report Industry Profile and Economic Impact* (April 2009) at 9-11.

<sup>122</sup> See Megan Marrelli, "Why the Redpath Sugar Factory Isn't Going Anywhere", *Torontoist* (9 October 2014), online: <torontoist.com>.

<sup>123</sup> Eidelman, *Landlocked*, *supra* note 101 at 87.

<sup>124</sup> See e.g. Marrelli, *supra* note 122.

<sup>125</sup> "Port Lands Planning Framework", *supra* note 68 at 14.

emitted.<sup>126</sup> As opposed to Government, which also operated at night, Redpath Sugar's dissonant existence in the neighbourhood is protected as an "Existing Use Area".<sup>127</sup> In addition, the way in which new residential units are constructed and advertised must take into account the inevitability of noise beyond the usual acceptable noise restrictions of 11pm, for example.<sup>128</sup> Nonetheless, in accounting for the new developments that are taking place in the East Bayfront Precinct, Redpath has adopted citizenship commitments to the area with attention to concerns such as noise reduction measures through alterations like a new, and more quiet, hydraulics-based material handler equilibrium crane to replace its rope cranes.<sup>129</sup>

### **B) Public Consultations Leading to Waterfront Redevelopment**

Even though it would turn out that the Toronto Waterfront Revitalization Corporation's public consultation processes had less of an influence than they were supposed to, as we saw above with the Corus Quay Toronto Waterfront Revitalization Corporation /Toronto Economic Development Corporation debacle, it bears looking into these consultation processes nonetheless. In terms of the East Bayfront Precinct, the current planning processes came into effect in 2003.<sup>130</sup> The precinct's design team was hired by the Toronto Waterfront Revitalization Corporation (which became known as "Waterfront Toronto" in early 2007) and the planning process began to take shape shortly after that.<sup>131</sup> The Toronto Waterfront Revitalization Corporation had also hired Lura Consulting to head up all of their efforts to engage the public and organize public consultations, beginning with the East Bayfront public consultations.<sup>132</sup>

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<sup>126</sup> See e.g. Marrelli, *supra* note 122.

<sup>127</sup> *Central Waterfront Secondary Plan*, *supra* note 3; Marrelli, *supra* note 122

<sup>128</sup> *Central Waterfront Secondary Plan*, *supra* note 3; Marrelli, *supra* note 122.

<sup>129</sup> Certainly noise was not the sole consideration in implementing the new crane system. The new cranes are, among other things, much more efficient ("Redpath Sugar is Clearing the Dock Faster with SENNEBOGEN Equilibrium Crane", *Marketing Strategies and Solutions* (website), online: <[www.marketingstrategiesandsolutions.com](http://www.marketingstrategiesandsolutions.com)>).

<sup>130</sup> White, *supra* note 83 at 184.

<sup>131</sup> *Ibid* at 185. See also Lehrer & Laidley, *supra* note 92 at 791.

<sup>132</sup> See e.g. White, *supra* note 83 at 184-85.

These started with four bi-monthly public forums and four bi-monthly Stakeholder Advisory Committee meetings held by the Toronto Waterfront Revitalization Corporation over the seven month period from October 2003 to April 2004, and since then additional public forums and Stakeholder Advisory Committee meetings have been organized to solicit views on a range of matters pertaining to the mechanics of the redevelopment process as it occurs, including: zoning by-law amendments, the development of urban design guidelines, progress updates, and unforeseen changes that have arisen as redevelopment occurs.<sup>133</sup>

In addition to these consultations, the Toronto Waterfront Revitalization Corporation has also organized general public forums along with Stakeholder Advisory Committee meetings leading up to the major individual development projects in the precinct, like the Sugar Beach project, for example.<sup>134</sup> Despite the unfortunate turn of events with the Toronto Economic Development Corporation's alternative plan for the precinct, the TWRC had developed a significant amount of goodwill and support amongst those who had participated in its initial consultation processes.<sup>135</sup>

But it is also important to examine how these consultations were constituted, and what kind of measurable influence they had. If, as Patterson and Silver suggest, the development or decline of a city's waterfront provides perspective into how a city goes about mediating between the various interests of those invested in the space in question as well as how and what cities prioritize, then Toronto's focus in designing this "creative" and "cultural" vision for the waterfront has prioritized attracting cultural businesses and private entities like Corus

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<sup>133</sup> *Ibid* at 185-86.

<sup>134</sup> *Ibid*.

<sup>135</sup> *Ibid* at 203. But see, *ibid* at 226-27.

Entertainment into the space, post-secondary education institutions like George Brown College, and building some open, outdoor, publicly accessible space.<sup>136</sup>

While Waterfront Toronto may now be seen by some as effective in engaging the local public in consultations regarding Toronto's waterfront revitalization project, significant improvements have been made from the period between 1999-2006, which was a key formative period in shaping the *Central Waterfront Secondary Plan* and what Toronto's waterfront revitalization program looks like today.<sup>137</sup>

In terms of how various interests were mediated, Ute Lehrer and Jennefer Laidley suggest that Toronto's waterfront redevelopment project—what they term a “mega-project” that embodies neoliberal processes at work within the city—winds up benefiting only particular groups in the city.<sup>138</sup> In making this suggestion, Lehrer and Laidley refer to the public consultations and stakeholder meetings that Waterfront Toronto ran leading up to its recommendations as to how to proceed with redeveloping the space.<sup>139</sup> There were between 200 and 250 people at each public meeting.<sup>140</sup> Attendees were largely comprised of the members of local neighbourhood associations, but also included individuals involved with local government, such as city planners, as well as members of the local architectural and urban design communities and a range of local advocacy groups interested in topics as varied as heritage to cycling.<sup>141</sup> Predictably perhaps, there was also a showing of graduate students.<sup>142</sup> Even though these consultations were carried out and attracted many participants, Lehrer and Laidley argue

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<sup>136</sup> Patterson & Silver, *supra* note 84 at 272; White, *supra* note 83 at 184, 214.

<sup>137</sup> White, *supra* note 83 at 155-59, 167-68; Gabriel Eidelman, “Who's in Charge? Jurisdictional Gridlock and the Genesis of Waterfront Toronto” in Gene Desfor & Jennefer Laidley, eds, *Reshaping Toronto's Waterfront* (Toronto: University of Toronto Press, 2011) 263 at 280 [Eidelman, “Who's in Charge?”]; Laidley, *supra* note 96; *Central Waterfront Secondary Plan*, *supra* note 3; Lehrer & Laidley, *supra* note 6 at 794.

<sup>138</sup> *Ibid.* See also White, *supra* note 83 at 182-83.

<sup>139</sup> See also *ibid.*

<sup>140</sup> *Ibid* at 185-86.

<sup>141</sup> *Ibid.*

<sup>142</sup> White, *supra* note 83 at 185-86.

the participants were predominantly from the comparably affluent nearby neighbourhoods and that these consultations did not effectively engage groups who live near the waterfront in less-affluent neighbourhoods—leading, as political scientist Gabriel Eidelman has suggested, to an underrepresentation of their concerns and views regarding the development of the waterfront.<sup>143</sup>

But regardless of whether Waterfront Toronto’s public consultation processes are thought to have improved from the early 2000s,<sup>144</sup> a recurring problem that is noticeable at the public consultations (primarily relating to heritage issues) that I have attended in Toronto, is that they still do not effectively engage all of the parties affected by decisions and do not do so at the most pertinent stages in decision-making processes.<sup>145</sup> The questions asked at these meetings, even if they might be the right questions, are not necessarily reaching those the questions need to be asked of, or at the right time in order for their answers to have any weight.<sup>146</sup> There is an expressed interest at these consultations to have a diversity of both geographic-based and interest-based perspectives represented in order to develop policies and design redevelopment that is inline with a representative sampling of what the public wants, but public consultations are attended by (a) those who are able to find out that a consultation is taking place, (b) those who are able to attend, and (c) those who feel that they have something to say about the matter being consulted. There is a lot of agency required to participate in a consultation and, while this is not necessarily an unfair expectation, it does not yield a representative sampling of urban citizens affected by redevelopment decisions.

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<sup>143</sup> Lehrer & Laidley, *supra* note 6; Eidelman, “Who’s in Charge?”, *supra* note 137 at 280; White, *supra* note 83 at 182-83.

<sup>144</sup> *Ibid* at 155-59, 167-68.

<sup>145</sup> In terms of the points at which a community in question is consulted within the lifespan of a redevelopment project’s design and approval process, see e.g. Brian Hoyle, “Confrontation, Consultation, Cooperation? Community Groups and Urban Change in Canadian Port-City Waterfronts” (2000) 44:3 *Can Geographer* 228 at 237.

<sup>146</sup> See also *ibid* at 237.

If the legal complexes of a city are satisfied that the onus should be on its citizens to ensure their opinions are heard, then this is less of a concern, but if the onus is on the city to go out of its way to effectively represent the interests of various affected parties, then more must be done to engage opinions beyond the current public consultation format. For example, early in my research period, as Government was closing, the individuals who used the East Bayfront Precinct space during nighttime hours as well as the adjoining Government had not been canvassed for their views about what that part of the waterfront should be used for.<sup>147</sup> Certainly there are layers of difficulty where spaces are used at less conventional times, such as spaces like Government that were used predominantly during nighttime hours. Area observation and engagement by, for example, city employees, or those of a private consulting firm, are less likely to occur during less dominant times of the day/night continuum. Unlike Government's employees, these kinds of jobs do not usually require employee availability at 2am on a Saturday. Nevertheless, as will be discussed further in Chapter 8, it is necessary to consider the kinds of alternative and unconventional strategies that could be deployed to better engage the different portions of a city's urban citizenry in redevelopment decisions that ultimately affect the spaces they inhabit and frequent in the city and which shape their lives.

For example, a simple method of reaching community members at times when they are using the affected space in question is done within the drum 'n' bass and electronic music scene itself, whereby those looking to inform community members of an upcoming event distribute small flyers outside of venues at closing time. While currently these are used to advertise upcoming parties or that evening's afterparty, these could be used to distribute information about an upcoming consultation or a link to online participation platforms that Toronto often uses for

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<sup>147</sup> Sara Ross, "Who Wins the Waterfront: A Sociolegal Approach to Port Development, Urban Regeneration, Industry and Culture" (Paper delivered at the Canadian Law and Society Mid-Winter Meeting at Concordia University, Montreal, 17 January 2015) [unpublished].

remote citizen participation. This utilizes an existing communications pipeline within the community to access individuals who are not currently figuring within public consultation design, and does so in a manner common to the community, whereas other methods such as daytime visits to a space not frequented by these community stakeholders during the day does not effectively access them.

As Chapter 8 will address, while the serial displacement of Toronto's music spaces is the primary concern of this dissertation, alongside the lack of valuation of music spaces like Government receive in a city's redevelopment plans, as Lehrer and Laidley highlight, an intimately attached problem is the way in which community consultation processes that occur during the planning stages prior to the sanctioning of these redevelopment plans do not effectively reach out to capture the views of those affected.

### **C) Contradictory Policy Objectives and a City's "Soul"**

The lack of consideration of the existing intangible cultural heritage within the waterfront space exemplifies a lack of regulatory balancing and contradictory policy objectives.<sup>148</sup> Unlike the case of the Silver Dollar, which we will examine next, Government's creative and live music assets were not considered in the redevelopment of an area for creative purposes.

Beyond the contradictory objectives within municipal legal and governance frameworks that seek out certain forms of generated "culture" while simultaneously destroying other forms of existing and often organically-derived culture and cultural spaces, more serious consideration must be paid to the destruction of spaces of high use-value and intangible cultural heritage within

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<sup>148</sup> Robert Winthrop, "Defining a Right to Culture, and Some Alternatives" (2002) 14:2 Cultural Dynamics 161 at 174.

the city.<sup>149</sup> Without greater attention to this matter, cities like Toronto run the risk of losing the spaces where urban citizens weave their lives, cultural fabric, and derive meaning within the city. Or—as Sharon Zukin would assert—these cities run the risk of losing their soul,<sup>150</sup> which is especially the case where the “soul” of a place is far more difficult to conserve than its physical attributes.<sup>151</sup>

The sale of Government’s space occurred despite its continued financial success and popularity, the vocal protests of attendees, and the venue owner and operator’s attempts to purchase the space in order to save it—although the owner’s attempts did result in a year-long extension of Government’s lease on the space.<sup>152</sup> Government’s sale and destruction also occurred despite statements, such as the following, by the Chair of Waterfront Toronto’s Board of Directors Mark Wilson that sought to attract youth to the space: “George Brown students will help create a vibrant lakeshore community. East Bayfront will come alive with the student population living, working and socializing during the day, and in the evenings all year round.”<sup>153</sup> This culture already existed here, but appears to have been ignored as at no point in all of the consultations, planning, and assessing of these issues of vibrancy were the interests of those who vibrantly frequented the Government space publicly acknowledged by the decision-makers or the eventual decisions that resulted.

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<sup>149</sup> See also John Paul Catungal & Deborah Leslie, “Placing Power in the Creative City: Governmentalities and Subjectivities in Liberty Village, Toronto” (2009) 41:11 *Environment & Planning A* 2576; Goldberg-Miller, *supra* note 6 at 224-25.

<sup>150</sup> Zukin, *supra* note 80 at xi, 9, 246.

<sup>151</sup> In the case of Toronto, Richard Longley, former president of the Architectural Conservancy Ontario, notes this in relation to Kensington Market, especially as concerned parties seek to have it designated as a Heritage Conservation District (Richard Longley, “The Once and Future Kensington Market”, *Now Toronto* (15 December 2016), online: <nowtoronto.com>.

<sup>152</sup> Benson, *supra* note 20 at 513.

<sup>153</sup> White, *supra* note 83 at 214; Waterfront Toronto, “Announcement of New George Brown College Campus Latest Waterfront Toronto Revitalization Milestone” (2008), online: <waterfront.ca>.

The oversights surrounding Government’s demolition are perhaps best illustrated by a 2015 Toronto mayoral “fact-finding” excursion led by John Tory to study the live music culture of Austin, Texas, which occurred around the same time as the redevelopment plans for Government’s space were announced.<sup>154</sup> Upon the Mayor’s return he expressed his “determination to more fully integrate music into the cultural and economic fabric of the city,” and then a few days later stood on the demolished grounds of Government to provide a speech praising the unveiling of the plans for “Daniels Waterfront – City of the Arts” as something that would provide a new cultural space, that as we know, would stand in Government’s place, without him acknowledging the destroyed iconic cultural and music space and its displaced community.<sup>155</sup>

Where Toronto’s Music City project calls for and encourages spaces for local music production, performance, and consumption, and requires large venues for attracting well-known artists and providing the space for enough attendees to leverage these artists’ performance fees, Government provided this kind of space already in a proven format. The irony and tone-deaf nature here of the nearly overlapping Music City mayoral trip and the mayoral endorsement of the Daniels development along the waterfront is striking. So too is the Mayor’s statement that the Daniels development would “have a lasting cultural legacy,”<sup>156</sup> though apparently not a notable past.

As we will continue see—perhaps apart from the case of the Silver Dollar Room, which we will examine next—careful consideration of Toronto’s musical vibrancy, music heritage and

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<sup>154</sup> Rayner, “Great Vibe”, *supra* note 53. See also Music Canada, “The Next Big Bang: A New Direction for Music in Canada” (2013) at 5-6, online: *Music Canada* <musiccanada.com>.

<sup>155</sup> For the full statement, see Rayner, “Great Vibe”, *supra* note 53. “Groundbreaking Plans Unveiled”, *supra* note 106. See also the planning application for the Daniels Waterfront development, *supra* note 106; David Shum, “Daniels Corporation Unveils Waterfront Mixed-Use Condo Project”, *Global News* (26 March 2015), online: <globalnews.ca>.

<sup>156</sup> “Groundbreaking Plans Unveiled”, *supra* note 106.

intangible culture, and its music communities, has not effectively played into redevelopment decisions. While some heritage considerations—in the form of industrial heritage—have figured into the designs for Toronto’s waterfront renewal, the applicable planning documents do not address the different kinds of intangible cultural heritage that may exist in a city, and glaze over the use-value that exists within cultural spaces that make up, or used to make up, the waterfront area.<sup>157</sup> The failure to consider the existing intangible cultural heritage within the waterfront space demonstrates the risk of a faulty assessment of the competing values and interests of the various cultures and communities either culturally and/or economically invested in the space.<sup>158</sup> This is in contrast to the acknowledgment and protection of the Silver Dollar Room’s intangible cultural heritage merits, use-value, and live music assets—which, as we will see, occurred thirteen days before Guvernment closed for good.

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<sup>157</sup> See e.g. Toronto Culture’s 2011 “Canada’s Urban Waterfront: Waterfront Culture and Heritage Infrastructure Plan”, available online:

<[www1.toronto.ca/wps/portal/contentonly?vgnextoid=0fc91ba53b450410VgnVCM10000071d60f89RCRD](http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=0fc91ba53b450410VgnVCM10000071d60f89RCRD)>

<sup>158</sup> Winthrop, *supra* note 148 at 174.

## **CHAPTER FIVE: CASE STUDY - THE SILVER DOLLAR ROOM AND COMFORT ZONE**

### **I. BACKGROUND DESCRIPTIONS**

#### **A) The Silver Dollar Room \***

The Silver Dollar Room is located near the intersection of Spadina and College in downtown Toronto's Harbord Village, next to the University of Toronto campus, and just a few blocks North of Kensington Market. Originally built in 1957-58 to serve as the cocktail lounge of the Waverly Hotel, which opened its doors in 1900, the Silver Dollar Room became a mecca for live blues music as well as jazz, rock, and bluegrass in Toronto. Despite its modest beginnings, its brief turn as a strip club in the 60s, and its share of police raids in the 70s and 80s,<sup>1</sup> the Silver Dollar Room quickly gaining an international reputation for its live blues music.<sup>2</sup> It continues to be important within Toronto's music scene today—both for the development as well as growth of indie music culture in Toronto. As noted by By-law 57-2015's designating Statement of Cultural Heritage Value, in addition to acts like Bob Dylan, the walls of the Silver Dollar have seen the likes of "John T. Davis, Tommy Okie and Jim Heineman, Grammy award winner, Bobby 'Blue' Bland, Juno-award winners Fathead and the Downchild Blues Band, the Deadly Snakes and Death from Above 1979, Blue Rodeo bassist Bazil Donovan and the Foggy Hometown

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\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, "Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value" (2017) 24:1 International Journal of Cultural Property 31; Sara Ross, "Preserving Canadian Music Culture: The Intangible Cultural Heritage Management of Urban Spaces of Culture and the Case of the Iconic Toronto Music Venue the Silver Dollar Room" (2016) 10:2 Architecture\_MPS 1.

<sup>1</sup> Tom Beedham, "Historic Venue Spotlight: The Silver Dollar Room," *Noisey* [blog], (July 9, 2014), online: <noisey.vice.com>.

<sup>2</sup> City of Toronto. By-law No 57-2015, *To designate the property at 484 Spadina Avenue (Silver Dollar Room) as being of cultural heritage value or interest* (11 December 2014) at 2 [By-law 57-2015].

Boys.”<sup>3</sup> The Silver Dollar has made film cameos (*Adventures in Babysitting* and *Police Academy*) and hosted live album recordings by greats such as jazz and blues saxophonist David “Fathead” Newman in 2004 and jazz and rhythm-and-blues pianist and vocalist Curley Bridges in 2009.<sup>4</sup>

But perhaps more significant than the international acts Silver Dollar has drawn and its international reputation, By-law 57-2015 also recognizes the cultural heritage value of its role “as an incubator for musical talent. From the 1960s onwards it has, often functioned as a workshop for new and sometimes struggling musicians, both local and transient, to sit-in with more-established musicians, to develop their music and to build up a following.”<sup>5</sup>

One of Toronto’s oldest hotels, its past grandeur faded, at the time of writing, the Waverly, sat in a state of disrepair, a sad shell of its former self with curtains hanging limply in its discoloured windows. Outwardly in stark contrast to the Waverly’s bland off-white exterior, the Silver Dollar Room sat prominently on the Waverly’s north side with a red and black exterior and its flashy, imposing, and familiar circular sign written in slanted cursive letters.

Just to the right of the Silver Dollar Room’s sign was list of upcoming shows and to the left of the sign, right over the entrance, was a black awning with another circular sign that read “JJ&S John Jameson & Son Limited”. Lining the upper part of the red painted portion at the bottom of the outer wall, right under the transition to black paint that dominated the upper half, are a series of framed concert posters. A wrought iron stand with a chalkboard at its center listed the neatly cursively-scripted names of the acts or bands scheduled for the evening. This was placed on the sidewalk in front of the door.

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<sup>3</sup> *Ibid* at 2. Brad Wheeler, “Why the Silver Dollar is Worth Saving”, *The Globe and Mail* (23 January 2015), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>4</sup> By-law 57-2015, *supra* note 2 at 2, 11. Film credits include *Adventures in Babysitting* and *Police Academy* (Beedham, *supra* note 1).

<sup>5</sup> By-law 57-2015, *supra* note 2 at 2.

Climbing the stairs that led into the Silver Dollar, one was greeted with another Silver Dollar Room sign overhead and walls lined with autographed photographs of acts that have played the Silver Dollar Room from its days as an iconic blues venue. On show nights, there was usually someone, often Silver Dollar Room's booker and promoter Dan Burke, perched on a stool at the top of the stairs collecting cover. Past this, there was a door with a glass window that led into the main venue. The interior of the venue was laid out in a narrow horizontal fashion, with a raised stage area on the right-hand side backed with either a red curtain or white fabric to facilitate projections, depending on the needs of the show that night, and divided from the room with the various speakers and amps that comprised the sound system. A raised seating area was found along the rear end of the right wall and was divided from another row of tables and chairs on the main level by a wrought iron railing. The bar ran along the left-hand side of the room and, in addition to some more black and white photographs, the walls were covered with colourful murals on a black background that depicted images of the bygone era of blues that played such a formative role in Silver Dollar's rich musical past. Behind the bar, amidst the bar paraphernalia and in front of the red leather chesterfield walls, a red and white electric guitar bearing the Molson Canadian logo was mounted vertically.

The speckled terrazzo tile floors recalled the formulaic floors of eighties-era elementary schools.<sup>6</sup> Much like the lighting system, the floors were no-frills—plain but practical. The sound quality of Silver Dollar's system was, by and large, not the best with notes of tinny shrillness as it amplified the sounds of the night, whether they were indie, electro, garage, rock, psych, alt-country, bluegrass, punk, or folk, and the list goes on. Nonetheless the sound system fulfilled its purpose and lent itself to the gritty essence of the space.

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<sup>6</sup> *Ibid* at 3 recognizes the floors as one of the physical heritage attributes of the interior of the Silver Dollar.

A door on the far end of the bar led to a semi-secluded room that was more brightly lit but retained a grimy warm yellow hue that complemented the row of dull green padded banquettes found along one wall, and which called to mind a worn hybridized greasy spoon diner and tired hotel dive bar. The other wall was lined with regular wooden tables and chairs. Wood paneling crept halfway up all the white walls that were peppered with black and white photographs. A couple of pool tables sat near the end of the room facing Spadina Avenue. While the space of the Silver Dollar Room dustily retained hints of its beginnings as a cocktail lounge, anyone could see that it was clearly no longer a polished space. But this was part of its gritty dive bar charm and what lent it an air of authenticity, of subcultural capital,<sup>7</sup> of legitimacy, but also a sense of transgressive disorder.

During shows, before an act began, patrons clustered around the bar in the main room, headed to the tables on the far end of the stage to claim tables (largely as a space to drop their coats, especially in the winter). But, when the music began, the audience gravitated, drinks in hand, to the center of the room in front of the stage. Most stood and listened, or continued to chat near the bar. There was movement to the music, but usually not to the extent that one would mistake the Silver Dollar for a dancing focused venue (with the exception being occasions when its space was in use for a Comfort Zone event as a secondary space to the downstairs club). While the long narrow space of the Silver Dollar could not be described as optimized for dancing as the main pathway from one side of the room to the other necessarily crosses through the crowd clustered in front of the stage, attendees did not appear to be fazed by this.

It is fitting that the musical lineup of an iconic venue like Silver Dollar was mainly curated by Dan Burke—somewhat of a local cultural icon and “rebel” live music booker and

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<sup>7</sup> See generally Sarah Thornton, *Club Cultures: Music Media and Subcultural Capital* (Cambridge, UK: Polity Press, 1995).

promoter—known locally for both his talent for recognizing and giving a chance to up-and-coming predominantly indie rock bands and acts, but also for his penchant for precariously toeing the line between success and a deep end of drugs, brawls, and transience.<sup>8</sup> In the same way that Silver Dollar was characterized by its gritty authenticity, so too is Dan Burke. And in the same way that Silver Dollar had a history of providing up-and-coming musicians with a space to hone their craft and an opportunity to develop their acclaim, so too does Dan Burke—not only in his role at Silver Dollar, but also during his time booking acts and shows at El Mocambo (another of Toronto’s iconic music venues) and for his NeXT shows that are now presented as part of Toronto’s North by Northeast (NXNE) festival for new and upcoming music in Toronto’s music scene.<sup>9</sup>

### **B) Comfort Zone**

In addition to the aging Waverly Hotel, to which both the history and space of the Silver Dollar Room is connected, the Silver Dollar also shared the block with Comfort Zone, which was found on the south side of the hotel. Quite different from the Silver Dollar Room’s dominant sign, Comfort Zone’s Spadina location was identifiable only by a discrete sign over its entrance. The Comfort Zone space stretched underneath the Waverly, where a door on the north end of Comfort Zone connected it to an internal staircase that led to the Silver Dollar Room. Comfort Zone is infamous as a Toronto afterhours electronic music venue and dance space. It opened in 1997, was one of the few remaining truly afterhours venues in Toronto—known by

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<sup>8</sup> Interview of Dan Burke (11 March 2013) on Canadian Reflections, “The Last Music Man”, *CBC Television* (accessed September 9, 2016). See e.g. Jordan Bimm, “In Search of Dan Burke”, *The Varsity* (29 January 2008), online: <thevarsity.ca>.

<sup>9</sup> Canadian Reflections, “The Last Music Man”, *CBC Television* (11 March 2013) (accessed September 9, 2016); Jay Somerset, “Local Hero” (2011) *27 Taddle Creek*, online: <www.taddlecreek.com>; Benjamin Boles, “The Last Music Man”, *NOWToronto* (12 March 2013), online: <nowtoronto.com>.

many who spent time within its walls over the years as a Toronto afterhours “institution” despite, or maybe even bolstered by, its colourful past and reputation.<sup>10</sup>

The venue itself was accessed via a simple entrance on the south side of the Waverly Hotel, which led down a set of stairs with blue walls to a large cavernous space for dancing underneath the Waverly, which connected to a set of stairs on the north side. These stairs led up to the Silver Dollar Room, which would on occasion be opened up by Comfort Zone after the Silver Dollar had either closed for the night or had no conflicting show booked in order to use the Silver Dollar as an additional room for another DJ where alcohol could be served and consumed within the confines of the Silver Dollar Room’s space. In this case the Silver Dollar Room would be suddenly transformed into a dance-centric space.

The Comfort Zone, as a space that operated predominantly as an electronic dance music event space with DJs spinning a variety of genres that have recently leaned heavily towards house music, was open predominantly on the weekends after most of the city, bars, and other music and dance spaces had closed down and the city had by-and-large gone to bed. It was usually open from about midnight or 2am until between 5am or 11am, depending on the day, had deep ties with the underground dance music community and afterhours scene/subculture, and was known for its Sunday daytime dance parties, sunset to sunrise hours, 24-hour dance marathons, and excellent sound system.<sup>11</sup>

Like most afterhours dance and music spaces (and not to be confused with Toronto booze cans that are unlicensed venues that serve liquor after 2am), Comfort Zone had no liquor license,

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<sup>10</sup> For an example of personal anecdotes related to the space, see e.g. Frankenraver, “Rave Reviews – The Comfort Zone” (10 November 2011) frankenraver: reprazentin 4 da ol skool (blog), online: <frankenraver.wordpress.com>. Paul Aguirre-Livingston, “The Night Shift: Into the Comfort Zone” (6 February 2012) (originally published in the now defunct The Grid, but available in replicated form, see post #1621, online: <www.tribemagazine.com/board/tribe-main-forum/143940-comfort-zone-raided-morning-65.html>).

<sup>11</sup> See e.g. Lee Trotter, “Afterhours in Toronto: A Look Inside Comfort Zone”, *6am Group* (25 August 2015), online: <6am-group.com>. See also the Comfort Zone website, online: <comfortzonetoronto.com>.

did not serve alcohol (although at one point it did, but lost its license, and still survived despite this loss, which is quite rare for a music, dance, and nightclub space), and had a relatively hefty cover charge mitigating the lack of liquor sales. But, as a haven for dancing, its open space, roster of regular DJs, and long hours available for non-stop dancing could make it a good investment when compared to the restricted hours available for dancing in non-afterhours but licensed venues.

Attendees sometimes arrived after a night out once the bars had closed, some used it as a space to dance and sober up before driving home in the morning, and others went straight to Comfort Zone as their main event of the evening. Some even arrived the morning after dawn and joined those who had been there since 2am for a dance session before heading to a weekend work shift or other daytime weekend activity. Regulars were known to refer to it as their church—which can be readily observed online in forums like the Comfort Zone Facebook page and the Comfort Zone (members only) Facebook group where the Comfort Zone community shares news and banters about the DJ lineup for the weekend and upcoming parties, ask questions about or comment on particular tracks heard the other night, and chat about other Comfort Zone-related news, rumours, and observations.<sup>12</sup>

The crowd at Comfort Zone's Spadina location, some who fondly self-identify as “Zone rats” or “Zoners”, was comprised of a varied blend of individuals from different walks of life and with no precise demographic, except for the element that united them—they were all there to dance to a particular kind of music, and nearly everyone did.<sup>13</sup> The notion of “fitting in” was

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<sup>12</sup> *Comfort Zone( I ♥ CZ)*, online: <[www.facebook.com/groups/2205182781/](http://www.facebook.com/groups/2205182781/)>; *Comfort Zonee*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)>.

<sup>13</sup> See e.g. *Comfort Zone( I ♥ CZ)*, *supra* note 12; *Comfort Zonee*, *supra* note 12. See also Shawn Micallef, “With Clubs Disappearing, Where Will Toronto Dance?”, *thestar.com* (11 April 2013), online: <[www.thestar.com](http://www.thestar.com)>. See also Benjamin Boles, “Leaving the Comfort Zone: Looking Back on Toronto’s After-Hours Institution that Closes this Weekend”, *Torontoist* (25 May 2017), online: <[torontoist.com](http://torontoist.com)> [Boles, “Leaving the Comfort Zone”].

irrelevant. For many, Comfort Zone, as a transgressive subcultural space, provided an important scene, a type of home, and a community that became like family.<sup>14</sup> As DJ Deko-ze related after playing the Comfort Zone space regularly for nearly two decades,

The crowds have changed a bit, and there's a younger audience now, but what I really appreciate about the Zone is that it's kind of a weird timeless capsule, where you can have the gay community, the Asian community, the university kids, the thugs, a whole bunch of ravers, and everyone in between. They're all going off, dancing in unison, having a good time, and there's not any judgment, as opposed to pretty much any other place in Toronto.<sup>15</sup>

Spaces such as these are important to a city and speak to James Paul Gee's description of what he terms "affinity spaces".<sup>16</sup> Some of the characteristics of affinity spaces that apply to spaces like Comfort Zone include:

- the centrality of a common interest or endeavour in how people relate to each other and which transcends gender, race, class, disability and so on;
- a lack of segregation or differential treatment of newcomers and lack of status based on levels of participation or roles within the space where everyone is not only accommodated within a common shared space but can also derive something

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<sup>14</sup> See e.g. Mike Sauve, "Downtown After-hours Club Attracts All Kinds, Including Police", *National Post* (28 March 2008), online: <www.nationalpost.com> (available at Mike Sauve, *Scorpion of Scofflaw*, online: <mikesauve.com>).

<sup>15</sup> Interview with DJ Deko-ze, see Boles, "Leaving the Comfort Zone", *supra* note 13.

<sup>16</sup> James Paul Gee, "Semiotic Social Spaces and Affinity Spaces: From the Age of Mythology to Today's Schools" in D Barton & K Tusting, eds, *Beyond Communities of Practice* (Cambridge, UK: Cambridge University Press, 2005) 214 at 216, 225-31; For another way of approaching understanding similar spaces, see also Brian Z Tamanaha's explanation of community/cultural normative systems (in the context of understanding and researching legal pluralism) as one of the six systems of normative ordering in social arenas:

[I]t is an imagined identification by a group of a common way of life, usually tied to a common language and history and contained within geographical boundaries of some kind, but there can be 'communities' of interaction which exist purely on the internet comprised of people from around the world. At the local level, communities consist of thick, share norms of interaction that constitute and characterise a way of life – including customs, habits, mores, and so forth – but at the broader level of the nation (or beyond) the bonds that constitute a community can be much thinner and mainly defined by a perceived identity. In its thinnest manifestation (which can nonetheless exert a powerful influence), the norms that bind a define the community may not be definite or reiterated enough to be considered a 'system' in the same sense that that applies to other categories ("Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 at 399).

See also Sara Gwendolyn Ross, "From the Octagon to the Courtroom: The Right to Fight, Subaltern Cosmopolitanism, and Public Interest Litigation as a Tool for Mixed Martial Arts as Community/Cultural Normative System" (2015) 11:1 *DePaul J Sports L & Contemp Probs* 91 at 93-94.

entirely different out of engaging in the space depending on their own personal choices, interests, and identities;

- the encouragement and valuation of different kinds of knowledge (individual, distributed, dispersed, tacit, and so on), and the sharing of both intensive (specialized) and extensive (less specialized) knowledge, which enables and encourages many to contribute and engage in the space in whatever way they are able or inclined to do and feel comfortable in doing so;
- numerous forms, levels, and routes to status and participation within the space, which are fluid over time;
- leadership within the space is porous, flexible, and often vague, and leaders are viewed as resources rather than within a hierarchical framework.<sup>17</sup>

Without venues like Comfort Zone that operate legally, the afterhours music and dance scenes that occupy these spaces tend to move underground into illegally operating and unregulated spaces.

By the musicians and artists that use those spaces, Comfort Zone was also seen as a space for past and present DJs to develop and hone their craft.<sup>18</sup> It was known for supporting various events and music genres, such as hip-hop events, during times when many other Toronto venues would not, and continued to exist even when it had fallen out of fashion with more mainstream factions of Toronto's electronic dance music community.<sup>19</sup> As one of the DJs whose career was founded within the walls of Comfort Zone describes it, "It was a magic zoo that we called home ... Even after traveling the whole world, Comfort Zone is still untouchable for me. This place moulded who we are today as people and DJs."<sup>20</sup>

Spaces that focus on presenting artists, provide a space to listen and dance to music, and which choose to, or must do so without being able to rely on alcohol sales face a level of

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<sup>17</sup> See also Holly C Kruse, "Local Independent Music Scenes and the Implications of the Internet" in Ola Johansson & Thomas L Bell, eds, *Sound, Society and the Geography of Popular Music* (Farnham: Ashgate, 2009) 206 at 39.

<sup>18</sup> See e.g. Trotter, *supra* note 11.

<sup>19</sup> Claudia McKoy, "The Great Divide" in Alana Wilcox, Christina Palassio & Jonny Dovercourt, eds, *The State of the Arts: Living with Culture in Toronto—uTOpia Two* (Toronto: Coach House Books, 2006) at 296-97. See also Boles, "Leaving the Comfort Zone", *supra* note 13.

<sup>20</sup> Interview of Carlo Lio in *ibid.* For an account of some of Comfort Zone's prior run-ins with the law, see Jackson Hayes, "33 Arrested in Club Raid, Drugs Seized", *thestar.com* (17 March 2008), online: <[www.thestar.com](http://www.thestar.com)>; But cf Benjamin Boles, "Revenge of the Comfort Zone", *Now Toronto* (12 March 2009), online:<[nowtoronto.com](http://nowtoronto.com)> [Boles, "Revenge"].

precarity without this backup profit safety net. These spaces, however, serve an important role as one of the few nighttime venues of music and dancing that one can attend that could not be classified as a bar.<sup>21</sup> For a venue of this kind, Comfort Zone’s Spadina Avenue location was around for a long time and weathered its fair share of turmoil, such as the 2008 police raid that will be discussed shortly, but managed to fight to stay murkily—yet satisfactorily—open within the defined parameters of lawfulness even when placed under increased police and city scrutiny.

**i. Comfort Zone and Differential Treatment**

A desire to keep fighting against what the venue perceived as differential treatment by the city and the Toronto Police is exemplified by Comfort Zone’s most recent lawsuit, this time for \$23 million, launched against the Toronto Police that alleged an eight-year campaign of intimidation and abuse of power stemming from a sting operation called Operation White Rabbit that began in 2008 and was instituted in response to a GHB overdose from drugs that were thought to have been purchased at Comfort Zone days before. This lawsuit followed the suit filed in 2009 with the Ontario Superior Court of Justice against the City of Toronto and then City Councillor Adam Vaughan of Ward 20 Trinity-Spadina for what Comfort Zone alleged to be a systematic harassment campaign and, specifically, alleged “misfeasance in public office, abuse of public office, unlawful interference with economic relations and conspiracy to defame and injury.”<sup>22</sup>

The most recent lawsuit narrowed in on what is viewed as differential treatment by Toronto’s law enforcement mechanisms.<sup>23</sup>

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<sup>21</sup> See also McKoy, *supra* note 19 at 296.

<sup>22</sup> Kirk Makin, “Nightclub Sues City for Harassment”, *The Globe and Mail* (9 March 2009), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>; Donovan Vincent, “Comfort Zone Dance Club Sues Over ‘Unfair Scrutiny’”, *thestar.com* (10 March 2009), online: <[www.thestar.com](http://www.thestar.com)>. Boles, “Revenge of the Comfort Zone”, *supra* note 20.

<sup>23</sup> Ongoing as of May 2017 per Comfort Zone manager Terry Yarmus. See also Boles, “Leaving the Comfort Zone”, *supra* note 13.

Comfort Zone’s lawyer Barry Swadron argued that Comfort Zone serves a useful purpose by catering “to that sector of the population who wish to listen to music, dance, eat and enjoy themselves after the closing hours of bars and nightclubs”<sup>24</sup> and that the city and police service “should recognize that a segment of our population enjoys music, dancing and food after nightclubs and bars close,”<sup>25</sup>—especially where “Toronto is a world-class city and the after-hours community want and should have a place to go.”<sup>26</sup> Where this is not done, the risk (and the last thing that city governance mechanisms should wish for), is “to force facilities like Comfort Zone to go underground to serve the after-hours community.”<sup>27</sup> The afterhours community picked up on this lawsuit, which is significant as it is not common for spaces like Comfort Zone to be able to take these kinds of legal actions in response to perceived injustice.<sup>28</sup>

While the lawsuit may be a step towards highlighting differential treatment received within the city in terms of policing and law enforcement, at the same time that the most recent lawsuit was underway, Comfort Zone had already lost its battle for survival on another front before even having a chance to fight. Of most immediate concern for Comfort Zone’s future was the lack of acknowledgment its existence received within the Wynn Group’s redevelopment proposal as well as within the advocacy undertaken by the city to preserve the Waverly and the Silver Dollar Room. Comfort Zone faces an entirely different future than the Silver Dollar Room, as its space is now destined to eventually become what will most likely be the parkade for

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<sup>24</sup> Christopher Reynolds, “After-hours Club Sues Toronto Police, Alleging ‘Abuse of Power’”, *thestar.com* (3 January 2016), online: <[www.thestar.com](http://www.thestar.com)> (quoting Barry Swadron).

<sup>25</sup> Sam Pazzano, “Cops Hit with Club Suit”, *Toronto Sun* (2 January 2016), online: <[www.torontosun.com](http://www.torontosun.com)>.

<sup>26</sup> Reynolds, *supra* note 24 (quoting Barry Swadron).

<sup>27</sup> Pazzano, *supra* note 25 (quoting Barry Swadron).

<sup>28</sup> See e.g. Boles, “Revenge of the Comfort Zone”, *supra* note 20; Kurtis Hooper, “Toronto’s Comfort Zone is Suing Police for \$23 Million”, *TRC trc.daily-beat.com* (2 January 2016), online: <[trc.daily-beat.com](http://trc.daily-beat.com)>; Jeffrey Yau, “Toronto After-Hours Comfort Zone Looks to Sue Police for \$23 Million”, *YOURED.M* (2 January 2016), online: <[www.youredm.com](http://www.youredm.com)>.

the Wynn Group’s student-oriented mixed-use housing complex.<sup>29</sup> And, as we will see, unlike the Waverly Hotel and the Silver Dollar Room, Comfort Zone was not included in any of the heritage designation requests or heritage assessments. No inquiry into or public mention of the Comfort Zone space was made, and no consultation, reference, or effort was made to engage with Comfort Zone’s soon-to-be displaced afterhours community that regularly occupied but at invisible hours.

## **II. SILVER DOLLAR ROOM: REDEVELOPMENT THREATS, HERITAGE PRESERVATION, AND READING IN INTANGIBILITY INTO EXISTING HERITAGE LEGISLATION**

### **A) Intangible Cultural Heritage, Community Cultural Wealth, and Designating By-Law 57-2015**

Thirteen days before the official closure of Government, on January 13, 2015, the Silver Dollar Room officially received cultural heritage designation pursuant to City of Toronto By-law 57-2015 under Part IV, Section 29 of the *Ontario Heritage Act*.<sup>30</sup> What is significant about this designation, is that it was awarded not on the basis of the Silver Dollar Room’s physical or tangible (built) heritage attributes but, instead, due to the intangible cultural heritage value embodied within the space.<sup>31</sup> The Statement of Cultural Heritage Value within the designating by-law acknowledges Silver Dollar Room’s cultural heritage value “by virtue of it being a well-known, long-standing destination for live music with an international reputation,” “its contribution to Toronto’s musical culture” as a space for the incubation of musical talent and the “development and growth of music in Toronto, particularly in the genres of jazz, blues, rock and bluegrass,” and for its frequent role as a “workshop for new and sometimes struggling musicians,

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<sup>29</sup> Richard Longley, “Waverly Goodbye”, *NOW Toronto* (17 June 2015), online <nowtoronto.com>.

<sup>30</sup> By-law No 57-2015, *supra* note 2; *Ontario Heritage Act*, RSO 1990, c O.18.

<sup>31</sup> By-law 57-2015, *supra* note 2.

both local and transient, to sit-in with more established musicians, to develop their music and build up a following.”<sup>32</sup>

Examining Silver Dollar Room’s heritage designation journey and the reasons it received cultural heritage protection, crystallized in By-law 57-2015, provides an example of how the tangible (built) heritage preservation legislation and language of provinces, such as Ontario, can be (and gradually are being) interpreted to include intangible elements of lived cultural practice. Ultimately, the “associative” and “contextual” heritage criteria set out in Ontario Regulation 9/06 were interpreted to include the elements of intangible musical culture and heritage within the space of the Silver Dollar as worthy of cultural heritage protection.<sup>33</sup> This interpretation gestures towards the premise of intangible cultural heritage protection, which provides a mechanism to better account for the high use-value and community cultural wealth generated by communities, groups, and individuals within spaces of cultural and musical importance .

By-law 57-2015 and the decision to accord cultural heritage protection to the Silver Dollar Room to the detriment of the private developer’s proposed redevelopment project also represents a weighing of development versus preservation interests in the city, a recognition of the value in protecting the use-value, artistic and intangible cultural value that can be embodied by a space of culture, and a valuable example that may be instructive in potentially preventing the future irretrievable losses of important spaces of Toronto music culture and subcultural community wealth. By subjecting the redevelopment approval process to the greater scrutiny required due to cultural heritage designation, the interests of private developers have been better balanced with the artistic and cultural value of the Silver Dollar Room. While cultural heritage protection may only provide venues and spaces temporary shelter from redevelopment, at least

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<sup>32</sup> *Ibid.*

<sup>33</sup> O Reg 9/06.

for the Silver Dollar Room, it has successfully won long-term protection such that it will remain a venue for live music and will retain its key characteristics.<sup>34</sup> Receiving cultural heritage designation is important for the future of the Silver Dollar Room as it has effectively contributed to the end of plans for its demolition and redevelopment that have been on the table since June 2013.<sup>35</sup>

### **B) Displacement Threat: The Wynn Group Proposal \***

The threat to the Silver Dollar Room, Comfort Zone, and Waverly spaces came via a proposed amendment to Zoning By-law 438-86 made by the Wynn Group (who own both the Waverly and the Silver Dollar as well as Comfort Zone underneath the two built structures). This proposed amendment sought rezoning in order to permit “a 22-storey mixed-use development containing 202 residential units and approximately 1,600 square metres of commercial space.”<sup>36</sup> Beyond the legal language of zoning, this amendment would have allowed the Wynn Group to replace the Waverly, the Silver Dollar Room, and Comfort Zone with a high-rise mixed-use

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<sup>34</sup> See e.g. Codi Wilson, “Silver Dollar Will Live on as Live Music Venue”, *CP24* (8 May 2015), online <[www.cp24.com](http://www.cp24.com)>; Letter from Joe Cressy (Ward 20 City Counsellor), Ausma Malik (Toronto District School Board Ward 10 Trustee) & Tim Grant (Chair of the Harbord Village Resident’s Association) to neighbourhood residents re: “Resolution on 484 Spadina Avenue (the Waverley and Silver Dollar Room) (8 May 2015).

<sup>35</sup> See e.g. 484 Spadina Avenue – Zoning Amendment Application, *Staff Report Action Required* (19 August 2013) [Staff Report, 19 August 2013]; *1095909 Ontario Ltd. (c.o.b. Wynn Group of Companies) v Toronto (City)*, [2014] OMBD No 498, OMB Case No PL131176 [*Wynn v Toronto*, OMB Appeal]. See e.g. Patty Winsa, “Toronto Rejects Proposal to Tear Down Hotel Waverly and Silver Dollar Room for Student Housing”, *thestar.com* (15 January 2014), online <[www.thestar.com](http://www.thestar.com)>; Richard Longley, Architectural Conservancy Ontario, “Re: Hotel Waverly (484 Spadina Ave) and The Silver Dollar Room (486 Spadina Ave)”, (26 March 2014) at 3 [Longley, “Re: Hotel Waverly”]; Gregg Lintern, Director, Community Planning, Toronto and East York District, *Staff Report Action Required – 484 Spadina Ave – Zoning Amendment Application - Request for Direction Report* (22 November 2013) at 3 [Request for Direction Report, 22 November 2013]. Regarding the settlement of the matter between the City of Toronto and Silver Dollar Room advocates, one the one side, and the private developer the Wynn Group, on the other, see Wilson, *supra* note 34; Justin Skinner, “OMB Settlement a Good Deal for Spadina and College Neighbourhood”, *InsideToronto.com* (12 May 2015), online <[www.insidetoronto.com](http://www.insidetoronto.com)>; Cressy, Malik & Grant, *supra* note 34.

\* © Sara Ross. Parts of Subsection B were previously published in: Sara Ross, “Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value” (2017) 24:1 *International Journal of Cultural Property* 31; Parts of Subsections B, C, and D were previously published in: Sara Ross, “Preserving Canadian Music Culture: The Intangible Cultural Heritage Management of Urban Spaces of Culture and the Case of the Iconic Toronto Music Venue the Silver Dollar Room” (2016) 10:2 *Architecture MPS* 1.

<sup>36</sup> See e.g. *Wynn v Toronto*, OMB Appeal, *supra* note 35.

complex intended as a private student residence for about 200 students in addition to a Wynn Fitness Club on the second-floor, three levels of underground parking with seventy spaces for vehicles and 214 spaces for bicycles, and a new replacement tavern intended to “re-create” the Silver Dollar on the ground floor with the Silver Dollar’s famous sign moved into the inside of the buildings and no longer visible to those passing by.<sup>37</sup>

The Wynn Group’s proposal first began to circulate in the Summer of 2013 and soon received unfavourable treatment by the Toronto Planning Department in their Preliminary Report.<sup>38</sup> Other reports followed,<sup>39</sup> and eventually the proposal was rejected by Toronto and East York Community Council in early 2014 and subsequently appealed by the Wynn Group to the Ontario Municipal Board.<sup>40</sup> The proposal was rejected for a number of reasons but, in sum, because “[t]he proposed density, building height, and lack of transition do not reinforce or respect the physical character of the existing neighbourhood” such that the intent of the City of Toronto’s Official Plan was not being met.<sup>41</sup> While the hearing was initially set to begin November 14, 2014, it was forecasted that a decision would not be reached by the Ontario Municipal Board until Spring of 2015.<sup>42</sup> Nonetheless, “City Planning Staff ... indicated a willingness to work with the applicant to achieve a development which may be supportable for this site and is in keeping with the policies contained within the Official Plan.”<sup>43</sup>

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<sup>37</sup> See e.g. Winsa, *supra* note 35; Longley, “Re: Hotel Waverley”, *supra* note 35 at 3; Request for Direction Report, 22 November 2013, *supra* note 35 at 3.

<sup>38</sup> Staff Report, 19 August 2013, *supra* note 35.

<sup>39</sup> See e.g. Request for Direction Report, 22 November 2013, *supra* note 35.

<sup>40</sup> Winsa, *supra* note 35; See also *Wynn v Toronto*, OMB Appeal, *supra* note 35; Letter from Mark Flowers at Davies Howes Partners LLP to Toronto and East York Community Council (14 January 2014).

<sup>41</sup> Request for Direction Report, 22 November 2013, *supra* note 35 at 11. See also City of Toronto, Ontario Municipal Board, *Official Plan* (Toronto: City of Toronto, July 2006).

<sup>42</sup> Wheeler, *supra* note 35.

<sup>43</sup> Request for Direction Report, 22 November 2013, *supra* note 35 at 11.

**C) Applying the Ontario Heritage Act to the Case of the Silver Dollar Room: Reading in Intangibility**

In terms of the mechanics of how the *Ontario Heritage Act* was applied to the Silver Dollar Room's space, the Toronto Preservation Board, assisted by the Heritage Preservation Services, advises Toronto's City Council in matters related to the *Ontario Heritage Act*. Part IV of the *Ontario Heritage Act* specifically provides municipalities with the ability to pass by-laws designating selected properties to be of "cultural heritage value or interest."<sup>44</sup> In 2005 the *Ontario Heritage Act* was amended to offer (arguably) stronger protection, provide more specific designation criteria, and allow municipalities to more effectively stop the demolition of heritage designated properties.<sup>45</sup> The *Ontario Heritage Act* at Section 29(1)(a) refers municipal council to Ontario Regulation 9/06 for the "Criteria for Determining Cultural Heritage Value or Interest:"

(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

1. The property has design value or physical value because it,
  - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
  - ii. displays a high degree of craftsmanship or artistic merit, or
  - iii. demonstrates a high degree of technical or scientific achievement.
2. The property has historical value or associative value because it,
  - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
  - ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
  - iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.
3. The property has contextual value because it,
  - i. is important in defining, maintaining or supporting the character of an area,

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<sup>44</sup> *Supra* note 28.

<sup>45</sup> *Cf ibid* as it appeared before 28 April 2005. See also Message from the Honourable Madeleine Meilleur, Minister of Culture, "Strengthening Ontario's Heritage: An Introductory Guide to Identifying, Protecting, and Promoting the Heritage of our Communities" (Toronto: Queen's Printer for Ontario, 2005) at 3.

- ii. is physically, functionally, visually or historically linked to its surroundings, or
- iii. is a landmark.<sup>46</sup>

One or more of these criteria must be met to qualify for heritage designation status. The first criteria speaks to the design or physical value of a property and considers elements such as the architecture primarily, method of construction, artistic merit, or technical or scientific achievement.<sup>47</sup> The second criteria considers whether there is either historical or associative value to the property in relation to a particular culture or community.<sup>48</sup> In order to determine this, research is done to ascertain whether there is a direct association between the property and a significant person or event, or if the property either contributes or potentially contributes to the understanding of a community or culture, or if the property exemplifies the work or ideas of an architect, builder, designer or theorist of note to a particular community. The third criterion asks subjectively whether the property has contextual value—whether the property in question serves a role in defining, maintaining or supporting the character of an area, if it is vitally linked through physical, functional, visual, or historical means to the surrounding area, or if it is a landmark.<sup>49</sup>

What is unique about the cultural heritage designation and protection afforded to Silver Dollar is that it is not based on physical or tangible heritage attributes (the first criteria of Regulation 9/06) but, instead, it is based on the intangible cultural heritage value embodied within the space and for “its contribution to Toronto’s musical culture.”<sup>50</sup> Or, as it is framed under Regulation 9/06 and in By-law 57-2015, the Silver Dollar meets the Section 29 criteria in terms of “associative and contextual value”. Its associative value was primarily determined based

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<sup>46</sup> *Supra* note 28.

<sup>47</sup> *Ibid*, s 1(2).

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> By-law 57-2015, *supra* note 2.

on its historical association with “the development and growth of music in Toronto, particularly the genres of jazz, blues, rock and bluegrass, from the 1950s through to the present day,” its role as “an incubator for musical talent,” its “international reputation that allowed local bands to be booked internationally,” and the important musicians associated with its space.<sup>51</sup> Its contextual value was determined based on its “value as a landmark in Toronto by virtue of it being a well-known, long-standing destination for live music with an international reputation” as well as for its “important contribution to Toronto’s musical scene,” especially within the context of other similar venues in the area, such as Grossman’s Tavern, the El Mocambo, and the Horseshoe Tavern.<sup>52</sup> As such the Silver Dollar was also deemed important for its role in preserving “this particular aspect of the cultural character of Spadina Avenue.”<sup>53</sup>

On September 12, 2011, the Toronto and East York Community carried the motion brought by former City Councillor for Ward 20 (Trinity-Spadina) Adam Vaughan to request “the Acting Director, Policy and Research, City Planning Division, to consider listing and designating as Heritage Properties 484 Spadina Avenue (The Waverly Hotel) and 486 Spadina Avenue (The Silver Dollar Room).<sup>54</sup> This action originated in the letter to this effect written by Adam Vaughan to the Toronto and East York Community Council.<sup>55</sup>

Based on its assessment of the March 20, 2014 “Report from the Director, Urban Design, City Planning Division, respecting Intention to Designate under Part IV, Section 29 of the Ontario Heritage Act – 484 Spadina Avenue” as well as a series of communications between March 24<sup>th</sup>-26<sup>th</sup>, 2014 with individuals (listed in the document), on March 31, 2014 the Toronto

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<sup>51</sup> *Ibid* at 2.

<sup>52</sup> *Ibid*

<sup>53</sup> *Ibid*

<sup>54</sup> Toronto and East York Community Council, “Agenda Item” (11 September 2011), online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.TE9.93](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.TE9.93)>.

<sup>55</sup> Letter from Adam Vaughan to the Toronto and East York Community Council (8 September 2011).

Preservation Board recommended to the Toronto and East York Community Council that “City Council state its intention to designate the property at 484 Spadina Avenue under Part IV, Section 29 of the Ontario Heritage Act in accordance with the Statement of Significance: 484 Spadina Avenue (Reasons for Designation),” but that it should “refer the Waverly Hotel portion of the property at 484 Spadina Avenue to the Director, Urban Design, City Planning Division, for further review for designation under Part IV, Section 29 of the Ontario Heritage Act.”<sup>56</sup>

The Toronto and East York Community Council went on to follow these recommendations and carve out the Waverly Hotel portion of the 484 Spadina property for further review by the Director of Urban Design in Toronto’s City Planning Division. After completing further review, the Director of Urban Design in Toronto’s City Planning Division recommended on June 23, 2014 that the Waverly Hotel not receive heritage designation under Section 29 (Part IV) of the *Ontario Heritage Act* and that it not be added to the City of Toronto Inventory of Heritage, namely because the Waverly did not meet *Ontario Regulation 9/06*.<sup>57</sup> The Toronto Preservation Board in turn followed this recommendation,<sup>58</sup> despite objections from the Harbord Village Residents’ Association,<sup>59</sup> and City Councillor for Ward 20 (at the time) Ceta Ramkhalawansingh.<sup>60</sup>

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<sup>56</sup> Toronto Preservation Board, “Recommendation re: Intention to Designate under Part IV, Section 29 of the Ontario Heritage Act – 484 Spadina Avenue” (31 March 2014). See By-law 57-2015, *supra* note 2 at 1-3 for the “Statement of Significance: Reasons for Designation”.

<sup>57</sup> Meaning that the Waverly does not meet the criteria stipulated for s 29 designation under *Ontario Regulation 9/06*, O Reg 9/06; Toronto, Director Harold Madi, Urban Planning, City Planning Division, “Heritage Evaluation – 484 Spadina Avenue – Waverly Hotel, Staff Action Report Required” (23 June 2014) [Heritage Evaluation, Action Required, 23 June 2014].

<sup>58</sup> Toronto Preservation Board, Agenda Item PB 3315, “Heritage Evaluation – 484 Spadina Avenue – Waverley Hotel” (17 July 2014).

<sup>59</sup> Letter from Sue Dexter to the Toronto Preservation Board (16 July 2014). The Harbord Village Residents’ Association represents those who live between College and Bloor and Spadina and Bathurst.

<sup>60</sup> Letter from Ceta Ramkhalawansingh to the Toronto Preservation Board (16 July 2014).

Subsequent to this, the Toronto and East York Community Council also followed this recommendation.<sup>61</sup> However, in terms of the Silver Dollar Room portion of 484 Spadina, Toronto City Council did indeed give its Notice of Intention to designate, to which there was no notice of objection, and City Council enacted and passed the designation on December 11, 2014.<sup>62</sup> By-law 57-2015 came into force on January 13, 2015.<sup>63</sup>

**D) The Results of Designating By-law 57-2015 and the Preservation of the Silver Dollar Room**\*

On May 8<sup>th</sup>, 2015, many who generated and enjoyed the use-value and intangible live music culture of the Silver Dollar Room, cultural heritage preservationists, current Ward 20 (Trinity-Spadina) City Councillor Joe Cressy, and Harbord Village Residents' Association Chair Tim Grant, all breathed a collective sigh of relief as the lengthy appeal process at the Ontario Municipal Board came to a close after hard negotiations ended in a settlement agreement between the City of Toronto, on the one side, and the private developer and owner of the space (the Wynn Group), on the other.<sup>64</sup>

In addition to a decrease in the height of the proposed development down to fifteen stories from twenty-two stories, a decrease in the shadow impact of the new construction on a nearby school and its playground, the heritage status designation of the Silver Dollar Room led to encouraging results for its future and the preservation of its intangible cultural heritage and high

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<sup>61</sup> See also "Is Hotel Waverly's Lurid Past Keeping it from Heritage Designation?" *CBC News* (19 July 2014), online: <[www.cbc.ca](http://www.cbc.ca)>.

<sup>62</sup> By-law 57-2015, *supra* note 2 at 1.

<sup>63</sup> See e.g. Leslie Ferenc, "Silver Dollar Room Now a Heritage Site", *thestar.com* (13 January 2015), online: <[www.thestar.com](http://www.thestar.com)>.

\* © Sara Ross. Parts of Subsection D were previously published in: Sara Ross, "Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value" (2017) 24:1 *International Journal of Cultural Property* 31.

<sup>64</sup> Wilson, *supra* note 34; Skinner, *supra* note 35; Cressy, Malik & Grant, *supra* note 34.

use-value.<sup>65</sup> The new development will involve the heritage restoration and maintenance of the current space of the Silver Dollar Room as well as its iconic sign, and will also be constructed in a manner that emphasizes the built form of the Silver Dollar.<sup>66</sup> In particular, conservation measures

shall include retaining: the location, scale, form and massing of the existing resource, the location of the original entrance, the exterior "Silver Dollar Room" sign and its location on the east elevation, the open volume of the interior performance space including the bar, the stage with raised areas and the terrazzo floor. Conservation and commemoration of other heritage elements of the premise will, as part of the site plan approval conditions, include reinstatement of the original mural and photographs of entertainers, installation of a plaque to commemorate the heritage resources, re-use of the name "Silver Dollar" in connection with the entertainment component of the commercial land use.<sup>67</sup>

However, while the heritage protection afforded by By-Law 57-2015 made it more difficult for the Silver Dollar to be demolished, until a final favourable decision regarding the development proposal was made, heritage protection did not function as a bar against demolition. Rather, heritage designation simply made it more difficult for this to happen by requiring the owner of a Section 29 designated property (the Wynn Group in the case of Silver Dollar) to apply to the council of the municipality within which the property is located in order to obtain written consent for demolition.<sup>68</sup> Effectively, as expressed at the time by current City Councillor for Ward 20 (Trinity-Spadina) Joe Cressy, heritage designation simply “means we put another piece of furniture at the door”—it gives the city another chance to say no to demolition.<sup>69</sup> It is also important to remember that another obstacle the Silver Dollar faced in its struggle to stay intact is that the Waverly, to which the Silver Dollar is attached, did not receive heritage

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Toronto City Council Decision re: 484 Spadina Avenue: Zoning By-law and Site Plan Appeals (Adopted 5 May 2015), online <app.toronto.ca>.

<sup>68</sup> *Ontario Heritage Act, supra* note 28, s 34(1).

<sup>69</sup> Ferenc, *supra* note 63.

designation,<sup>70</sup> and, neither did the previously described Comfort Zone underneath the Waverly and Silver Dollar, which was ignored in the discussions and negotiations related to the property.<sup>71</sup>

While there has been no mention of Comfort Zone, some experts, such as the Architectural Conservancy of Ontario (“ACO”), find the separation of the Silver Dollar from the Waverly and the refusal to accord heritage designation to the Waverly alongside the Silver Dollar to be “incomprehensible”.<sup>72</sup> Rather, the “ACO proposes designation of the broad fore part of the Waverly Hotel ... with the Silver Dollar Room, as part of a development that will allow both institutions and the most conspicuous parts of their buildings to survive and thrive into the foreseeable future.”<sup>73</sup> However, this recommendation ignores the essence of why cultural heritage designation was accorded to the Silver Dollar. Rather than its architectural merits, the crux of the designation was instead based on the lived intangible culture that grew and continues to thrive within the Silver Dollar.

As discussed previously, it is this aspect—that the cultural heritage designation was accorded based on “use” or “function” within the space—that appears to be the sticking point in the criticisms that arose in relation to By-law 57-2015.<sup>74</sup> This is why Silver Dollar is an

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<sup>70</sup> Heritage Evaluation, Action Required, 23 June 2014, *supra* note 57.

<sup>71</sup> This is not surprising as Comfort Zone has an unfortunate history of drug raids and other related legal battles and difficulties (Jackson Hayes, “33 Arrested in Club Raid, Drugs Seized”, *thestar.com* (17 March 2008), online: <[www.thestar.com](http://www.thestar.com)>; Shawn Jeffords, “Vaughan in Legal Fight with Bar”, *Toronto Sun* (10 October 2012), online: <[www.torontosun.com](http://www.torontosun.com)>; Kirk Makin, “Nightclub Sues City for Harassment”, *The Globe and Mail* (9 March 2009, updated 10 April 2009), online: <[www.globeandmail.com](http://www.globeandmail.com)>; Beedham, *supra* note 1. Nonetheless, it is striking that Comfort Zone remains unmentioned within the balance of the negotiations and decisions regarding 484 Spadina, the Waverly Hotel, and the Silver Dollar Room.

<sup>72</sup> Longley, “Re: Hotel Waverley”, *supra* note 35 at 3.

<sup>73</sup> *Ibid.*

<sup>74</sup> See e.g. Comment by WM Johnston on a local Toronto *blogTO* article (Chris Bateman, “The Silver Dollar Could Get Heritage Protection” *blogTO* (blog) (24 March 2014), online: <[www.blogto.com](http://www.blogto.com)>):

This is a strange application of the concept of heritage preservation. Preserving a historic structure by preventing demolition or alteration makes sense based on the architectural merits of a structure. Physical maintenance is straightforward. But how does one preserve

interesting case study to consider in Toronto where heritage designations are predominantly given based on architectural merit. In addition, the protection of the Silver Dollar is unique as Toronto's City Council is not known for its interest in protecting bars, whether or not they are live music venues.<sup>75</sup> City Councillors, such as former councillor Adam Vaughan who played an important role in acquiring protection for the Silver Dollar, are not known for supporting the preservation of bars either—rather, the opposite is true.<sup>76</sup>

### **III. DISPLACED SPACE AND COMMUNITY**

#### **A) Comfort Zone Compared to Silver Dollar Room: Invisibility of Marginal Community Cultural Space, Lack of Consultation, and Music City Strategies \***

Back when the Wynn Group's proposal started circulating for approval and the decision regarding the Silver Dollar Room was made, there were some brief online flutterings of concern about potential displacement amongst the Comfort Zone community, but the community seemed

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heritage based on the use or function of a structure? If a future owner of the Silver Dollar Room wishes to operate a coffee shop or clothing store out of the location, would the city be able to prohibit such a use?

"Sorry, this is officially designated as a heritage dive bar. You must operate a somewhat sketchy drinking establishment with live music at this location."

The commenter is in fact correct that the heritage protection of the Silver Dollar Room based on its use and function as a live music venue and unlike, for example the next case study of Brunswick House, cannot be transformed into a coffee shop or clothing store unless it is still being used and functioning as a live music venue.

<sup>75</sup> Sebastien Darchen & Diane-Gabriel Tremblay, "The Local Governance of Culture-led Regeneration Projects: A Comparison between Montreal and Toronto" (2013) 6:2 *Urban Research & Practice* 140 at 150. See also Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 90; Bateman, *supra* note 74. See also the Daniels Waterfront development planning application: #14 249503 STE 28 SA for 142 Lake Shore Blvd East, online: *Toronto Development Projects* <app.toronto.ca>.

<sup>76</sup> Valverde, *Everyday*, *supra* note 75 at 90. Vaughan notes that his fight is "a war on hooliganism," rather than "a war on clubs" (Interview of Adam Vaughan by Raju Mudhar (28 May 2007) *thestar.com*, online: <www.thestar.com/entertainment/2007/05/28/interview\_transcript\_councillor\_adam\_vaughan.html>); Benjamin Boles, "Revenge", *supra* note 20. For the context of City Councillor for Toronto's Ward 14 (Parkdale-High Park) Gord Perks support for the Parkdale neighbourhood's moratorium on new restaurants and bars, see also Joshua Ostroff, "Gord Perks and Toronto's War on Hipsters" *Huffington Post* (blog) (16 July 2013), online: <www.huffingtonpost.ca>.

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, "Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value" (2017) 24:1 *International Journal of Cultural Property* 31.

largely unaware of the limited future of their space. It was not until November 11, 2016, that TRC (Toronto Rave Community) posted a concerned article on the threat to the Comfort Zone's future after having picked up on the Wynn Group's new renderings of the proposed new development that had appeared in the *UrbanToronto* forum in early November 2016.<sup>77</sup> The article began popping up on Toronto's other various online communities for electronic music and bass music enthusiasts as well as within Comfort Zone's online spaces. Surprised comments noted that, according to the Wynn Group's renderings, the current entrance to Comfort Zone appeared to sit within the condo's front foyer.

While the Wynn Group's proposal had never made any pretense about allocating space for Comfort Zone and had not acknowledged its existence, a number of discussions at this time seemed to hold out false hope that the portion of Comfort Zone that is located directly below the Silver Dollar Room's space could be left intact.<sup>78</sup> Others commented that surely those living in the building would not want to have to pass through Comfort Zone's weekend guest list lineup in order to get to their front door, and yet others were hopeful that a new entrance to Comfort Zone could be built or that the entrance could be moved to inside the Silver Dollar Room.

The case of Comfort Zone in contrast to the Silver Dollar Room is relevant here for three key points. The first is that the loss of Comfort Zone's Spadina Avenue space is at odds with the desire to grow and celebrate Toronto's music culture as part of its Music City initiative. Directly

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<sup>77</sup> TRC, "484 Spadina's Development Doesn't Bode Well for Notorious After-Hours Club", *TRC* (11 November 2016), online: <trc.daily-beat.com>; "484 Spadina by Wynn Group Residential", online: <urbantoronto.ca>. *urbantoronto.ca* is a Toronto website that focuses on news about Toronto condos, architecture, urban development, and real estate, and has a very active forum where interested individuals engage in lively discussions and debates about Toronto's developments. TRC is the Toronto Rave Community—a virtual community that provides a space for electronic music devotees can keep up to date with Toronto's local rave scene and events and share music, pictures, and news. As the TRC website describes, "Stemming from its roots as a Facebook group in 2012, TRC brings Toronto-area electronic music fans together as one community. The platform is an extension of this mission, providing a fully-integrated and unified ecosystem for electronic music fans to connect, and be the trusted source for local talent, events, and Canadian music news through community-driven editorial and podcasting" (*TRC*, online: <trc.daily-beat.com>).

<sup>78</sup> TRC, "484 Spadina's Development Doesn't Bode Well for Notorious After-Hours Club", *TRC* (11 November 2016), online: <trc.daily-beat.com>.

attached and under the same threat as the saved Silver Dollar Room, Comfort Zone is an established music venue that has importance and a high use-value to sections of Toronto's music subcultures and minority music communities. It also functions as an available space for Toronto's musicians to hone their craft and for local audiences to experience both the sounds of local musicians and international guest DJs. Secondly, much of the language used to describe the intangible heritage merits that led to the Silver Dollar Room's heritage designation also appears in how the music subcultures and communities who attend and participate within Comfort Zone's space describe its relevance to their experience of music in Toronto.

Third, and what is most striking, is that throughout the unsuccessful heritage designation inquiry into the Waverly Hotel, and the successful heritage designation decision acquired by the Silver Dollar Room, no public mention, inquiry, or reference was ever made to the Comfort Zone space, and no attempt was made to engage with its displaced community that occupied the space regularly but at the invisible hours of the day-night continuum. Like Toronto's many other venues that have disappeared silently over the years, and as one of the very last regularly operating afterhours music and dancing space, Comfort Zone's displacement will leave a void in the city for those who have occupied, used, and enjoyed its space. The matter of consulting with these kinds of communities affected by redevelopment decisions, or the potential of there being intangible cultural heritage merit within these kinds of spaces regardless of tangible (built) heritage merit, has simply never been raised—even while Music City initiatives seek to celebrate Toronto's music heritage and provide spaces for it to grow.

#### **B) Displaced Spaces: Outpouring of Community Memories and A New Comfort Zone for Now**

In the end, it was not until March and April 2017 that the Comfort Zone community became aware that they were about to lose their community hub. At that point, as we have seen,

it was far too late to do anything about it. The Toronto Music Advisory Council meeting at City Hall on February 13, 2017 was flagged by members of the Comfort Zone community on February 2<sup>nd</sup>, 2017,<sup>79</sup> but again, as we have seen, the applicable decisions regarding the Comfort Zone, Waverly Hotel, Silver Dollar Room’s futures had already been made. Still, however, there was no mention or acknowledgment of Comfort Zone’s existence, let alone its impending displacement, even by those who were very vocal about their concerns for the Silver Dollar’s temporary closure.

When a new “Comfort Zone 2.0” (the term the venue used for itself) opened up in the downtown Entertainment District of Toronto the weekend after Comfort Zone’s closure and displacement, many community members were unsurprisingly skeptical of the viability of the new version of their community space based on similar experiences with the outcomes of other displaced Toronto afterhours dance and music spaces.<sup>80</sup> Among other concerns, many wondered and chatted about how the new space would change based on its acquisition of a liquor license—meaning that it could now operate during the more conventional hours of licensed music and dance venues and would likely attract a new consumer base, which many anticipated would be amplified by its new location in the nightclub- and bar-heavy Entertainment District.<sup>81</sup> From observations of the space after Comfort Zone 2.0 opened, it appeared that many of these predictions were at least initially correct. By August 2017, much to the delight of community members, Comfort Zone was able to regain some temporary intermittent access to the old Spadina location for what, it was thought at the time, would be a few last events—some which occurred instead of events at the 2.0 location, and some which occurred at the same time as events at the 2.0 location.

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<sup>79</sup> *Comfort Zone*( I ❤️ CZ), *supra* note 12; *Comfort Zone*, *supra* note 12.

<sup>80</sup> *Ibid*; Benjamin Boles, “Leaving the Comfort Zone”, *supra* note 13.

<sup>81</sup> See also Boles, “Leaving the Comfort Zone”, *supra* note 13.

While these parties began to pop up occasionally at the original space, they increased in frequency until 2.0 was no longer in use, and every weekend was business-as-usual at the old Spadina location. At this point, however, Comfort Zone was now operating while the Waverly Hotel sat empty, its boarded-up entry covered in graffiti tags, with a single eerie light shining dimly from an upper window, and a shuttered Silver Dollar Room on its other side. At the very end, there was another final “grand finale” closing party the weekend of December 16, 2017, with one last twelve-hour dancing and music event beginning at 2am on December 17<sup>th</sup>:

2AM !!! SUNDING MORNING!!! THE ZONE LEAVES SPADINA! THE BUILDING IS FINALLY COMING DOWN, OUR LAST STAND ZONERS!! LET’S SAY GOODBYE TO OUR BELOVED CAVE WITH A BANG!! 480 SPADINA!! THE LAST 12 HRS MADNESS!!<sup>82</sup>

And then its sign came down and it was closed, much to the surprise of the community who, at this point, was pretty sure that there would maybe another closing party—“who demolishes buildings over Christmas?”<sup>83</sup>

There were vague promises of a new project/venue in the works (“the countdown is almost ready ...”),<sup>84</sup> and that a “new and improved” Comfort Zone would be coming soon:<sup>85</sup>

THANK YOU ZONERS FOR ALL YOUR YEARS OF LOYAL WORSHIP! AND FOR SUCH KNOW THAT WE ARE NEVER GOING AWAY!! JUST WORKING ON SOME NEW AND COOL STUFF AND BE BACK IN NO TIME!! SO STAY TUNED!!!<sup>86</sup>

But it was the first transition into a new year that Comfort Zone’s doors would not be open to welcome the New Year with one of its infamous events.

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<sup>82</sup> “2AM !!!” (16 December 2017), posted on *Comfort Zone*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)>.

<sup>83</sup> “They can stick around till Nye iunno [sic] who destroys a building in the middle of Christmas time”; “Anytime now till they’ll surprise us that they will open up one more time this weekend.... Hopefully...” (19 December 2017), posted on *Comfort Zone (I ♥ CZ)*, online: <[www.facebook.com/groups/2205182781/](http://www.facebook.com/groups/2205182781/)>.

<sup>84</sup> (17 January 2018), posted on *Comfort Zone*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)>.

<sup>85</sup> (27 December 2017), posted on *Comfort Zone*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)>.

<sup>86</sup> “THANK YOU ZONERS ...” (27 December 2017), posted on *Comfort Zone*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)>.

The outpouring of community emotion and appreciation of the time spent with each other in the space began to role in during Spring 2018 as everyone realized that they only had a few months left in their community and cultural space that had featured so prominently in shaping their lives, friendships, and support structures over the years. The sharing of these thoughts and emotions within Comfort Zone’s online spaces mirrored the tributes—handwritten notes, flowers, symbolic objects—that can sometimes be observed on the, for example, closed doors of a closed meaningfully community space or venue.<sup>87</sup> As the prolific local DJ and long-time Comfort Zone attendee Miz Megs wrote to the Comfort Zone community:

So Comfort Zonee this morning ..... I am speechless. The vibe? It felt like 1999 again. The music!?! Holy Carlo Lio!! He was absolutely incredible. Super techy and housey - just the way I like it. I haven't danced that hard in a long time. It was a very very magical morning. Words can't even describe how incredible that was. I can't believe that space is closing, its [sic] such a piece of electronic music history in Toronto that I'm so happy I've been a part of for 20 years. My feet hurt, I slept all day and I can barely keep my eyes open now. But musical heart feels so happy! I had to stop into a random store in China town on my walk home for a ridiculous pair of sunglasses because it was so sunny. It was a little random moment that took me back to the old days. Truly special vibes. ⚡<sup>88</sup>

Better quoted directly rather than paraphrased, other powerful emotional outpourings described Comfort Zone’s importance in the lives of attendees as they made their way to dance for one last time at Comfort Zone’s Spadina Avenue space:

Thank u for saving my life. U were there for me when i had nothing and no one. I lost myself and found myself inside these walls countless times. Tonight is going to be incredibly hard for me. I feel like im losing a piece of myself. Sounds corny but this isnt just a club to us for some of us it was really all we had at one point. I feel like im losing a best friend. Ill always miss people watching on the patio @ 9 am, dancing till the lights came on security begging us to leave, life chats with friends and strangers alike. Im so happy u existed xoxo ... Just a bunch of misfits who found solace in a dungeon. Luv u forever cz. ❤️❤️❤️❤️❤️ ... I love u all. Staff and djs you

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<sup>87</sup> A terrific example of this were the outer doors of Fabric Nightclub in London, England during August-October, when it was forced to close after having its license revoked.

<sup>88</sup> Miz Megs, “So Comfort Zonee this Morning ...” (9 April 2017), posted on *Comfort Zonee*, online: <[www.facebook.com/Comfort.Zone.CZ/](http://www.facebook.com/Comfort.Zone.CZ/)> (Carlo Lio was one of the DJs who played Comfort Zone on 9 April 2017).

guys held us down for years. Took care of us like their own. And we all took care of each other. So many sentiments  <sup>89</sup>

A common theme among those who paid their respects to Comfort Zone via online community spaces dedicated to discussions about its weekly events and the music heard and people met within its walls was the safety and acceptance that attendees valued within the space and had continued to seek there over many years. For some, this was the case even after moving away from Toronto. There was also the recurring lament that future generations would not be able to find the same home that attendees had been able to find, sustain, and grow over the years:

So many great memories in CZ. I am so sad to hear this great meeting place will be closed. I have been visiting the zone since 1997. Each time I go I say....this is my last time. But time and time again I still make my 2 yearly visits mostly Good Friday or New Years Eve. I have met so many beautiful souls here and celebrated many times the fact that I am alive. We come together in this place to celebrate music, life and eachother. It is one of the last places on earth where everyone dances, loves and accepts eachother for who they are. It to me has always been more than the walls you are inside but about the people and the best damn music on earth. I am so sorry future generations will not be able to enjoy this dark dingy sketchy sweaty beat havin great time. I am not from Tdot so I prob won't get a last hurrah so pls all my house heads dance a whole in the floor for me n all the other ppl who have spent 20 yrs in this place. #theresnoplacelikezone<sup>90</sup>

**C) Cleansed Spaces: A Preserved Silver Dollar Room but Future Community Challenges Remain**

While better off in that they were not entirely losing their music venue and community space to redevelopment and had been acknowledged by the City and city politicians, the temporary closure of Silver Dollar Room was still problematic for the music community highly involved in the Silver Dollar Room in its current iteration. Many had not been aware of the fight for the Silver Dollar Room's heritage designation, and when Winter 2017 brought with it

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<sup>89</sup> "Thank U for Saving My Life" (7 April 2017), posted on *Comfort Zone(I  CZ)*, online: <[www.facebook.com/groups/2205182781/](http://www.facebook.com/groups/2205182781/)>.

<sup>90</sup> "So Many Great Memories in CZ" (7 April 2017), posted on *Comfort Zone(I  CZ)*, online: <[www.facebook.com/groups/2205182781/](http://www.facebook.com/groups/2205182781/)>.

announcements for Silver Dollar Room's final shows, these were met with alarm.<sup>91</sup> Since many were not aware of the heritage battle the Silver Dollar Room had fought, it was assumed that the Silver Dollar Room would be closing for good. Even when City Councillor Joe Cressy explained that the Silver Dollar Room would only be closing while the Waverly's redevelopment took place and that the owners (the Wynn Group) was obligated to reopen the Silver Dollar Room intact and as a live music venue, there was less relief on the part of Toronto's current music communities than one might have expected.<sup>92</sup>

While the Silver Dollar Room was in theory protected for what it had received its heritage designation for, this was seen as unsatisfactory for the existing music community and their concern for the current use, living heritage, and the existing community who had found a home within the space.<sup>93</sup> Even though the current operator had signed a separate agreement with the owner of the space (the Wynn Group) for the right of first refusal to operate the Silver Dollar Room when it eventually reopened, many expressed sadness and concern that there was no guarantee that this would in fact occur.<sup>94</sup> The even greater concern that surfaced was that Dan Burke, the infamous booker who had curated the space, would no longer be the booker once the Silver Dollar Room would reopen, and that the music scene and venue he curated would no

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<sup>91</sup> The flurry of concern all over social media even surfaced prominently in the media, see e.g. Carla Gillis, "The Silver Dollar, As You Know It, Is Closing", *Now Toronto* (31 January 2017), online: <nowtoroto.com>; Carla Gillis, "Vanishing Music Venues: Three Months Into 2017 and We've Already Lost Seven", *NOWToronto* (1 March 2017), online: <nowtorontocom>; Ben Rayner, "Silver Dollar Set to Close in the Spring", *thestar.com* (31 January 2017), online: <www.thestar.com>.

<sup>92</sup> Joe Cressy, "Silver Dollar Will Return as a Venue", Letter to the Editor, *thestar.com* (6 February 2017), online: <www.thestar.com>; Toronto Music Advisory Council (meeting), 13 February 2017 at Toronto City Hall; *Ontario Heritage Act*, *supra* note 28; By-law 57-2015, *supra* note 2.

<sup>93</sup> Toronto Music Advisory Council meeting, (5 June 2017) at Toronto City Hall. See also Carla Gillis, "The Silver Dollar, As You Know It, Is Closing", *NOWToronto* (31 January 2017), online: <nowtoroto.com>; Richard Trapunsky, "Farewell to the Silver Dollar", *NOWToronto* (1 March 2017), online: <nowtoronto.com>.

<sup>94</sup> Gillis, *supra* note 93; Trapunsky, *supra* note 93.

longer exist as the community knew it.<sup>95</sup> What would the operator do while the space was closed?

Even though the intangible use of the space would technically be maintained alongside the tangible characteristics of the Silver Dollar Room space, many attendees and musicians, such as, for example, the Toronto band Highest Order lead singer Simone Schmidt, expressed quite frankly that they did not have much faith for what heritage protection would meaningfully provide for the community and intangible culture currently existing within the Silver Dollar Room's walls: "The heritage status thing doesn't matter. It's about the people who work here, who live around here. That's who forms the culture."<sup>96</sup>

Certainly, the main concern in terms of heritage—both tangible and basic intangible protection—was to achieve the kind of protection the Silver Dollar Room now has and to avoid a situation like that of Brunswick House, which we will examine subsequently, where the tangible heritage merits of a space might be preserved but the space becomes, for example, a chain drugstore where the heritage-related *use* of a space and its intangible merits are erased. But the historic cultural heritage value and historic musical uses of Silver Dollar Room have evolved over time to now also include the current musical community using the space, and the Silver Dollar Room now (until its temporary closure) represents an accessible, nurturing, safe space for music, performance, and gathering in Toronto for a variety of today's music (sub)cultures. While not necessarily straightforward to accomplish, ideally, an inclusive view of heritage that truly

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<sup>95</sup> See e.g. Carla Gillis, "Vanishing Music Venues: Three Months Into 2017 and We've Already Lost Seven", *NOWToronto* (1 March 2017), online: <nowtorontocom>; Trapunsky, *supra* note 93.

<sup>96</sup> *Ibid.*

moves beyond authorized heritage discourse should accommodate changes and transformations in cultural uses, meanings, and values.<sup>97</sup>

Here, the future reopening of the Silver Dollar Room will show us how the acknowledgement and protection of the Silver Dollar Room's intangible cultural heritage will play out, how and whether it will be meaningfully maintained, what the reopened space will ultimately be like, and, most importantly, how those who currently use and value the Silver Dollar Room will respond—whether they will be welcome both in terms of social and well as economic inclusion, whether an organic music community will pick up where it left off, and whether the community subcultural wealth and use-value of the space will be maintained. But where the heritage protection the Silver Dollar Room received, despite being groundbreaking in its acknowledgment of intangibility and ability to preserve the Silver Dollar's space based on its use and function regardless of built tangible heritage merit, still fell flat for many as the question remains: how can this kind of existing community hub, and the community subcultural wealth, living heritage, and use-value generated in the space, be better acknowledged and maintained by a city's legal complexes that govern culture and heritage? How can our understanding of heritage be expanded to better include and represent the perspectives of the many different subsets of urban society?

As will be explored further in Chapters 7 and 8, for this particular situation my findings indicate that the two main paths forwards towards a better inclusion and representation of these perspectives would be: (1) a more meaningful engagement with the definition and understanding of heritage value that is set out in the *Burra Charter*, as it is already incorporated into Canada's

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<sup>97</sup> Laurajane Smith, *Uses of Heritage* (London, UK: Routledge, 2006) at 4, 300. "Authorized heritage discourse" will be discussed further in Chapter 7 but, briefly, it can be defined as: "a process of mediating cultural change, and of asserting, negotiating and affirming particular identities and values. It is a process wherein the narratives, values, and cultural and social meanings that underpin certain identities—often national ones—are asserted, assessed and legitimized" (*ibid* at 300)

legal framework for heritage matters through the Canadian Register of Historic Spaces and provides the definition to be used when crafting the requisite Statement of Significance that must be included in the heritage information assessed at the provincial level through, for example, Ontario’s heritage designation framework and its “Criteria for Determining Cultural Heritage Value or Interest”;<sup>98</sup> and (2) a more meaningful design and structure for public consultation processes leading up to (re)development and heritage decisions that better engage with social science methods like ethnography through the use of tools such as Rapid Ethnographic Assessment Procedures (REAP).<sup>99</sup>

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<sup>98</sup> *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013; “Practice Note: Understanding and Assessing Cultural Significance”, version 1, Nov 2013, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013; Canadian Register of Historic Places. “Writing Statements of Significance” (Parks Canada, 2006), online: <[www.historicplaces.ca](http://www.historicplaces.ca)>; *Criteria for Determining Cultural Heritage Value or Interest*, O Reg 9/06; *Criteria for Determining Cultural Heritage Value or Interest of Provincial Significance*, O Reg 10/06.

<sup>99</sup> See e.g. Setha M Low, “Anthropological-Ethnographic Methods for the Assessment of Cultural Values in Heritage Conservation” in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 31.

## **CHAPTER SIX: CASE STUDY - BRUNSWICK HOUSE, ALBERT'S HALL, AND THE MATADOR**

### **I. YE OLDE BRUNSWICK HOUSE AND ALBERT'S HALL: DESCRIPTION, HISTORY, VALUE, AND IMPORTANCE** \*

Located at 481 Bloor Street West, on the outer edge of Toronto's Harbord Village and bordering on Toronto's Annex neighbourhood, the 141-year-old Brunswick House closed in April of 2016. About a fifteen minute walk away from the Silver Dollar Room, it was listed as a heritage property on September 17, 1991.<sup>1</sup> While its tangible heritage merits have played into negotiations as to how the space would be redeveloped into a pharmacy drugstore chain called Rexall, and even though residents in the area have "expressed concerns about losing the Brunswick House's rich heritage — it's been a working class tavern, a noted jazz venue, and a gathering place for local literary lions," preserving the intangible culture, music assets, and cultural capital of the space has not figured into redevelopment plans, and is not (and was not) protected by the building's existing heritage listing.<sup>2</sup> It is important to note here that a heritage listing is different from a heritage designation. The latter confers a property with legal status under the *Ontario Heritage Act* whereas the former simply means an added step in the approval process for development proposals and building applications where Heritage Preservation

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\* © Sara Ross. Parts of Section I were previously published in: Sara Ross, "Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value" (2017) 24:1 International Journal of Cultural Property 31.

<sup>1</sup> City of Toronto, Heritage Preservation, Heritage Property Detail, online <[app.toronto.ca/HeritagePreservation](http://app.toronto.ca/HeritagePreservation)> [Heritage Property Detail].

<sup>2</sup> Annemarie Brissenden, "Brunswick on the Block", *Gleaner Community Press* (5 December 2015), online: <[gleanernews.ca](http://gleanernews.ca)> [Brissenden, "Brunswick on the Block"]; Annemarie Brissenden, "The Brunswick House has a Tenant", *Gleaner Community Press* (23 March 2016), online: <[gleanernews.ca](http://gleanernews.ca)> [Brissenden, "Brunswick House has a Tenant"]. See also Michael Hutter & David Throsby, "Value and Valuation in Art and Culture: Introduction and Overview" in Michael Hutter & David Throsby, eds, *Beyond Price: Value in Culture, Economics, and The Arts* (Cambridge: Cambridge University Press, 2008) 1 at 5; David Throsby, *Economics and Culture* (Cambridge: Cambridge University Press, 2001) at ch 2ff; David Throsby, "Seven Questions in the Economics of Cultural Heritage" in Michael Hutter & Ilde Rizzo, eds, *Economic Perspectives on Cultural Heritage* (Great Britain: Macmillan Press, 1997) 13 at 14-15.

Services must now also assess any proposed developments building applications for the listed building.<sup>3</sup>

Unlike the Silver Dollar, or Comfort Zone, Brunswick House had shifted from the musical offerings that made it famous and, although still operating as a music venue when it closed, had become mostly known as a relatively generic nightclub operating on the weekends, popular with an early-20's demographic and university students from the nearby University of Toronto campus; and often the subject of complaints by neighbouring residents about noise and “disruptive” nighttime behaviour. Nonetheless, Brunswick House’s musical legacy and history as a community gathering space stretches far back. Starting out as a tavern in 1876 that primarily served the local community, Brunswick House continued as a neighbourhood institution into the 1970s when it also became popular with students—as it was when it closed. As the foreword to a 1975 poetry book written about Brunswick House reads: “A community like this doesn’t need a ‘club,’” Kalman wrote, “it develops, indeed evolves, the classical meeting place in the classical Greek manner. The Brunswick House is this meeting place.”<sup>4</sup>

Like the Silver Dollar Room, Brunswick House originally served as a hotel bar to the hotel above its space, a space that would eventually become a flophouse prior to ceasing operations as a hotel entirely.<sup>5</sup> As far as its musical past, Brunswick House struggled to have live music during the 1930s when Ontario’s Liquor Control Board was known to restrict amenities provided by venues serving alcohol that were seen to stimulate alcohol consumption—such as live music.<sup>6</sup> Contrary to the requests of “respectable” hotels to have live music, such as “tasteful trios playing on weekend evenings”, the requests from hotels like the Brunswick House with

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<sup>3</sup> *Ontario Heritage Act*, RSO 1990, c O.18. See Heritage Property Detail, *supra* note 1.

<sup>4</sup> Rold Kalman, *Toronto, We Love You* (Toronto: Simon & Pierre Pub Co, 1974-75) (pages unnumbered).

<sup>5</sup> Jamie Bradburn, “Scenes from the Brunswick House”, *Torontoist* (30 November 2015), online: <torontoist.com>.

<sup>6</sup> Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge, UK: Cambridge University Press, 1998) at 151.

rougher reputations were not often granted.<sup>7</sup> While the Brunswick House was known in the 1960-70s for performances by the Annex neighbourhood's quirky and eccentric characters that famously comprised its neighbourhood fabric, and as the site of LGBT community activism, and even as home to a syndicated television series,<sup>8</sup> the Brunswick House really hit its stride for live music in the 1970s and especially as the 1980s came about.<sup>9</sup> During this period Brunswick House became intimately linked to its newly opened upstairs space: Toronto's legendary jazz and blues bar Albert's Hall. After Albert's Hall opened in the 1970s, in conjunction with Brunswick House, acts such as KD Lang and blues greats such as Albert King, Etta James, and Muddy Waters were frequently brought into the space.<sup>10</sup>

While Brunswick House continued as a music and dance venue up until its closure, Albert's Hall eventually became an unremarkable teletheater/off-track betting venue and, like Brunswick House, was also replaced during the Rexall development.<sup>11</sup> While some nearby residents were concerned with preserving the intangible cultural heritage merits and music assets that were germinated within Brunswick House's space over the years,<sup>12</sup> there were also many who were happy with the news of its closure, such as the chair of the Harbord Village Resident's Association Tim Grant (the same association that fought for the Silver Dollar Room's intangible

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<sup>7</sup> *Ibid.*

<sup>8</sup> Glenn Cochrane, *Glenn Cochrane's Toronto: Tales of the City* (Toronto: ECW Press, 2005) at 51-53; Deborah J Godin's poetry in Kalman, *supra* note \_\_ (pages unnumbered); Eric Mutrie, "Street Stories: Brunswick Avenue", *Spacing: Toronto* (10 December 2010), online: <spacing.ca>; Michelle Da Silva, "News of Brunswick House Closure Ignites Foggy Memories of Legendary Past" (27 November 2015), *Think Free: The NOWToronto blog* (blog), online: <nowtoronto.com>; Jamie Bradburn, "Scenes from the Brunswick House", *Torontoist* (30 November 2015), online: <torontoist.com>.

<sup>9</sup> See e.g. Celina Johnson, "The Past and the Future of the Brunswick House" (24 April 2016) *blogTO* (blog), online: <www.blogto.com>.

<sup>10</sup> Irene Stergiopoulos, "How I Learned to Stop Worrying and Love the Brunny", *Toronto Standard* (9 January 2012), online: <www.torontostandard.com>; Edward Keenan, *Some Great Idea: Good Neighbourhoods, Bad Politics and the Invention of Toronto* (Toronto: Coach House Books, 2013) 1.

<sup>11</sup> Brissenden, "Brunswick on the Block", *supra* note 2.

<sup>12</sup> *Ibid.*; Brissenden, "Brunswick House has a Tenant", *supra* note 2.

cultural heritage and heritage designation).<sup>13</sup> While the Silver Dollar Room has its share of past misdemeanors and history of disruptive behaviour, critics of the Brunswick House’s continued existence highlight “that while there are many people who remember the "The Brunny’s" golden years, when it was filled with university students and live musicians like Jeff Healey, in recent years police have been constantly called to the bar and there's a regular spillover on to the street after the bar closes around 2 a.m.”<sup>14</sup>

**A) “Adaptive Reuse”, the End for Brunswick House and the Third Realm: “You Can’t Really Hang Out in A Drug Store”**

The Harbord Resident’s Association along with the Annex Resident’s Association held a meeting at the end of November 2015 regarding the future of the Brunswick House, although at the time it was not clear what the purpose of the meeting would be since it was emphasized that the change to a month-to-month lease for the Brunswick House did not signal its closure—even though its closure was the final result.<sup>15</sup> The meeting, as listed on the Harbord Village Resident’s Association website, was advertised as a neighbourhood consultation to “hear what neighbours think” regarding the potential long-term lease of the space by Boston Pizza, especially since Boston Pizza’s interest in the space, as would eventually become clear, was contingent upon the construction of a patio.<sup>16</sup> The meeting was packed and ultimately Boston Pizza’s interest in the space appeared to wane as residents expressed concern about adding a patio to the space as well as concern regarding Boston Pizza’s fit into the character of Bloor Street West and the neighbourhood.<sup>17</sup> While Rexall’s interest in the space had preceded Boston Pizza’s, it had been initially withdrawn due to the refusal by Toronto’s Heritage Preservation Services of Rexall’s

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<sup>13</sup> “Brunswick House Denies Reports That Last Call is Drawing Near” *CBC News* (27 November 2015), online: <www.cbc.ca>. [“Brunswick House”, CBC News]

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Harbord Village Residents’ Association <harbordvillage.com>; Da Silva, *supra* note 8.

<sup>17</sup> Brissenden, “Brunswick on the Block”, *supra* note 2; Brissenden, “Brunswick House has a Tenant”, *supra* note 2.

preliminary application for particular changes to the building.<sup>18</sup> In the end, however, it is clear that Rexall agreed to work around the limits on redevelopment that resulted from heritage designation.

While Rexall's redevelopment plans were obliged to address the protection of the *tangible* heritage elements of 481 Bloor Street West identified in the 1991 heritage listing, the original heritage listing focuses only on the built merit of the space and does not include reference to, or protection for, the intangible cultural heritage merits of the space—such as the musical culture within its walls—meaning that these characteristics could be effectively ignored during redevelopment.<sup>19</sup> In the foreword to that 1975 poetry book on Brunswick House one can find the proud statement, “For fifty years the Annex Ratepayers Association has tried to keep this area – in spite of developers, city planners and others – as a refuge for humans, for people.”<sup>20</sup> But the battle here, however, was finally lost, even while the building was listed as a heritage property, and even though Toronto's Music City strategy purportedly seeks to embrace the city's music heritage and intangible culture that has grown in historic spaces like Brunswick house over the years.

With the new Rexall outpost now open, the freshly scrubbed and restored brick and limestone exterior of the space has remained by-and-large the same, save for the replacement of the Brunswick House sign with a large turquoise and white Rexall sign and the replacement of the royal blue awnings with Rexall-branded turquoise awnings. The interior, predictably, looks like a drugstore, but incorporates some “artifacts” from the Brunswick House's past that are on display as you pick up whatever it is that you need from the aisles. Its original keg barrel bar, for example, is now the checkout area, a couple of its old recognizable signs are placed around the

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<sup>18</sup> Brissenden, “Brunswick on the Block”, *supra* note 2.

<sup>19</sup> Brissenden, “Brunswick House has a Tenant”, *supra* note 2; Heritage Property Detail, *supra* note 1.

<sup>20</sup> Kalman, *supra* note 4 (pages unnumbered).

space, and a little display case/”museum” pays homage to the Brunswick House’s history with some bits of memorabilia—a few piles of pink tickets to an unknown show scattered below a haphazard selection of black-and-white photos that memorialize only the recent past of the Brunswick House considering its actual age.<sup>21</sup> Its archway still features prominently along with its tin ceiling, interior chandeliers, exposed brick walls, and Ye Olde Brunswick House sign placed on one of the side walls.<sup>22</sup> Crossing into the new space, it is certainly a charming, attractive, and unique drugstore, but as critics point out, what has not been preserved are the “third realm” characteristics of the space—the intangible heritage merits of the space—where people can congregate, interact, and spend their non-working and leisure hours.<sup>23</sup> Or, as Michael McClelland of ERA Architects puts it: “You can’t really hang out in a drugstore.”<sup>24</sup>

The case of the Brunswick House highlights the importance of the more rigorous process of heritage designation (as opposed to only listing a building on the Heritage Register). More importantly though, the loss of the Brunswick House as “third realm” space and as space for Toronto’s Music City aspirations to flourish shows why it is important to look into the intangible cultural heritage merits of a space during cultural heritage designation efforts and decision-making processes as, without this, heritage designation or listing based upon built merit cannot serve inclusively to protect a more expansive understanding of what heritage is and an inclusive range of (sub)cultures and communities associated with a building.

## **II. THE MATADOR: BACKGROUND, DESCRIPTION, HISTORY, VALUE, AND IMPORTANCE**

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<sup>21</sup> For additional pictures and a description, see also Amy Grief, “The Brunswick House is Now a Rexall Drug Store”, *blogTO* (23 March 2017), online: <[www.blogto.com](http://www.blogto.com)>.

<sup>22</sup> For additional descriptions, see also Laura Beeston, “The Brunny Gets a Corporate Facelift, but Rexall Vows to Maintain Building’s Charm”, *thestar.com* (17 February 2017), online: <[www.thestar.com](http://www.thestar.com)>.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

Unremarkable on the outside but boasting a beautiful vaulted ceiling inside with sprung classic wooden floors, the Matador is located at 466 Dovercourt Road, near the intersection of Dovercourt Road and College Street, and located within Toronto's Dufferin Grove neighbourhood, which is found within Ward 18 (Davenport). Even though it has been closed for years, the building stands intact, shuttered but with potential for new life, and with a future that remains in flux. The Matador's iconic sign, written out in vertical fading black capital letters on a white background, now mottled with rust, reads "MATADOR". "CLUB" is written on each side of the "A" while "BALLROOM" runs vertically down the width of the sign that protrudes from the side of the brick building away from the portion of the wall covered with creeping green vines. Below the main portion of the sign, curved like a smile, hangs a single word: "DANCING". The Matador's sign still remains outside, even though the building has been vacant and closed for years. The sign is a lauded Toronto landmark in much the same way as the nearby (about a thirty-minute walk away) Silver Dollar Room's iconic sign, and the nearby El Mocambo's iconic sign. Inside, past the brick-lined lobby, through an arch that leads down a half a dozen steps, there is a vast ballroom with a high ceiling that stretches the full length of the open floor.

While its protruding sign is still visible from the Starbucks that sits on the opposite corner of College Street and Dovercourt Road, the Matador itself sits awkwardly back from College Street, a bit down Dovercourt Road, and right next to a row of houses—a good example of the realities of legal non-conforming use in Toronto.<sup>25</sup>

When Ann Dunn bought the building, and opened the Matador Club in 1964, it soon grew into one of Toronto's historic music venues. Mostly known for its role in Canada's country music history, it played host to quite a few big name musicians like Blue Rodeo and Randy

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<sup>25</sup> *Planning Act*, RSO 1990, c P.13, s 34(9).

Bachman among others, was a favourite spot for many like Stompin' Tom Connors, Loretta Lynn, Gordon Lightfoot, and Leonard Cohen, and was also known as a space where musicians could sit in on jam sessions with the likes of Johnny Cash and Conway Twitty.<sup>26</sup> It even made an appearance in k.d. lang's music video for "Turn Me Round"<sup>27</sup> and was immortalized in Leonard Cohen's video for "Closing Time".<sup>28</sup> But the Matador was not only a space for big-name talent, and not only promoted Canadian country music, but it was also a space for local musicians due to Ann Dunn's commitment to promoting local acts.<sup>29</sup>

Even before the Matador's life as an iconic country music venue, it was the Davis Assembly Hall, which opened as a community dance hall in 1916 during the First World War, and was used for ceremonies, dances, balls, fundraisers, and send-offs.<sup>30</sup> As part of its history as a colourful and vibrant community space, after its original inception as a dance hall, it put in some time as a bowling alley before being transformed back into its original use as a space for music and dance by Ann Dunn.<sup>31</sup> As the years went by, in addition to the musicians who passed through its doors, the Matador also became known as one of Toronto's afterhours go-to "booze cans" (slang for unlicensed venues where alcohol is served afterhours—not to be confused with "afterhours" electronic dance and music clubs like Comfort Zone that do not serve alcohol).<sup>32</sup>

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<sup>26</sup> Scott Mitchell, *Secret Toronto: The Unique Guidebook to Toronto's Hidden Sites, Sounds and Tastes*, revised ed (Toronto: ECW Press, 2002) at 17; Jeff Gray, "The Fight of the Matador: A New Owner Struggles to Revive the Legendary Toronto Booze Can", *The Globe and Mail* (13 May 2016), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>27</sup> (1987).

<sup>28</sup> (1992).

<sup>29</sup> Interview with Charmaine Dunn (daughter of Ann Dunn) in Beth Macdonell, "Death and Rebirth of the Matador", *Gleaner Community Press* (29 December 2010), online: <[gleanernews.ca](http://gleanernews.ca)>.

<sup>30</sup> "Social Notes", *The Toronto Daily Star* (21 November 1916) 12; Mitchell, *supra* note 26 at 18; Alex Ballingall, "The Matador Music Club to Rise Again, Says Owner", *thestar.com* (27 January 2015), online: <[www.thestar.com](http://www.thestar.com)>.

<sup>31</sup> Mitchell, *supra* note 26 at 18.

<sup>32</sup> *Ibid*; Gray, *supra* note 26.

But it nonetheless served a community role, as Ann Dunn’s daughter described it, as “a late-night refuge for regular people, people who sweep sidewalks, up to people who made movies.”<sup>33</sup>

The aging Matador then experienced potential life-threatening drama in 2007 when it narrowly missed expropriation by the Toronto Parking Authority, who sought to turn the space into a parking lot after identifying the Matador’s location as an area in high-demand for parking<sup>34</sup>--a move that was initially advocated for by Toronto City Councillor Adam Giambrone, who was representing Ward 18 at the time.<sup>35</sup>

The Matador’s ability to avoid the parking lot fate that has been a common fate for many of Toronto’s music venues (Twilight Zone, 23 Hop, Comfort Zone, and so on)<sup>36</sup> was due at least in part to the “Save the Matador” campaign and community outcry.<sup>37</sup> The campaign of about forty individuals included some recognizable figures, such as author Michael Ondaatje,<sup>38</sup> and eventually led the Toronto Parking Authority to rescind its decision and led Councillor Giambrone to formally withdraw his support from the proposed expropriation.<sup>39</sup>

The close call with the parking lot situation and the resulting community outcry is yet another example of faulty consultation practices leading up to decisions such as these. Even though the stated reason behind the decision was based on the outcry by one contingent of the affected community—local businesses along College Street that were concerned about a lack of parking—this interpretation of the “public benefit” ignores all of the other groups and

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<sup>33</sup> Ballingall, *supra* note 30.

<sup>34</sup> John Goddard, “Is it Closing Time for the Matador”, *thestar.com* (24 September 2007), online: <[www.thestar.com](http://www.thestar.com)>;

<sup>35</sup> John Barber, “It May Not Be Paradise, But the Matador is No Place for a Parking Lot”, *The Globe and Mail* (17 October 2007), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>36</sup> See generally Denise Benson, *Then & Now: Toronto’s Nightlife History* (Toronto: Three O’Clock Press, 2015) for an overview of Toronto’s music and dancing venues that have been influential throughout the years but have subsequently been replaced, shut down, and so on.

<sup>37</sup> Goddard, *supra* note 34; Ballingall, *supra* note 30; Barber, *supra* note 35; Marc Lostracco, “The Matador Will Stand”, *Torontoist* (16 October 2017), online: <[torontoist.com](http://torontoist.com)>.

<sup>38</sup> Barber, *supra* note 35.

<sup>39</sup> *Ibid.*

community members potentially affected by or invested in the decision to remove a potent space of intangible cultural heritage.<sup>40</sup>

**A) The Matador Today, Preserving Use: Clashes Between Tangible and Intangible Heritage**

The Matador’s new owner Paul McCaughey has stated that he seeks to distance the venue from its booze can days while maintaining its original purpose as a nightclub-type space for music and dance—which is a change from his initial plans to turn the space into a wellness, performance, and tai chi space named “Wellspace” when he bought the space from Ann Dunn in 2010.<sup>41</sup> When the original plaster moulding that was part of the original dance hall was revealed in the bathrooms as the “black barnboard wood” was peeled back, McCaughey was motivated to look into the history of the Matador.<sup>42</sup> As he became aware of the Matador’s musical heritage and also in light of the recent closure of spaces like Government and near-closure of and rescue of the El Mocambo music venue, McCaughey noted that his plans for the Matador changed over time.<sup>43</sup> As McCaughey has stated, “My respect for the history of the Matador is something I’ve learned over time through other people’s stories and being inside the building,” “I’ve grown into a strong understanding of the history of the Matador in the city of Toronto and its place in Canadian music culture.”<sup>44</sup> Preserving a stronger link between the building’s future use and its musical history also speaks to preserving what past attendees had noted about the “feel” of the building—that its past legacy augmented the current experience of live music in the space.<sup>45</sup>

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<sup>40</sup> *Ibid.* See also Lostracco, *supra* note 37. It also bears noting that some nearby residents and businesses were in support of the expropriation as they found the Matador drew “bad crowds” and could be rowdy and disruptive into the early morning (“Iconic Matador Club Saved from Expropriation”, *CTV News Toronto* (17 October 2017), online: <toronto.ctvnews.ca>).

<sup>41</sup> Gray, *supra* note 26. For a description of the original plans celebrated by the local community newspaper see Macdonell, *supra* note 29.

<sup>42</sup> Gray, *supra* note 26; Ballingall, *supra* note 30.

<sup>43</sup> Gray, *supra* note 26; Ballingall, *supra* note 30.

<sup>44</sup> *Ibid.*

<sup>45</sup> Macdonell, *supra* note 29.

Potential heritage designation has thus far played an interesting role in the future of the Matador. Where McCaughey seeks to maintain continuity with the Matador's original use (its "intangible culture") and would like to carry out renovations to make this happen with an aesthetic of "rustic charm" that combines "the building's early 20<sup>th</sup>-century charm with the rough-and-tumble country aura the club was known for during its after-hours years,"<sup>46</sup> at one point an application for heritage designation for the building by Ward 18's current city councillor Ana Bailão in April 2015 threatened to limit his renovation plans.<sup>47</sup> Councillor Bailão's request came to fruition subsequent to a "pre-application consultation community meeting" that took place at the Matador on January 27, 2015 in order for McCaughey to "to introduce the community to the new uses that he plans for the space."<sup>48</sup>

Councillor Bailão's letter requesting heritage designation simply notes that, subsequent to the building's inception as the Davis Assembly Hall, it "served the community for many years," had "opened as a country music venue and was a popular destination for Torontonians and tourists alike."<sup>49</sup> This scant mention of the Matador's musical history and intangible cultural heritage is then supplemented with mention of its *tangible* heritage merits: "The building features a beautiful interior that was recently discovered as part of renovation work by the current owner. The local community is aware of these unique heritage characteristics and would

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<sup>46</sup> Ballingall, *supra* note 30.

<sup>47</sup> Gray, *supra* note 26. Toronto & East York Community Council, "Request for Heritage Designation at 466 Dovercourt Road (The Matador Ballroom)", letter from Councillor Ana Bailão, Ward 18, Davenport (14 April 2014), online:

<[app.toronto.ca/tmmis/viewPublishedReport.do?function=getDecisionDocumentReport&meetingId=9763](http://app.toronto.ca/tmmis/viewPublishedReport.do?function=getDecisionDocumentReport&meetingId=9763)> [Matador Request for Heritage Designation].

<sup>48</sup> Ana Bailão, "The Matador Ballroom's Pre-Application Community Meeting", *anabailão Toronto City Councillor Ward 18* (blog), online: <[www.anabailao.com/the\\_matador\\_ballroom\\_s\\_pre\\_application\\_community\\_meeting](http://www.anabailao.com/the_matador_ballroom_s_pre_application_community_meeting)>.

<sup>49</sup> Matador Request for Heritage Designation, *supra* note 47.

like to ensure that the historical richness of this property is protected, regardless of future change of use and/or development.”<sup>50</sup>

It is interesting that in this case, while aspects of the Matador’s built merit and tangible heritage may have been better preserved with heritage designation than they will be under the developer McCaughey’s current designs, focusing on these tangible protections may actually have thwarted the continuance of the Matador’s intangible musical heritage by blocking its renovations to reopen as a venue that reflects its original use and function along with its history and storied past.<sup>51</sup> While the heritage designation request did not ultimately pan out, based on the other case studies canvassed in this dissertation, had this route been successful, two results are possible. On the one hand, as we saw with the Brunswick House, heritage listing certainly imposes requirements on what can be done with the physical built heritage merits of the building, but nothing currently limits the future function and use that will be made of the building, and the disregard of its intangible musical heritage that often results. On the other hand, while heritage designation sought to keep the Matador from operating as a nightclub, the Silver Dollar Room’s heritage designation sought to maintain its use as a nighttime music venue and has not only successfully worked to protect its tangible heritage, but also to protect its intangible cultural heritage.

### **B) Disjunctive Treatment: The Matador and Toronto’s Music City Aspirations**

Despite the Matador’s potential for providing the resources to meet Toronto’s stated Music City objectives, another ongoing legal barrier remains to actualizing its potential by reopening and sustaining its original use and function—beyond expropriation threats, heritage designation concerns, and liquor license acquisition difficulties. In seeking to reopen the club as

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<sup>50</sup> *Ibid.*

<sup>51</sup> Gray, *supra* note 26.

a functioning dance and music and sometimes nighttime oriented space, McCaughey faces a conflict with the City as to whether or not he can successfully have the zoning status of legal non-conforming use grandfathered in for the Matador, since the building suffers from what can be seen as a gap in use and continuous operation between its sale in March 2010, subsequent vacant status, and McCaughey's current renovations and plans to reopen, or if it will remain zoned as commercial residential subject only to an application for rezoning of the property.<sup>52</sup>

At the time of writing, ten years after McCaughey and his brother bought the Matador in 2007, after many compromises with the City and local residents' opposition to the Matador's reopening in terms of capacity, venue format, opening hours, and so on, and after submitting twelve different plans to the City, the brothers were ready to sell the venue in exasperation.<sup>53</sup> Despite the many revisions to the Matador Ballroom Plan based on feedback from the neighbouring community and the City, the plans continued to be rejected based on current zoning by-laws and the pervasive view by the City that the space would ultimately function as a "nightclub".<sup>54</sup>

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<sup>52</sup> *Planning Act*, *supra* note 25, s 34(9). But see *Emily (Township) v Johnson* ((1981), 37 OR (2d) 623 at para 28, 135 DLR (3d) 465) as McCaughey insists that his plans for the Matador always included, at least for a portion of the building, space for music/dancing events (Gray, *supra* note 26), which is an important factual element that may ultimately play out in his favour (*Central Jewish Institute v Toronto (City of)*, [1948] SCR 101 at para 9, [1984] 2 DLR 1; *O'Sullivan Funeral Home Ltd v Sault Ste Marie (City)*, [1961] OR 413 at para 13, (1961), 28 DLR (2d) 1. See also Edward Keenan, "City in Need of That Old Matador Magic", *thestar.com* (28 April 2017), online: <[www.thestar.com](http://www.thestar.com)>; "Holding out Hope for a Music Hall", *CityNews* (26 April 2017), online: <[www.citynews.ca](http://www.citynews.ca)>. Elsewhere, Mariana Valverde (*Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) at 13) notes the spatiotemporal focus of twentieth-century planning law on the future rather than the past, and the subordination of the present to the future. Here, Valverde specifically highlights the application of the "legal non-conforming use" category to label "currently existing buildings and activities that do not meet the standards set for the future" as a mechanism by which planning law's spatiotemporal preference plays out—where future development subordinates both present reality as well as the past and the past use of a building/space (*ibid*).

<sup>53</sup> See e.g. also Marcus Gee, "Saying 'Yes, in My Backyard' to Toronto's Historic Matador Club", *The Globe and Mail* (10 March 2017), online: <[beta.theglobeandmail.com](http://beta.theglobeandmail.com)>; John Rieti, "Will the Matador Open Again: Its Owner Hopes So, But Says the City Has Him at His 'Wit's End'", *CBC News* (17 March 2017), online: <[www.cbc.ca](http://www.cbc.ca)>; Kate McGillivray, "Matador Ballroom Owner Ready to Sell After Latest Roadblock", *CBC News* (24 April 2017), online: <[www.cbc.ca](http://www.cbc.ca)>.

<sup>54</sup> See e.g. *ibid*.

The latest rejection occurred April 21, 2017, just hours after Mayor John Tory spoke glowingly at a Music City Summit (part of the 2017 Canadian Music Week) about Toronto’s successful music scene and all of the strides that had been made and would be made this year including newly opened venues like the Baby G, a reopened Hideout, which had to move when it was displaced from its home on Queen West, and the soon to reopen iconic El Mocambo.<sup>55</sup> As McCaughey noted on social media when he announced the latest rejection of the Matador Ballroom Plan, it was hard to view the Mayor’s statements as meaningful considering the immense amounts of stubborn red tape music venue owners and operators can experience in reopening or opening a venue in Toronto.<sup>56</sup>

### **III. FURTHER BARRIERS TO ATTAINING A LICENSE FOR A “NIGHTCLUB” OR “ENTERTAINMENT FACILITY”**

However, this preoccupation with the Matador’s potential operation as a nightclub, unreasonable as it might seem, is actually not a surprising reaction from the City considering the simultaneous licensing review underway to address better enforcement of the existing moratorium on new nightclub licenses and ongoing concerns with curbing the common contravening practice of venues that feature music and dancing at night and essentially operate in what might be deemed a “nightclub” manner but do not have appropriate entertainment facility or nightclub license and are instead only licensed to operate as a restaurant.<sup>57</sup> The primary stated motivating factor behind this review is listed as intending to address noise and nuisance concerns

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<sup>55</sup> See also “Mayor John Tory Unveils Plans to Bolster Toronto’s Music Scene”, *CBC News* (21 April 2017), online: <[www.cbc.ca/news](http://www.cbc.ca/news)>.

<sup>56</sup> Paul McCaughey, “The Matador Ballroom Plan was rejected by the City at 4:30pm, Friday” (21 April 2017), posted on *Friends of the Matador*, online: <[www.facebook.com/groups/11461785166/](https://www.facebook.com/groups/11461785166/)>.

<sup>57</sup> See e.g. Michael Smee, “City Looking to Crack Down on Nightclubs Masquerading as Restaurants”, *CBC News* (16 March 2017), online: <[www.cbc.ca/news](http://www.cbc.ca/news)>; Letter from Jim Karygiannis, Toronto City Councillor, Ward 39, Scarborough-Agincourt to Cesar Palacio, Chair, Toronto Municipal Licensing and Standards Committee (6 March 2017), Re: Action #LS17.3, available online: <[www.toronto.ca/legaldocs](http://www.toronto.ca/legaldocs)>; Toronto Licensing & Standards Committee, “Downtown Entertainment District – Enforcement of Nightclub”, Action #LS17.3 (6 March 2017), available online: <[app.toronto.ca](http://app.toronto.ca)> [adopted without amendment] [Toronto Licensing & Standards Committee, “Enforcement of Nightclub”].

that affect residents in the area surrounding the venues in question, along with public safety concerns where venues operating in this way may advertise and welcome crowds beyond the capacity of what their floorspace as a “restaurant” permits.<sup>58</sup>

While many of these establishments provide crucial space for musicians to play and provide valuable space for communities to congregate, dance, and enjoy music together, venues may choose to apply for a restaurant license as it is much more difficult and cost-prohibitive to acquire an entertainment facility or nightclub license.<sup>59</sup> In addition, there are few areas in Toronto that are zoned to accommodate venues licensed as entertainment facilities or nightclubs—with the only remaining option for would-be nightclub operators being an attempt to have the zoning by-law in their neighbourhood changed.<sup>60</sup> But where noise and nuisance concerns have led to this review in the first place, it is likely that local city councillors and the residents who have voiced nuisance concerns would be vocally opposed to any zoning amendments.

However, not only are there few zones outside of the Downtown Entertainment District that can accommodate a nightclub license, but there is also an existing moratorium on the issuance of new nightclub licenses within the Downtown Entertainment District.<sup>61</sup> Ultimately, however, with all these battles between the Toronto Parking Authority, the local City Councillor, the community, former attendees and other interested parties, preservation and development interests, and nightclub license moratorium advocates there remains a surprising

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<sup>58</sup> Smee, *supra* note 57; Letter from Jim Karygiannis, *supra* note 57; Toronto Licensing & Standards Committee, “Enforcement of Nightclub”, *supra* note 57.

<sup>59</sup> See e.g. See e.g. Smee, *supra* note 57. For but one example of a community very concerned with the effects of Toronto’s licensing review on transgressive and precarious communities, see Arshy Mann, “Toronto Councillor Wants to Enforce Bylaw that Could Shut Down Almost Every LGBT Club”, *Daily Xtra* (30 March 2017), online: <[www.dailyxtra.com](http://www.dailyxtra.com)>.

<sup>60</sup> See e.g. Smee, *supra* note 57; Letter from Jim Karygiannis, *supra* note 57; Toronto Licensing & Standards Committee, “Enforcement of Nightclub”, *supra* note 57.

<sup>61</sup> See e.g. Smee, *supra* note 57; Letter from Jim Karygiannis, *supra* note 57; Toronto Licensing & Standards Committee, “Enforcement of Nightclub”, *supra* note 57.

dearth in formal attention and meaningful public consultation regarding the future of the Matador as an iconic Toronto music venue. As alluded to by McCaughey, this oversight remains surprising considering the apparent efforts being put into Toronto's Music City initiative, growing the local music scene and Toronto's international draw as a center for music as well as the recognition of the need for suitable music venues to sustain a Music City and the City's stated desire to celebrate Toronto's music history.

In terms of public consultation practices and the effective weighing of all sides of neighbourhood and physical community concerns as well as the concerns of those who use a space but do not necessarily physically reside near the space, where the Matador had a close call with a new life as a parking lot due to local business concerns about parking, in 2015-17 a vocal group attending public Matador-related meetings as well as Music City strategy related meetings demonstrated how one group can skew the perception of what the "public" might want. Despite the momentum behind developing music and music venues in Toronto, and despite growing concerns about rapidly disappearing music venues even while the city was trying to increase its Music City reputation, some of the most vocal public participants attended to specifically oppose the Matador's reopening as a regularly operating music and dance venue in the neighbourhood—regardless of the fact that these meetings were unrelated to the City's review of the Matador's licensing applications and so on.<sup>62</sup> But the attendance of those vocally opposed to the reality of music venues and a Music City does highlight the need to effectively and diligently consult with a neighbourhood's and a city's residents beyond those who are willing, able, aware, and motivated to seek out opportunities to have their opinions heard by a city's consultation and decision-making mechanisms.

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<sup>62</sup> i.e. February 13, 2017 Toronto Music Advisory Council meeting at City Hall. See also Gee, *supra* note 53.

These situations demonstrate the difficulty of collecting a representative sample of public views that are not those at the extreme end of a spectrum. NIMBY vitriol against a venue opening or remaining open is a powerful tool to motivate these particular individuals to attend these meetings. Yet, those who accept or are in favour of the existence of the venue, are less likely to mobilize to vocally represent their views with equally relentless commitment within public fora. Being very much in favour of the space does not usually physically materialize to the same extent as those who oppose the space, but this lack of agency in representing favourable opinions (or other views) should not necessarily dictate the final outcome. There are other ways, as we will see, that can be used to diligently gather marginal, transgressive, and subaltern views, values, concerns, and so on, within a city.

## **CHAPTER SEVEN: TOWARDS A COUNTERHEGEMONIC USE OF HEGEMONIC LEGAL TOOLS FOR PROTECTING SPACES OF HIGH USE-VALUE AND COMMUNITY CULTURAL WEALTH**

While this section will first canvas existing mechanisms for intangible cultural heritage protection, where explicit intangible cultural heritage protection is not an option, or where the legal infrastructure does not necessarily provide for the explicit acknowledgment and/or protection of intangible cultural heritage, other strategies also exist or can be developed that nonetheless answer to what an equitable approach to valuating, acknowledging, protecting, and promoting diverse iterations of culture and subculture in the city might look like. As Sophia Labadi and William Logan note, “innovative grassroots approaches to the development pressures faced by urban heritage are seldom considered.”<sup>1</sup> In moving towards developing these approaches, examples of innovative potential strategies, which we look at in this section, in addition to explicit intangible heritage protection, include the agent of change principle, assets of community value initiatives, creative placekeeping, conscientious zoning practices, better public consultation practices, heritage conservation districts, intangible heritage-oriented height and density trading, more expansive application of heritage listing to include intangible heritage merits, culture-oriented task forces, grassroots community-based heritage protection initiatives, heritage subsidies and rent control for maintaining the intangible heritage of important cultural spaces and so on.

As Toronto’s Mayor John Tory suggested in his introduction to the “Mastering of a Music City” Music Cities Summit at the 2017 Canadian Music Week, at the municipal level, the

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<sup>1</sup> Sophia Labadi & William Logan. “Approaches to Urban Heritage, Development and Sustainability” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 1 at 2.

various divisions within the City’s administrative structure—i.e. City Planning, Economic Development and Culture, Municipal Licensing and Standards, and so on—need to better work together at the outset of development processes in order to ensure the sustainability of spaces of intangible music culture and heritage in the City.<sup>2</sup>

## **I. COUNTERHEGEMONIC POTENTIAL OF HERITAGE MANAGEMENT TOOLS**

For law to be mobilized in a counterhegemonic manner within the city redevelopment context, a number of areas within existing urban legal complexes carry potential for application in a more equitable fashion through better engagement with the interests of diverse subsections and subcultures affected by (re)development processes and decisions. Better protection of intangible cultural heritage for cultural practices generated by various cultures and subcultures in the city is one of these areas with counterhegemonic potential.

### **A) Scales of Application: Translating the International to the National and to the Local\***

International frameworks that deal with, regulate, promote, and protect tangible and especially intangible culture and cultural heritage carry great potential at the local level for a counterhegemonic application. Sophia Labadi and William Logan suggest that the sensitive management of urban heritage is intermeshed with many of the great issues of our time that are now taking place in the city setting—exponential population growth, social exclusion, and socioeconomic inequality alongside urban (re)development projects, shrinking recreational

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<sup>2</sup> John Tory, “Introduction to ‘Mastering of a Music City’” (Delivered at the Music Cities Summit, 2017 Canadian Music Week, Sheraton Center Hotel, Toronto, 21 April 2017) [unpublished].

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5; Sara Ross, “*Buen Vivir* and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach” (2015) 5:1 *City University of Hong Kong Law Review* 55.

spaces and agricultural land and the unrestrained proliferation of mass tourism consumption.<sup>3</sup> As such, designing better and more context-sensitive strategies for urban heritage management may also be a key component in addressing the larger array of problems manifesting within cities.<sup>4</sup>

In particular, the preservation of both tangible and intangible cultural heritage speaks to a *buen vivir* approach to urban redevelopment and the equal recognition of diverse lifeworlds and histories in the city space. Furthermore, heritage preservation is also referenced by many of the city-based human rights charters discussed in Chapter 1. As Walter Benjamin asserts, and Santos picks upon, “We have become poor. Piece by piece we have relinquished the heritage of human kind, often deposited in a pawnshop for a hundredth of its value, only to get back the small change of the ‘current balance’.”<sup>5</sup> This passage speaks to the intangible worth and use-value of certain objects and spaces that tend to be woefully disregarded or mismanaged when simply valued based on their market potential and exchange-value within local urban redevelopment strategies.

Santos suggests that “[i]n order to be successfully mobilized in a counter-hegemonic context, law must undergo a deep process of revision” and an inquiry into the potentiality of its counterhegemonic use despite its hegemonic nature.<sup>6</sup> With this intention, existing legal notions—such as the legal protection of intangible cultural heritage—can be applied in a more

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<sup>3</sup> Labadi & Logan, *supra* note 1 at 1, 8, 12. See also *The Florence Declaration on Heritage and Landscapes as Human Values: Declaration of the Principles and Recommendations on the Value of Cultural Heritage and Landscapes for Promoting Peace and Democratic Societies*, ICOMOS, 18<sup>th</sup> GA (adopted October 2014), art 4.3, online: ICOMOS <[www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA\\_2014\\_results/GA2014\\_Symposium\\_FlorenceDeclaration\\_EN\\_final\\_20150318.pdf](http://www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA_2014_results/GA2014_Symposium_FlorenceDeclaration_EN_final_20150318.pdf)>.

<sup>4</sup> Labadi & Logan, *supra* note 1 at 1.

<sup>5</sup> Walter Benjamin, “Erfahrung und Armut” in *Gesammelte Schriften* (II.I), Rolf Tiedemann & Hermann Schweppenhäuser, eds (Frankfurt: Suhrkamp, 1972) 213 at 214, cited in Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 170, fn 9 [translated by Santos] [Santos, *Epistemologies*].

<sup>6</sup> Boaventura de Sousa Santos, “Beyond Neoliberal Governance: The World Social Forum on Subaltern Cosmopolitan Politics and Legality” in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 29 at 60 [Santos, “Beyond Neoliberal Governance”].

transgressive and subaltern manner.<sup>7</sup> But, to do so, these kinds of notions must be examined, revised, and assessed for their counterhegemonic application and potential. This can involve not only a shift in the scale of application (international and national to municipal), but also in the object of application. For example, intangible cultural heritage protection benefits from a well-established framework at international law, but as we saw with the case studies canvassed in this dissertation, this is often not replicated within the local and municipal governance of cities and urban spaces where the intangible fabric of urban cultural heritage is generated and engages with the everyday lives of urban citizens.

While recent scholarship has begun to reveal the evolution of cultural policy from a largely national-level concern to one that has taken on an increasingly urban shape in numerous areas including the arts, cultural diversity, cultural heritage, and so on, this becomes progressively more important as cities latch on to these areas in the race for creative city and global city status.<sup>8</sup> Here, however, Canada lags behind in the protection of intangible cultural heritage without having ratified or implemented the UNESCO *Intangible Cultural Heritage Convention*. Nonetheless, while culture is a federally regulated matter, as we have seen, some provinces have taken a role in monitoring cultural heritage and, through this, intangible cultural heritage.<sup>9</sup> In addition, certain notable (if yet very limited) cases exist within city-based initiatives

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<sup>7</sup> *Ibid* at 30; Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 467ff [Santos, *Toward*].

<sup>8</sup> See e.g. Carl Grodach & Daniel Silver, "Introduction: Urbanizing Cultural Policy" in Carl Grodach & Daniel Silver, eds, *The Politics of Urban Cultural Policy: Global Perspectives* (London, UK: Routledge, 2013) 1 at 1. For a discussion of manifestations of these creative city initiatives in Toronto, see Ute Lehrer & Andrea Winkler, "Public or Private? The Pope Squat and Housing Struggles in Toronto" (2006) 33:3 *Social Justice* 142 at 144; Ute Lehrer & Jennifer Laidley, "Old Mega-Projects Newly Packaged? Waterfront Redevelopment in Toronto" (2008) 32:4 *Intl J Urban & Regional Research* 786 at 794, 796.

<sup>9</sup> See e.g. Quebec's *Cultural Heritage Act* (CQLR, c P-9.002) and Newfoundland and Labrador's, Department of Tourism, Culture, & Recreation, "Creative Newfoundland and Labrador: The Blueprint for Investment and Development in Culture" (2006) at 34 ["Creative Newfoundland and Labrador"]. Other provinces, such as Ontario, have sometimes read "intangible" into their provisions for protecting tangible cultural heritage. See i.e. the case of the Silver Dollar Room in Toronto (City of Toronto. By-law No 57-2015, *To designate the property at 484 Spadina*

to safeguard spaces that have important formative use-value to particular subcultural groups within the city and have resulted in the sustenance of important spaces of subcultural practice—such as the case of the Silver Dollar Room and the decision to harness provincial cultural heritage legislation to protect the intangible music culture generated over the years within its walls.<sup>10</sup>

Turning to the existing international cultural heritage protection framework as one potential guide in determining which spaces and properties of intangible cultural heritage should be protected, cultural anthropologist and current Under Secretary for History, Art, and Culture at the Smithsonian Institution Richard Kurin explains the objectives, that it “is the dynamic social processes of creativity, of identity-making, of taking and respecting the historically received and remaking it as one’s own that is to be safeguarded.”<sup>11</sup> Yet this still leaves open the role of the “arbiter of value”—or, the “expert”—in determining what should be protected. In terms of this role, Kurin suggests that “those who might be mindful of variants and yet decide on their relative significance and correctness – are not governments or scholars or collectors or aficionados, but rather *members of the concerned communities themselves.*”<sup>12</sup>

Following in this people-centered approach, Article 15 of the 2003 UNESCO *Intangible Cultural Heritage Convention*, entitled “Participation of Communities, Groups and Individuals”, reads: “Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and

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*Avenue (Silver Dollar Room) as being of cultural heritage value or interest* (11 December 2014) [By-law 57-2015], the *Ontario Heritage Act*, RSO 1990, c O.18, and the linked *Ontario Regulation 9/06*, O Reg 9/06.

<sup>10</sup> By-law 57-2015, *supra* note 9; *Ontario Heritage Act*, *supra* note 9; Justin Skinner, “OMB Settlement a Good Deal for Spadina and College Neighbourhood”, *InsideToronto.com* (12 May 2015), online: <[www.insidetoronto.com](http://www.insidetoronto.com)>.

<sup>11</sup> Richard Kurin, “Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention” (23 November 2006) Inaugural Public Lecture, Smithsonian Institution and the University of Queensland MoU Ceremony, at 13.

<sup>12</sup> *Ibid* [emphasis added].

to involve them actively in its management.” While Kurin goes on to explain that “members of the communities whose heritage is being safeguarded are to be full partners with any and all [safeguarding] efforts”<sup>13</sup> he warns that

Governments, or university departments or museums, cannot just assume they have permission to define ICH and undertake its documentation, presentation, protection or preservation. Community participation is meant to be significant and meaningful – involving the consent of community leaders, consultation with lead cultural practitioners, shared decision-making on strategies and tactics of safeguarding and so on.<sup>14</sup>

Kurin is also notes that while intangible cultural heritage might often be assumed to be ethnically or regionally based, or “traditional culture” that is genealogically passed on, this is not the full picture of what intangible cultural practices the 2003 UNESCO *Intangible Cultural Heritage Convention* encompasses.<sup>15</sup> Rather, the *Convention* is flexible and allows for the protection of non-traditional notions of what constitutes cultural activities and forms, their related spaces, and associated cultural communities—with wide ranging examples such as, for example, “rap music, Australian cricket, modern dance, post-modernist architectural knowledge, and karaoke bars” to name a few.<sup>16</sup> While this assessment of the state of intangible cultural heritage at the international level is a helpful guide, where countries, such as Canada and the United States, have yet to ratify the *Convention*, the next step is to turn to the mechanics of how intangible cultural heritage determinations are currently being dealt with on the ground level without reference to the *Convention*, and what kinds of future mechanisms might enable the recognition of different kinds of subcultural community wealth in the city.

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<sup>13</sup> *Ibid* at 15.

<sup>14</sup> *Ibid.* Laurajane Smith, *Uses of Heritage* (London: Routledge, 2006) at 38.

<sup>15</sup> Richard Kurin, “Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal” (2004) 56:1-2 *Museum International* 66 at 69.

<sup>16</sup> *Ibid.*

## **B) Intangible Cultural Heritage Treatment at the Provincial and Municipal Level in Canada\***

To shift the notion of intangible cultural heritage from international legal mechanisms to the reality of city governance structures within cities, there are a series of frameworks and bodies that ultimately govern the gates of what is or is not considered to be *tangible* heritage—such as planning boards, heritage boards, municipal governance boards, preservation boards, committees of adjustment, and so on. But whether or not these might be assessed as effectively dealing with *tangible* heritage protection, a serious gap exists in *intangible* cultural heritage protection.

Comparatively, where Canada has not ratified the 2003 UNESCO *Intangible Cultural Heritage Convention*, provinces and cities deal with (or fail to effectively deal with) their intangible cultural heritage through a few different strategies regardless of whether these are conscious efforts to explicitly acknowledge intangible cultural heritage. Where cultural matters fall within provincial jurisdiction, some provinces have gone ahead and developed their own provincial legislation that acknowledges intangible cultural heritage. Quebec’s *Cultural Heritage Act*, for example, explicitly addresses the preservation of elements of intangible cultural heritage.<sup>17</sup> Here, Section 1 of the Act defines “cultural heritage” to include intangible cultural heritage: “Cultural heritage consists of deceased persons of historical importance, historic events and sites, heritage documents, immovables, objects and sites, heritage cultural landscapes, and intangible heritage.”<sup>18</sup> Section 2 subsequently defines “intangible heritage” as “the skills, knowledge, expressions, practices and representations handed down from generation to generation and constantly recreated, in conjunction with any cultural objects or spaces associated

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\* © Sara Ross. Parts of Subsection B were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>17</sup> *Cultural Heritage Act*, *supra* note 9.

<sup>18</sup> *Ibid.*

with them, that a community or group recognizes as part of its cultural heritage, the knowledge, protection, transmission or enhancement of which is in the public interest.”<sup>19</sup>

Other provinces, such as Newfoundland and Labrador, have less developed but nonetheless nascent initiatives like the “Creative Newfoundland and Labrador: The Blueprint for Investment and Development in Culture” and its “Strategic Priority 7: Safeguarding and Sustaining our Intangible Cultural Heritage (‘Living Heritage’)”<sup>20</sup> Here, the term “intangible cultural heritage” is used interchangeably with “living heritage”.<sup>21</sup> This guiding document explains that

An elusive but, nonetheless, very special element in our identity as a people and a province is what we now call our intangible cultural heritage or, alternatively, our “living heritage.” This dimension of our collective self, as it were, encompasses a host of traditions, practices and customs that permeate and help constitute the very marrow of our society. Intangible cultural heritage embraces, among other things, our stories, holidays, community gatherings, culinary arts, rituals, songs and languages. These are passed from one generation to another but do not remain static; they are modified and recreated by each new generation.<sup>22</sup>

The overarching goal of Newfoundland and Labrador’s strategic intangible cultural heritage priority seeks to “[r]ecognize, record, disseminate and promote the intangible cultural heritage (‘living heritage’) of Newfoundland and Labrador and develop strategies for its safeguarding” in order to: “[r]aise awareness of intangible cultural heritage in Newfoundland and Labrador; [a]ssess specific issues and areas of particular vulnerability; [d]evelop a vision and mission for the safeguarding of our province’s intangible heritage; [i]dentify an enabling mechanism for the partnership and actions for intangible heritage among stakeholders; [i]dentify steps in developing an overall strategy and action plan.” The plan outlined seeks to “[c]reate an effective provincial mechanism for identifying and recognizing examples of intangible cultural

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<sup>19</sup> *Ibid.*

<sup>20</sup> “Creative Newfoundland and Labrador”, supra note 9 at 34-35.

<sup>21</sup> *Ibid* at 34.

<sup>22</sup> *Ibid.*

heritage that are of significance to Newfoundland and Labrador” and to showcase best practices in intangible cultural heritage management.<sup>23</sup> It draws on international frameworks and progressively focusses on a people-centered approach that moves beyond heritage determinations that are based on the knowledge and values of experts in order to actively include local individuals, communities, and the active intergenerational participation of youth.<sup>24</sup>

Yet other provinces, like Ontario have at times read in the notion of *intangible* cultural heritage into provincial *tangible* cultural heritage provisions, which is what we saw with the case of the Silver Dollar room.<sup>25</sup> At the municipal level, while cities may have policies or boards that lobby for heritage preservation, this is largely in relation to tangible cultural heritage preservation. Nonetheless, an example of municipal legislation alluded to previously that describes the protection of intangible culture and its heritage merits at the city level is Montreal’s *Charter of Rights and Responsibilities*.<sup>26</sup>

### C) Determining Heritage Value \*

#### i. Understanding Community (Sub)Cultural Wealth as Intangible Cultural Heritage Within Local Musical (Sub)Cultural Spaces

In the introduction to Denise Benson’s book tracing the history of key spaces of Toronto’s nightlife and electronic dance music scene that have now been lost, Toronto writer Stuart Berman finishes with this: “With its few remnants of Victorian and art-deco architecture overpowered by hastily assembled modern towers of concrete and glass, Toronto has developed

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<sup>23</sup> *Ibid* at 35.

<sup>24</sup> *Ibid*.

<sup>25</sup> See e.g. By-law 57-2015, *supra* note 9; *Ontario Heritage Act*, *supra* note 9; *Ontario Regulation 9/06*, *supra* note 9.

<sup>26</sup> City of Montreal, *Montréal Charter of Rights and Responsibilities* (1 January 2006), online <ville.montreal.qc.ca> [*Montreal City Charter*].

\* © Sara Ross. Parts of Subsection C, numbers ii and iv, were previously published in: Sara Ross, “Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value” (2017) 24:1 *International Journal of Cultural Property* 31.

a not-undeserved reputation for paving over its past and short-changing its future.”<sup>27</sup> Unpacking statements like these reveals contrasting views on what is and/or should be valued in the context of city redevelopment: whether the future should be privileged over the past, whether heritage should be privileged over innovation, or whether heritage preservation is simply a form of outdated nostalgia; what constitutes “heritage”, what kinds of heritage and whose heritage matters, and how we should determine which spaces—whose spaces—merit protection and/or promotion. These kinds of statements make us think about what kind of weight should be accorded to places that are meaningful to people but could be more commercially viable if redeveloped or transformed into a place that attracts more people to spend money, or the kinds of people who have more money to spend. But oftentimes this notion of what is meaningful—or what carries great cultural community wealth, use-value, or embodies a group’s intangible cultural heritage—takes a back seat in determining the redevelopment processes of cultural spaces in the city. Within these redevelopment and development discussions, Sharon Zukin identifies three loosely defined but often overlapping camps: those who focus on historic preservation concerns, those who focus on community preservation concerns, and those who fall under the vague and catch-all term of “gentrifiers”.<sup>28</sup>

While the replacement of venerated music venues with residential, mixed-use, non-nightlife, or non-leisure-oriented spaces is perhaps more easily castigated as a loss; the gentrification of areas where music spaces operate can also lead to the replacement of one kind of nightlife or leisure space with another. Whether this is a more cleansed space, one that is trendier, one with a higher price point, or whether the shift in venue genre might come as a

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<sup>27</sup> Stuart Berman, “Foreword” in Denise Benson, *Then & Now: Toronto’s Nightlife History* (Toronto: Three O’Clock Press, 2015) i at v.

<sup>28</sup> Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford: Oxford University Press, 2010) at 11.

welcome change for those eager for new and different nighttime-oriented or leisure spaces within a neighbourhood, the change can have lasting effects on particular iterations of culture and subculture if one of the subcultural community's few remaining spaces or venues are displaced.

This presents a situation where a cultural or community preservationist argument for the use-value or community cultural wealth of a space may exist even where an argument for the tangible cultural heritage merits of a space are unlikely to raise the ire of a historic preservationist unless they are concerned with intangible cultural heritage. Nevertheless, where a particular subculture may not yet have stood the test of time, this becomes difficult for it to accomplish when faced with gentrification forces and the ongoing removal of spaces of high use-value where subcultural practices are generated and community cultural wealth flourishes. In these cases, it may become even more difficult to formulate an argument for heritage value. But that does not diminish the "special" and important nature that these spaces carry, and what they contribute to a sense of place and "local" character of a neighbourhood. John Schofield and Rosy Szymanski describe what can be understood by "special" in this context:

By special we do not necessarily mean iconic. We are not in the same territory here as words and values that are specifically used to justify the introduction of heritage protection measures, such as listing buildings of "special historic interest" and monuments of "national importance". Rather, we are typically referring to things (which can mean places, objects, cultural traditions, landscape components) that are valued locally, that characterize a local area, that give a place distinctive quality, that set it apart from other places. Of course, some of these places are "special" in terms of cultural significance, national importance and so on. But more often they are not. They are ordinary, mundane, everyday places, the commonplace in national terms, but deeply ingrained with local significance and special to those who live there. Such special things need not always be tangible. ... Musical traditions can be highly localized, while a place's auditory characteristics can offer distinctive qualities. ... We are talking about things that contribute to a sense of place, or – in Tuan's words, '*genius loci*'. These things need not be (and often are not) material. All of these contribute to local character. And local is important.<sup>29</sup>

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<sup>29</sup> John Schofield & Rosy Szymanski, "Sense of Place in a Changing World" in John Schofield & Rosy Szymanski, eds *Local Heritage, Global Context: Cultural Perspectives on Sense of Place* (Surrey: Ashgate, 2011) 1 at 2-3. In

As Jane Jacobs warned in 1956 about “holes in the wall”, “Sometimes you learn more about a phenomenon when it isn’t there, like water when the well runs dry.”<sup>30</sup> As Jacobs goes on to describe, these kinds of spaces are necessary in a city as social spaces as “they help make an urban neighbourhood a community instead of a mere dormitory.”<sup>31</sup> Again turning back to Stuart Berman’s introduction of Denise Benson’s book, Berman lays out a description of the use-value generated within the walls of these kinds of local social spaces, and explains how the availability of these spaces as a “third realm”—away from home and work—are important for activities like dancing that can enrich the everyday life, culture, and happiness of a community in a city:

Dancing is a vehicle for escape: from the day job you hate, from your overpriced apartment that’s way too small, from the unpaid bills sliding down your fridge under cheap-ass business-card magnets that advertise realtors trying to sell you houses you can’t possibly afford. In other words, it’s a wholly self-indulgent act whose chief purpose is to momentarily stimulate your tired soul before the real world beckons once again each Monday morning and you reassume your rightful, cubicled station. As such, dancing is considered by most to be a purely leisure activity, something to do in your spare time—like watching television or playing Candy Crush—when you’re not tending to The Important Stuff in Life.<sup>32</sup>

But, as Berman notes, dancing, and spaces for music and dancing, are a lot more than that. In the same vein as Jane Jacobs’s argument for the importance of “holes in the wall” to a neighbourhood and to a city,<sup>33</sup> spaces for music, and for dancing to this music, are not only crucial to a city as transgressive zones for renegotiating identities, escaping daily drudgeries, and for self-care but they are also key intercultural contact zones, as we saw in the case studies

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terms of Tuan’s use of the term “genius loci”, see Yi-Fu Tuan, *Space and Place: The Perspective of Experience*, revised ed (Minneapolis: University of Minnesota Press, 2001).

<sup>30</sup> Jane Jacobs, “The Missing Link in City Redevelopment”, (June 1956) *Architectural Forum* [Jacobs, “Missing Link”]

<sup>31</sup> *Ibid.*

<sup>32</sup> Berman, *supra* note 27 at i. See also, generally, Laam Hae, *The Gentrification of Nightlife and the Right to the City: Regulating Spaces of Social Dancing in New York* (New York: Routledge, 2012).

<sup>33</sup> Jacobs, “Missing Link”, *supra* note 30.

canvassed previously, for people to meet, dance, interact, and share in an experience.<sup>34</sup> Or, in yet other words, to legally protect and equitably value spaces of music and dance in the city is to protect and value essential spaces for fun and enjoyment in a city.

ii. **Notions of Time, Intra-Generational Equity, Inter-Generational Equity, and Intertemporal Distributive Justice as Part of Sustainable Development in the City**

Considering the heavy youth involvement in generating and participating in music-based subcultural spaces and nighttime cultural spaces,<sup>35</sup> the heritage value of these space may be overlooked by a conventional assessment of what constitutes “heritage value”. While an argument for heritage value may be hard to make for some spaces—which are nonetheless captured under the preservation interests of safeguarding community cultural wealth and spaces of high use-value in the city—the meaning of “heritage value” encompasses more than that which is currently being applied in Canadian cities like Toronto. As Gail Higginbottom and Philip Tonner warn, even though a cultural site may seem at present to be of little relevance, this “does not mean it won’t have any for future generations, who could well be astonished as to why we allowed the destruction of places that presently ‘do not appear to have any value to anyone.’”<sup>36</sup>

Amy Terrill, VP Public Affairs at Music Canada, asks: “Could it be that if you do not protect, celebrate or nurture your past music history, you cannot hope to maintain or grow a

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<sup>34</sup> Shawn Micallef, “With Clubs Disappearing, Where Will Toronto Dance?”, *thestar.com* (11 April 2013), online: <[www.thestar.com](http://www.thestar.com)>; Santos, *Epistemologies*, *supra* note 5 at 218, 227; Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 472 [Santos, *Toward*]. See also Hae, *supra* note 32 at 6.

<sup>35</sup> See e.g. Miranda Campbell, *Out of the Basement: Youth Cultural Production in Practice and Policy* (Montreal: McGill-Queen’s University Press, 2013) at 3; Paul Chatterton & Robert Hollands, *Urban Nightscapes: Youth Cultures, Pleasure Spaces and Corporate Power* (London, UK: Routledge, 2003) at 5, 71, 88-89, 209-10; Hae, *supra* note 32 at 40; Ernst & Young, “Creating Growth: Measuring Cultural and Creative Markets in the EU” (December 2014) at 5-6, online: <[http://www.ey.com/Publication/vwLUAssets/Measuring\\_cultural\\_and\\_creative\\_markets\\_in\\_the\\_EU](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU)>.

<sup>36</sup> Gail Higginbottom & Philip Tonner, “Archaeologies and Geographies of Value” in Stephanie Koerner & Ian Russell, eds, *Unquiet Past: Risk Society, Lived Cultural Heritage, Re-designing Reflexivity* (Burlington, Ashgate, 2010) 291 at 299-300.

successful current music scene? Does a lack of respect for the past lead to instability in the present and future?”<sup>37</sup> While this statement speaks to the fundamental role of time in heritage, where heritage is “a view from the present, either backward to a past or forward to a future,” the three tenses of past, present, and future are intimately connected and overlapping.<sup>38</sup> Within urban redevelopment strategies seeking global recognition and economic gains—as Toronto’s processes display—views of present heritage spaces forward to the future often suffer from an overemphasis of present and future projections of the exchange-value merits over present use-value merits and the cultural importance of a space, in addition to a failure to effectively consider without prejudice future projections of the use-value merits of a space, which are inherently difficult to measure.<sup>39</sup> Where spaces of intangible cultural heritage are destroyed, the consequences are irreversible but, again, often invisible and unquantifiable.<sup>40</sup> In moving towards effective place-oriented laws and redevelopment strategies in cities, spaces in the city must also be viewed for what they *have now* and the meaning that they *currently carry* for the citizens of a city and its (sub)cultural communities, rather than an overemphasis on what they lack, their deficiencies, and how their utility might be either economically maximized through replacement or reconfiguration.<sup>41</sup> Or, these kinds of questions must be better investigated within the affected communities for replacing non-renewable culture and heritage spaces in a city.

In applying sustainable development principles to the cultural heritage context, where “a key element of this concept is equity in the treatment of different generations over time,” David

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<sup>37</sup> Amy Terrill, “How Cities Benefit from Helping the Music Industry Grow”, *WIPO Magazine* (September 2015), online: <[www.wipo.int/wipo\\_magazine](http://www.wipo.int/wipo_magazine)>).

<sup>38</sup> Brian Graham, GJ Ashworth & JE Tunbridge, *A Geography of Heritage: Power, Culture & Economy* (London, UK: Arnold, 2000) at 2; Higginbottom & Tonner, *supra* note 36 at 299-300.

<sup>39</sup> *Ibid.* See also Graham, Ashworth & Tunbridge, *supra* note 38 at 4-5.

<sup>40</sup> Higginbottom & Tonner, *supra* note 36 at 299-300.

<sup>41</sup> See also Lisa T Alexander, “Hip-Hop and Housing: Revisiting Culture, Urban Space, Power & Law (2012) 63 *Hastings LJ* 803 at 807 for a discussion of place-based lawmaking, people-based lawmaking, and the false dichotomy between the two of them where existing places and communities of a city must be valued and understood in order to develop equitable law and policy for the people of communities and cities.

Throsby draws on the terms “intergenerational equity” and “intertemporal distributive justice” in order to “to refer to fairness in distribution of welfare, utility, or resources between generations.”<sup>42</sup> As we will see subsequently, the *Burra Charter*’s preamble picks up on this notion: “These places of cultural significance must be conserved for present and future generations in accordance with the principle of inter-generational equity.”<sup>43</sup>

Along with inter-generational equity, Throsby emphasizes the importance of *intra*-generational equity, which also speaks to the diversity of values and stakeholders affected by city redevelopment processes who may not be adequately consulted, or considered, in redevelopment decisions. Intra-generational equity “refers to equity in access to the benefits of cultural capital across social classes, income groups, locational categories, and so on.”<sup>44</sup> Finally, as Throsby goes on to delicately note in terms of inter- and intra-generational stakeholders, “It may be appropriate for stakeholders affected by the decision to have some input into these processes. This concern raises the matter of empowerment of those whose interests are affected by heritage decisions; *general considerations of sustainability would suggest attention to the fairness of decision-making procedures in this context.*”<sup>45</sup>

Discussing the future importance of heritage and the conflict that can exist between present and future consumption, as Throsby asserts, again highlights the need for better consultation with affected stakeholders, the divergent and often-dissonant values that can exist within a space, and effective acknowledgment of the use-value and intangible cultural heritage

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<sup>42</sup> David Throsby, “Cultural Capital and Sustainability Concepts in the Economics of Cultural Heritage” in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 101 at 107 [Throsby, “Cultural Capital”].

<sup>43</sup> *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 [2013 *Burra Charter*].

<sup>44</sup> Throsby, “Cultural Capital”, *supra* note 42 at 109.

<sup>45</sup> *Ibid* [emphasis added].

merits that can be bound up in spaces targeted for redevelopment.<sup>46</sup> The future is even more difficult to predict without thorough assessment of who will be affected by decisions and how. Wrapping back to Toronto’s Music City and redevelopment strategies, it would seem that greater regard for the diversity of values—whether framed as intangible cultural heritage or use-value—would lead to development more aligned with a sustainable approach to cultural development that accounts not only for inter- and intra-generational equity, but also more generally, a more equitable city.

iii. *Heritage as Power, and Problematizing Tangibility to Unseat Authorized Heritage Discourse*

Authorized heritage discourse “is a process of mediating cultural change, and of asserting, negotiating and affirming particular identities and values. It is a process wherein the narratives, values, and cultural and social meanings that underpin certain identities—often national ones—are asserted, assessed and legitimized.”<sup>47</sup> On the one hand, if used in this way, heritage can unfortunately serve as a hegemonic tool to flatten diversity with “the promotion of a consensus version of history by state-sanctioned cultural institutions and elites to regulate cultural and social tensions in the present,” thus serving to undermine alternative, subaltern, and transgressive notions of heritage.<sup>48</sup> But, on the other hand, if heritage can be accepting of diversity and encourage transgressive understandings of heritage, it is possible for heritage to then be used counterhegemonically “to challenge and redefine received values and identities by a range of subaltern groups.”<sup>49</sup>

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<sup>46</sup> *Ibid* at 107.

<sup>47</sup> Smith, *supra* note 14 at 300.

<sup>48</sup> *Ibid* at 4, 11, 30-31.

<sup>49</sup> *Ibid* at 4. See also *ibid* at 35-42.

Rather than viewing heritage as a “thing”, it is more usefully understood as a “cultural and social process, which engages with acts of remembering that work to create ways to understand and engage with the present.”<sup>50</sup> Heritage and its formation, acknowledgement, and protection is a dynamic site of contestation, which is why spaces of intangible and tangible heritage are potent zones for intercultural translation and decolonization of the city space. As Jane Jacobs mused in her 1996 book *Edge of Empire: Postcolonialism and the City*:

The making of heritage is a political process. Certain places may be incorporated into sanctioned views of the national heritage while others may be seen as a threat to the national imaginary and are suppressed or obliterated. Other oppositional places may be sanitised and depoliticised in their transit into officially sanctioned heritage. Which places do or do not become part of heritage and what transformations places undergo in this process of recognition is a key arena for combative struggles of identity and power. It is not simply that heritage places symbolise certain values and beliefs, but that the very transformation of these places into heritage is a process whereby identity is defined, debated and contested and where social orders are challenged or reproduced. Heritage is not in any simple sense the reproduction and imposition of dominant values. It is a dynamic process of creation in which a multiplicity of pasts jostle for the present purpose of being sanctified as heritage.<sup>51</sup>

In this vein, Laurajane Smith explains that “[h]eritage is dissonant—it is a constitutive social process that on the one hand is about regulating and legitimizing, and on the other hand is about working out, contesting and challenging a range of cultural and social identities, sense of place, collective memories, values and meanings that prevail in the present and can be passed to the future.”<sup>52</sup>

In seeking to unseat the dominant and outdated view of heritage as a “thing” so strongly linked to tangibility, Laurajane Smith suggests that this shift begins by first viewing *all heritage* as intangible and “deprivileging and denaturalizing [the tangible] as the self-evident form and

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<sup>50</sup> *Ibid* at 2. See also *ibid* at 44-45; *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, (2005) 27.X, Council of Europe Treaty Series No 199 [*Faro Convention*].

<sup>51</sup> Jane M Jacobs, *Edge of Empire: Postcolonialism and the City* (London, UK: Routledge, 1996) at 35 [references omitted].

<sup>52</sup> Smith, *supra* note 14 at 82 [emphasis in original].

essence of heritage.”<sup>53</sup> Even sites recognized “purely” for their tangible built merit are not inherently valuable or innately meaningful, but rather, become valuable, meaningful, symbolic, and gain heritage value based on their current cultural uses, activities, and the processes taking place within them and surrounding them that include these sites in a city’s urban social and cultural (and, sometimes, economic) fabric.<sup>54</sup>

Heritage is *more* than just a “thing”, but rather, an array of both values, meanings, and understandings that are grown, deployed, and set through cultural practice(s).<sup>55</sup> Yet age, aesthetics, monumentality, and technical expertise continue to be problematically, and hegemonically, overrepresented as key informants in heritage determinations within Western and Eurocentric notions of heritage.<sup>56</sup> Including a more diverse understanding of heritage and “whose” heritage matters can enable cultural heritage recognition and protection to become a more inclusive and equitable process, and a step towards accomplishing this is through this unseating of the hegemony of materiality in order to shift and expand our present notion of heritage value and our process of valuing heritage in the present beyond dominant Western and Eurocentric notions of “heritage” that focus on the tangible and material as being central to determinations of value.<sup>57</sup>

This problematizing of the tangible in favour of the *intangible* speaks to the application of *buen vivir* and a counterhegemonic legality to heritage legislation frameworks. It speaks to a move away from an authorized heritage discourse and “heritage gaze” that codes as legitimate certain views, values, and spokespersons of an often-reified “past” and the meaning and value of

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<sup>53</sup> *Ibid* at 3. See also *ibid* at 13, 44-45.

<sup>54</sup> *Ibid* at 3, 54, 56.

<sup>55</sup> *Ibid* at 11.

<sup>56</sup> See also *ibid* at 3-4, 11-12. Cf Schofield & Szymanski, *supra* note 29 at 2: places and spaces can be “architecturally mundane but socially meaningful” to a community.

<sup>57</sup> See also Smith, *supra* note 14 at 54, 56.

this “past” in the present.<sup>58</sup> It also places people and human values at the center of an understanding of cultural heritage by, as the Preamble to the Council of Europe’s 2005 *Faro Convention* explains, “[r]ecognising that every person has a right to engage with the cultural heritage of their choice, whilst respecting the rights and freedoms of others, as an aspect of the right freely to participate in cultural life.”<sup>59</sup>

**iv. A Meaningful and Rigorous Application of the 2013 Burra Charter in Canada**

As the 2013 *Burra Charter* (the *Australia ICOMOS Charter for Places of Cultural Significance*) notes at Article 5.1: “*Conservation of a place* should identify and take into consideration all aspects of cultural and natural significance without unwarranted emphasis on any one value at the expense of others.” There are a number of ways of looking at the value or merit housed within a cultural space in the city. There is, as we have seen, the tangible value or merit as well as the intangible—where intangibility tends to be a lesser acknowledged element. There is also a tension between the use-value of a space and the exchange-value of the space, but even more relevant here, there is the need for inter-generational equity in assessing what constitutes heritage value for divergent groups and generations, and what should be protected. In terms of balancing the diverse and often diverging interests that exist simultaneously within the space, it is problematic when redevelopment decisions and strategies are deployed counteractively—such as the redevelopment of key music venues while also seeking to establish a vibrant Music City steeped in the city’s musical history.

The *Burra Charter* at Article 26.3 outlines the balancing process that should be applied to remove the centrality of commodity- and market-orientation in heritage decision-making:

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<sup>58</sup> See also *ibid* at 11-12, 29. See also *ibid* at 31.

<sup>59</sup> Preamble to the *Faro Convention*, *supra* note 50. See also Graham Fairclough et al, “The Faro Convention, A New Paradigm for Socially – and Culturally—Sustainable Heritage Action” (2014) 8 *Culture* 9; Schofield & Szymanski, *supra* note 29 at 2.

“Groups and individuals with *associations* with the *place* as well as those involved in its management should be provided with opportunities to contribute to and participate in identifying and understanding the *cultural significance* of the place. Where appropriate they should also have opportunities to participate in its *conservation* and management.”<sup>60</sup>

The reason that the *Burra Charter* is particularly relevant to the Toronto and Canadian context is that the Canadian Register of Historic Places has adopted the 2013 *Burra Charter*'s definition of “heritage value” (used interchangeably with “cultural significance” within the *Burra Charter* itself): “the aesthetic, historic, scientific, cultural, social or spiritual importance or significance for past, present or future generations.”<sup>61</sup> It has also recognized the *Burra Charter* to be “an internationally accepted statement of principles that provides guidance for the conservation and management of places of cultural significance.”<sup>62</sup> In seeking heritage designation status, the Canadian Register of Historic Places provides the national standard guidance for crafting the requisite Statement of Significance that will be included in the information assessed at the provincial level in, for example, an Ontario Section 29 *Ontario Heritage Act* heritage designation through Ontario Regulation 9/06's “Criteria for Determining Cultural Heritage Value or Interest.”<sup>63</sup> A building or space that receives heritage designation at the municipal and provincial level will eventually also be listed by the Canadian Register of Historic Places.

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<sup>60</sup> 2013 *Burra Charter*, *supra* note 43 [emphasis in original]. See also Randall Mason, “Assessing Values in Conservation Planning: Methodological Issues and Choices” in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 5 at 10; David Throsby, “Seven Questions in the Economics of Cultural Heritage” in Michael Hutter & Ilde Rizzo, eds, *Economic Perspectives on Cultural Heritage* (Great Britain: Macmillan Press, 1997) 13 at 14 [Throsby, “Seven Questions”].

<sup>61</sup> Canadian Register of Historic Places, “Writing Statements of Significance” (Parks Canada, 2006) at 10-11, online: <[www.historicplaces.ca](http://www.historicplaces.ca)>; 2013 *Burra Charter*, *supra* note 43, s 1.2. See also *Standards and Guidelines for the Conservation of Historic Places in Canada: A Federal, Provincial and Territorial Collaboration*, 2nd ed (2010).

<sup>62</sup> Canadian Register of Historic Places, *supra* note 61 at 11. See also Smith, *supra* note 14 at 24.

<sup>63</sup> *Ontario Heritage Act*, *supra* note 9.

By using the *Burra Charter*'s definition of heritage value as a soft regulatory mechanism, the guidance it provides via its Practice Note in interpreting and deploying this definition (which includes an equitable treatment and valuation of intangible cultural heritage), is thus also applicable in the Canadian context, despite Canada's dearth of hard regulations dealing with intangible cultural heritage.<sup>64</sup>

Currently, while existing heritage frameworks may theoretically establish the potential for equally valuing intangible and tangible heritage, modern heritage intangibility concerns are not being effectively examined within redevelopment decisions due at least in part to preconceived notions of what constitutes heritage. As we can see with the case studies canvassed previously, elements such as the comparative age of a venue, its disruptive presence in a neighbourhood, the applicable zoning by-law of the neighbourhood it is found in, or the potential exchange-value gains that can be maximized through replacement or redevelopment, can be barriers to preservation considerations. As the *Burra Charter*'s "Practice Note: Understanding and Assessing Cultural Significance" warns, it is important to avoid preconceptions in heritage determinations:

A place can be culturally significant regardless of its age, notions of conventional beauty, or the presence or absence of built form, or the number of people for whom it is significant. A place does not have to be 'old' to be historically or socially significant, nor conventionally beautiful to be aesthetically significant. Places with no visible physical evidence can still be highly significant. In assessing cultural significance, it is essential to be open to knowledge and values expressed from

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<sup>64</sup> As Throsby ("Seven Questions", *supra* note 60 at 20) outlines:

We can draw a distinction between what we might call 'hard' and 'soft' regulation. Hard regulation comprises enforceable directives requiring certain behaviour, implemented via legislation and involving penalties for non-compliance. Soft regulation comprises non-enforceable directives requiring certain behaviour, implemented by agreement and not involving penalties. Both types of regulation seek to change behaviour, the first by involuntary means, the second by encouraging voluntary compliance.

different perspectives and cultural contexts. Be prepared to conduct deeper research beyond ‘the mainstream’.<sup>65</sup>

Finally, this warning lines up with seminal research reports out of the Getty Conservation Institute that acknowledged that different kinds of value or values can exist within a heritage space and that these different and often conflicting values of stakeholders in the space must be engaged within heritage preservation assessment and decisions without allowing one kind of value to dominate to the detriment of other values.<sup>66</sup> More importantly here though, avoiding preconceptions as to what merits heritage preservation and ensuring openness to alternate conceptions of value and cultural significance are gestured to in the 2011 recommendations compiled by Heritage Toronto and the Toronto Historical Association that note a “lack of emphasis on, and protections afforded at the provincial level to intangible heritage resources,”<sup>67</sup> and call on Toronto and local heritage organizations “to update their perspective and broaden their scope in order to reflect a more diverse definition of ‘heritage’, one that includes intangible heritage resources, cultural landscapes and natural heritage resources as well as built heritage.”<sup>68</sup>

#### **D) Heritage Conservation Districts**

In Toronto, and Ontario, the establishment of a Heritage Conservation District, under Part V of the *Ontario Heritage Act*, is thought of as Ontario’s “gold standard” for heritage protection.<sup>69</sup> In assessing Toronto and Ontario’s relevant heritage protection legislative

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<sup>65</sup> “Practice Note: Understanding and Assessing Cultural Significance”, version 1, Nov 2013, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 at 7 [The Burra Charter, “Practice Note”]. See also Schofield & Szymanski, *supra* note 29 at 2.

<sup>66</sup> See e.g. Marta de la Torre & Randall Mason. "Introduction" in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 3; Mason, *supra* note 60. See also Higginbottom & Tonner, *supra* note 36 at 300.

<sup>67</sup> Heritage Toronto and the Toronto Historical Association, “*Heritage Voices: A Report Presented by Heritage Toronto and the Toronto Historical Association*” (2011) at 4, 7, online: <heritagetoronto.org>.

<sup>68</sup> *Ibid.* See also the UNESCO *Universal Declaration on Cultural Diversity*, GA Res 25, UNESCOR, 31st Sess, Annex 1, UN Doc 31C (2001) Doc 31CGA Res 25, Annex I, 41 ILM 57 (adopted on 2 November 2001) and the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 (entered into force 18 March 2007).

<sup>69</sup> *Ontario Heritage Act*, *supra* note 9, Part V.

frameworks, the process of nominating and establishing a Heritage Conservation District provides an example of a protective mechanism that engages with the intangible cultural heritage of a district. This engagement is due in part to the intention behind establishing a Heritage Conservation District where preserving the character or integrity of a district is integral.<sup>70</sup> The character and integrity of a district engage intimately with the social and contextual value (and intangible heritage) of a district as these are seen as contributing resources to the heritage merit of the area.<sup>71</sup> The assessment of these factors goes beyond the built merit and structural integrity of the buildings in the district in order to also look at parks, public spaces, laneways, and so on, that contribute to the contextual heritage of the district.<sup>72</sup>

This kind of context-sensitive preservation speaks to a safeguarding against Sharon Zukin's concern that cities increasingly run the risk of losing their soul, which is especially the case where the "soul" and intangible attributes of a place are far more difficult to conserve than its physical attributes.<sup>73</sup> This approach also reflects the "Historic Urban Landscape" approach that gained prominence with the adoption of the *Recommendations on the Historic Urban Landscape* by UNESCO's General Conference in 2011.<sup>74</sup> One of the key elements of this approach is viewing heritage through a values-based and (a reasonable degree of) community consensus-based approach that, through significant incorporation of community participation,

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<sup>70</sup> See e.g. Scott Barrett, *Heritage Conservation Districts in Toronto: Procedures, Policies and Terms of Reference*, Mary MacDonald, ed (Toronto: City of Toronto, Public Planning Division, 2012), HCD Policy 12.

<sup>71</sup> *Ibid* at 26.

<sup>72</sup> *Criteria for Determining Cultural Heritage Value or Interest*, O Reg 9/06. See also Barrett, *supra* note 70 at 26. See also Alexander's discussion of the Pilsen Historic District in Chicago that has provided some measure of protection for the "cultural character" of the community and against the displacement of its residents (*supra* note 41 at 847-48).

<sup>73</sup> Zukin, *supra* note 28 at xi, 9, 246. Richard Longley, former president of the Architectural Conservancy Ontario, notes this especially in relation to Kensington Market in Toronto and the current efforts towards its successful designation as a Heritage Conservation District (Richard Longley, "The Once and Future Kensington Market", *Now Toronto* (15 December 2016), online: <nowtoronto.com>.

<sup>74</sup> *Recommendation on the Historic Urban Landscape*, GC Rec, UNESCO, 36th Sess (adopted on 10 November 2011).

better accounts for the role of emotion in how the connection between people and places is assessed, acknowledged, and understood in urban cultural heritage and development decisions.<sup>75</sup>

The process of establishing a Heritage Conservation District is of interest in its concerted effort to engage a wide array of stakeholders in crafting and carrying out the Heritage Conservation District study as well as in implementing the Heritage Conservation District plan when the Heritage Conservation District has been achieved. The process takes many years to complete from beginning to end. Heritage Conservation District studies and plans consult and incorporate the work of various “experts” including historians, archaeological resource managers, urban designers and planners, and landscape architects; undertake a series of community and public consultations as well as incorporate information from other studies that may be assessing the area in question; and also engage a variety of actors within Toronto City Planning, including a heritage planner, in order to ensure that the various municipal legal frameworks and goals of city departments that intersect with the establishment of a Heritage Conservation District are adhered to.<sup>76</sup>

While areas with high concentrations of music community assets might be able to harness Heritage Conservation District status, in reality, important grassroots venues are not necessarily conveniently located within proximity to each other—although there are certainly exceptions to this rule. More importantly, however, the utility of the Heritage Conservation District structure continues to be limited with contradictory legislation. Heritage Conservation Districts studies, plans, and eventual establishment—due to the many parties involved and the detailed process required to achieve designation—are a planning policy that takes a very significant amount of

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<sup>75</sup> *Ibid.* See also Kristal Buckley, Steven Cooke & Susan Fayad, “Using the Historic Urban Landscape to Re-Imagine Ballarat: The Local Context” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 93.

<sup>76</sup> See e.g. Barrett, *supra* note 70; “Heritage Conservation Districts are Long Overdue”, *Spacing | Canadian Urbanism Uncovered* (23 September 2016), online: <spacing.ca/Toronto>.

time to establish. Where greater citizen participation and consultation in decision-making processes is desirable, the length of time this can take without altering the present way in which consultation and participation are carried out, highlights the importance of consultation redesign with greater attention to timeframe as well as the timeframe of other legislation that may ultimately counteract heritage preservation and public consultation efforts.<sup>77</sup>

While the Heritage Conservation District study and plan are being developed, buildings are only fully protected from demolition once they receive heritage designation (as opposed to simply being *listed* as a heritage building which does provide the same level of protection). Designation confers a property with legal status under the *Ontario Heritage Act*, whereas listing means that Heritage Preservation Services will assess proposed development and building applications.<sup>78</sup> Non-residential buildings are thus placed in a vulnerable position (as opposed to residential buildings, which are protected). as, even when a building is under a Heritage Conservation District framework, or other heritage consideration—a developer can request a demolition permit from the city.<sup>79</sup> The city then has a limited period of time to grant or reject the request, and can only reject the demolition request under Section 34(1) of the *Ontario Heritage Act* on the basis of heritage importance if the building is, at the time of the permit request, a designated heritage building.<sup>80</sup> As such, there have been a number of cases where a building has been suddenly demolished while an ongoing heritage designation study is nearing its final

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<sup>77</sup> This has also been highlighted in recent pilot programs exploring how best to operationalize the *Recommendation on the Historic Urban Landscape* (supra note 74), such as the program underway in the City of Ballarat in central Victoria, Australia instigated the World Heritage Institute of Training and Research for Asia and the Pacific (WHITR-AP), and the results of which will be reported to UNESCO's Executive Board and General Conference (World Heritage Institute of Training and Research in Asia and the Pacific, "The Historic Urban Landscape" (2014) (website), online: <historicurbanlandscape.com> [WHITR\_AP]); City of Ballarat, "Ballarat and UNESCO's Historic Urban Landscape Approach" (Ballarat: City of Ballarat, 2013); Buckley, Cooke & Fayad, supra note 75.

<sup>78</sup> *Ontario Heritage Act*, supra note 9, s 29.

<sup>79</sup> *Ibid*, s 34(1).

<sup>80</sup> *Ibid*, s 34(1).

stages.<sup>81</sup> These situations are not only an example of where, due to disjunctive legislation, development interests are in an advantaged position over preservation interest, but this is also an example of how involving public consultation processes (even if they are progressive) must be mindful of their timeframes in order to lead to successful results.

Nonetheless, a greater respect for the preservation interests of both tangible and intangible heritage, use-values, important community spaces of music, culture, and so on, that would better line up with the tenets of creative placekeeping—explored in greater depth shortly—might see cities invest time surveying their buildings and spaces in order to preemptively create a mass list flagging potential heritage and important community cultural spaces before demolition becomes a concern, or create an overarching obligation for a summary heritage “signing off” by the city whenever a demolition request is submitted.<sup>82</sup> The potential merits of a mass-listing strategy for heritage are clear in recent action by Toronto’s Preservation Board where elements of this strategy have been incorporated into some of its more recent recommendations to Toronto City Council.<sup>83</sup> While more work would still need to be done to

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<sup>81</sup> See e.g. Laura Fraser, “Councillor, Residents Frustrated at Demolition of 110-Year-Old Building”, *CBC News Toronto* (24 January 2017), online: <[www.cbc.ca/news/canada/toronto](http://www.cbc.ca/news/canada/toronto)>; Kate McGillivray, “City Loses ‘Race Against Time’ to Save Historic Mimico Factory”, *CBC News Toronto* (30 September 2016), online: <[www.cbc.ca/news/canada/toronto](http://www.cbc.ca/news/canada/toronto)>.

<sup>82</sup> In addition to the Toronto Music Advisory Council’s recurring proposal of developing and maintaining a Live Music Venue Registry that would, among other things, help proactively guard against encroaching development interests that lead to displacement (Toronto Music Advisory Council, “Measures to Protect Live Music Venues in Toronto – Update” (Motion) (adopted 13 February 2017)), see Edward Keenan, “The Simple Way to Save Toronto’s Heritage”, *thestar.com* (3 April 2017), online: <[www.thestar.com](http://www.thestar.com)>; Michael McClelland, “A Better Way to Protect Toronto’s Heritage Buildings”, *thestar.com* (3 April 2017), online: <[www.thestar.com](http://www.thestar.com)>. See also similar findings in the reporting of recent WHITR-AP pilot programs exploring how best to operationalize the *Recommendation on the Historic Urban Landscape* (*supra* note 74) underway in Ballarat, Australia: WHITR-AP, *supra* note 77; City of Ballarat, *supra* note 77; Buckley, Cooke & Fayad, *supra* note 75.

<sup>83</sup> See e.g. Jennifer Keesmaat, Chief Planner and Executive Director, City Planning Division, *Report for Action to Toronto Preservation Board, Planning and Growth Management, “Inclusion on the City of Toronto’s Heritage Register – Midtown in Focus – Phase 01: Main Street Properties”* (10 August 2017), available online: <[www.toronto.ca/legdocs/mmis/2017/pb/bgrd/backgroundfile-106142.pdf](http://www.toronto.ca/legdocs/mmis/2017/pb/bgrd/backgroundfile-106142.pdf)> [Keesmaat, “Inclusion on the City of Toronto’s Heritage Register”]; Toronto Preservation Board Meeting, City Hall, Meeting 25 (24 August 2017), Agenda Item PB25.8 “Inclusion on the City of Toronto’s Heritage Register - Midtown in Focus - Phase 01: Main Street Properties” (action adopted 24 August 2017), available online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.PB25.8](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.PB25.8)> [Toronto Preservation Board Meeting,

ensure an equal measuring of what is being deemed as “heritage”, and the development of well-designed consultation processes that effectively engage all affected parties, this kind of counterhegemonic use of existing legal heritage protection tools would nonetheless better balance use-values, preservation interests, and the community cultural attributes of a city with the exchange-values and development interests that currently have an upper hand.

## **E. Section 37**

### **i. What Is It?**

A Section 37 Agreement, as authorized under the Ontario *Planning Act*, is intended as an incentive-based strategy for greater inclusionary practices in development and redevelopment projects with the aim of providing public benefits through encouraging affordable housing development, providing social housing, and so on.<sup>84</sup> This is accomplished through a form of “density bonusing” where developers negotiate the ability to exceed height and density restrictions in exchange for the provision of a “public benefit” to the community. The community must be in physical proximity to the development and the public benefit can, in addition to providing accessible and/or social housing, also include “additional parkland, public art, community centres, childcare facilities, streetscape improvements, or new affordable rental housing.”<sup>85</sup> Heritage preservation is another listed “public benefit”.<sup>86</sup> The specific benefits proposed must be specified in the by-law, which eventually comprises what is referred to as a

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“Inclusion on the City of Toronto’s Heritage Register”]; Josh Matlow, Toronto City Councillor, Ward 22, “Announcing an Unprecedented Action Toward Preserving Midtown Toronto’s Heritage”, *Ward 22 Updates and Info*, online: <joshmatlow.ca>; John Rieti, “Heritage Board Unanimously Approves Plan to Protect Commercial Buildings in Midtown”, CBC News (25 August 2017), online: <www.cbc.ca>.

<sup>84</sup> *Planning Act*, RSO 1990, c P.13; Julie Mah, “Can Inclusionary Zoning Help Address the Shortage of Affordable Housing in Toronto”, CPRN Research Report (December 2009) at 5, online: <cprn.org/documents/51952\_EN.pdf>.

<sup>85</sup> City of Toronto, Toronto Planning, *Toronto Official Plan* (August 2007), s 5.1.1; City of Toronto, Toronto Planning, *Consolidated Section 37 Implementation Guidelines and Protocol for Negotiating Section 37 Community Benefits* (16-17 November 2007) [City of Toronto, *Section 37 Implementation*]. See also Mah, *supra* note 84 at 6.

<sup>86</sup> *Toronto Official Plan* (August 2007), *supra* note 85, s 5.1.1.5

Section 37 Agreement.<sup>87</sup> Benefits can also be provided in the form of “specific capital facilities or cash contributions that go toward capital facilities.”<sup>88</sup>

For Section 37 to be applied in an Ontario municipality, the municipality must also have appropriate provisions in their Official Plan (planning legislation) that enables them to pass zoning by-laws for the purpose of authorizing height and/or density increases.<sup>89</sup>

**ii. Need for Better Public Consultation Leading up to Section 37 Agreements**

The types of benefits agreed to in the Section 37 negotiating process is entirely up to the city council’s discretion, which has come under criticism for a number of reasons, one of which is transparency and a failure to effectively consult the affected community and community groups.<sup>90</sup> Where the primary use of Section 37 is to provide compensation to the affected neighbourhood for the negative externalities that come with increased density, decisions as to what is acceptable compensation to be provided through a Section 37 agreement should involve community consultation and not solely the discretion of the councillor.<sup>91</sup> As this dissertation explored in Chapter 1, a lack of community or public consultation and failure to encourage equitable public participation within decision-making processes that affect the everyday experience of urban citizens is contrary to what a *buen vivir* approach to city planning and development should look like and contrary to the ideology of public participation where, rather

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<sup>87</sup> Mah, *supra* note 84 at 6

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 5; *Toronto Official Plan*, *supra* note 85, s 3.2.1.

<sup>90</sup> Aaron A Moore, “Trading Density for Benefits: Section 37 Benefits in Toronto” (2013) 2 IMFG Perspectives at 3, 6; Isaac Tang, “Critics Weigh in on Section 37 Agreements” (2012) 32:9 The Lawyers Weekly 14 at 14-15; Gladki Planning Associates, “Section 37 Review: Final Report” (Toronto: 2014) at 1, 8, 10 [Gladki Planning Associates, “Section 37 Review”]; Gladki Planning Associates, “Improvements to the Section 37 Implementation Process: Interim Study Findings” (Toronto: 2013) at 16-17, 19-20 [Gladki Planning Associates, “Improvements”].

<sup>91</sup> Moore, *supra* note 90 at 6; Tang, *supra* note 90 at 15; Gladki Planning Associates, “Section 37 Review”, *supra* note 90 at 3; Gladki Planning Associates, “Improvements”, *supra* note 90 at 16, 19-20.

than consulting with the public, public servants are instead identifying and acting on what they view as beneficial for the “public interest”.<sup>92</sup>

Even where implementation guidelines and protocols require the city’s planning staff to be involved in Section 37 negotiations, this does not necessarily represent the interests of those who are affected by developments in an area.<sup>93</sup> While the involvement of community groups may appear in the guidelines of some cities for Section 37 processes, this does not appear in the Official Plan (of Toronto), which can lead to spotty enforcement or no enforcement at all, even though inclusion in the guidelines is a step in the right direction in terms of what a community or affected group actually find to be a valid benefit in exchange for a developer’s height and/or density increases.<sup>94</sup>

### **iii. Section 37 and Heritage Preservation**

With more effective consultation practices and better engagement with community heritage concerns, Section 37 could play a greater role in supporting the heritage assets of communities, both in terms of individual buildings as well as contributing funds towards Heritage Conservation Districts. This could also improve the utility of Section 37 agreements to establish more meaningful contributions to communities than the usual outcome.<sup>95</sup> Of course, as we have seen, where intangible heritage merits tend to be less represented in preservation concerns, again there would have to be a concerted effort at improved consultation (and a desire

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<sup>92</sup> Gladki Planning Associates, “Section 37 Review”, *supra* note 90 at 8; Gladki Planning Associates, “Improvements”, *supra* note 90 at 16. *Cf* Patrick McAuslan’s description of the ideology of public participation in urban planning (*The Ideologies of Planning Law* (Oxford, Pergamon Press, 1980) at 2, 5-6).

<sup>93</sup> Tang, *supra* note 90 at 15. See also Gladki Planning Associates, “Improvements”, *supra* note 90.

<sup>94</sup> Tang, *supra* note 90 at 15. See also City of Toronto, Section 37 *Implementation*, *supra* note 85.

<sup>95</sup> See also Gladki Planning Associates, “Section 37 Review”, *supra* note 90 at 11.

to do so) and equitable public participation in order to identify spaces of important intangible heritage within a community.<sup>96</sup>

As we saw with the Silver Dollar Room, where City Council’s decision on the zoning by-law and site plan appeal included the condition that “[t]he owner shall enter into an agreement under Section 37 of the Planning Act to implement proposed heritage conservation measures.”<sup>97</sup>

The Silver Dollar Room is a small example of how heritage gains may be made even within development processes, but that, again, consultation with the affected parties is of key importance.

## **II. PRECARIOUS PROPERTY AND CREATIVE PLACEKEEPING STRATEGIES: NEIGHBOURHOOD DYNAMICS, NUISANCE, OWNERSHIP VERSUS TENANT/OPERATOR, AND ZONING DEBACLES**

### **A) Lack of Ownership, Precarity, and Displacement\***

The ownership, versus rental or leasing, of a space or venue in the face of city redevelopment projects differentially affects community subcultural wealth, use-value, and intangible cultural heritage of vulnerable groups of individuals, cultures, and subcultures and the associated spaces they use and value. Subcultural groups are often affected as “subcultures are usually located at one remove from property ownership [and] territorialise their places rather than own them,”<sup>98</sup> and culture-led city redevelopment projects can target the current exchange-value that “authentic” or “hip” urban (sub)cultural spaces have to the detriment of the use-value

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<sup>96</sup> Recall James Michael Buckley & Donna Graves, “Tangible Benefits from Intangible Resources: Using Social and Cultural History to Plan Neighborhood Futures” (2016) 82:2 *Journal of the American Planning Association* 152 at 152.

<sup>97</sup> Toronto City Council, Decision, *484 Spadina Avenue: Zoning By-law and Site Plan Appeals* (5 May 2015).

\* © Sara Ross. Parts of Subsection A were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>98</sup> Ken Gelder, *Subcultures: Cultural Histories and Social Practice* (London, UK: Routledge, 2007) at 3.

of the space for originate subcultural occupiers.<sup>99</sup>As Rankin, Kamizaki, and McLean note in relation to redevelopment of neighbourhood spaces that seek neighbourhood or community “outsiders”, or intra-city tourists, by making these spaces a “destination”, these kinds of visions depict the space as empty, abandoned, underused, neglected, and as a hotbed of illegal activity.

But, as they go on to explain, this perspective, or framing device, “pays little attention to how redevelopment will affect existing users.”<sup>100</sup> Since these spaces and venues of high use-value are not usually owned by the group in question, displacement occurs through the raised rents that creep in as the exchange-value of the space is maximized in attracting purchase interests. The rent necessary to operate a subculturally-oriented venue can become unaffordable or the owners of the space, who might themselves be facing an extensive increase in property taxes, may sell it out from under the originate subcultural occupiers in order to capture the greater profit available when the space is no longer leased to the originate subcultural occupiers.<sup>101</sup>

Lack of ownership is a significant barrier for maintaining *many* different kinds of community cultural hubs and safe community spaces that provide intangible community space, especially for vulnerable or precarious individuals, groups, and communities. While the Government and Comfort Zone are two examples of subcultural music spaces sold, demolished, or redeveloped out from under the feet of the lessee, operator, and occupants of the space by the owner, many other examples exist from Toronto’s past. Next, I will briefly turn to a discussion of the Twilight Zone as one of these examples from the development of Toronto’s musical past

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<sup>99</sup> See e.g. Zukin, *supra* note 28 at 102; Hae, *supra* note 32 at 20, 22, 32; Chatterton & Hollands, *supra* note 35 at 19-44.

<sup>100</sup> Katherine N Rankin, Kuni Kamizake & Heather McLean (“Toronto’s Changing Neighborhoods: Gentrification of Shopping Streets” in Sharon Zukin, Philip Kasinitz & Xiangming Chen, eds, *Global Cities, Local Streets: Everyday Diversity from New York to Shanghai* (New York: Routledge, 2016) 140 at 160, 166.

<sup>101</sup> See e.g. Zukin, *supra* note 28 at 102; Hae, *supra* note 32 at 20, 22, 32; Chatterton & Hollands, *supra* note 35 at 19-44.

and history. But first, it is helpful to consider another pertinent Toronto example of the displacement of this kind of a space and organic hub as these processes are certainly not limited to (sub)cultural music spaces. The recent acquisition and slated redevelopment of Honest Ed's and the Mirvish Village area by the developer Westbank Projects Corp., for example, led to the displacement of (among numerous other similar nearby spaces) of the A Different Booklist bookstore that served as a key community space for Toronto's Black community and provided support for a range of community members and community needs.<sup>102</sup> As Itah Sadu, one of the owners of the bookstore describes, access to space and the lack of ownership of property, things, and land are key historic and recurring barriers to building community infrastructure, organizing, and sustainability.<sup>103</sup>

i. ***The Twilight Zone: A Long-Lost Venue from Toronto's Past, Displacement, and Lack of Ownership***

Twilight Zone: Twilight Zone last word closing party Saturday featuring New York dee-jay David Moralis [*sic*]. (\$25 in advance, \$40 at door. Hot and cold buffet served until 2 a.m. Doors open at 8 p.m. Two floors of dancing. 185 Richmond St. W. 977-3345.<sup>104</sup>

Reaching into Toronto's past, another prominent example of an unowned space forced to close due to the sale of the space out from under its operators is the iconic Twilight Zone, which was operated between 1980 and 1989 by the four Assoon brothers.<sup>105</sup> The venue has recently popped back onto Toronto's radar due to the renaming of a laneway in its honour near where the

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<sup>102</sup> See e.g. Amanda Parris, "How a Different Booklist Changed Toronto (and Not Only Through Books)", *CBC Arts* (17 March 2016), online: <[www.cbc.ca/arts](http://www.cbc.ca/arts)>; *Westbank Projects Corp* (website), online: <[westbankcorp.com](http://westbankcorp.com)>.

<sup>103</sup> Interview of Itah Sadu by Amanda Parris [nd] in Parris, *supra* note 102.

<sup>104</sup> Due to Toronto's municipal by-laws and enforcement of this particular by-law, at the time Twilight Zone always featured an all-night buffet (Colm Hogan, "Phantom on The Dance Floor: A Brief History on Toronto's Twilight Zone Club & How It Transformed a City Forever" (6 September 2015), *Digitized Graffiti* (blog), online: <[digitizedgraffiti.com](http://digitizedgraffiti.com)>).

<sup>105</sup> See Denise Benson, *Then & Now: Toronto's Nightlife History* (Toronto: Three O'Clock Press, 2015) at 71-84.

venue once stood. The official unveiling of the newly named “Twilight Lane” took place on October 8, 2016 at the intersection of Twilight Lane and Richmond Street West.

Like Charles Khabouth’s attempt to rescue Guvernment by purchasing the space from the owner, the Assoon brothers also tried to purchase the Twilight Zone property when their lease was up, but to no avail:

We would have bought the building [but] despite our successes the banks would never finance us with anything except the one time my father put up his house for us to buy The Twilight Zone’s sound system, which was approximately \$100,000 U.S. We had to sign a waiver where our unborn children would have to pay if we defaulted. That loan was paid on time and in full, but they would not agree with our vision.<sup>106</sup>

An early example of a Comfort Zone genre of venue for afterhours music and dance that did not serve alcohol and did not have a license to do so, Twilight Zone was known for introducing house music and a New York-style underground club to Toronto.<sup>107</sup> The quotation at the beginning of this subsection is from a news clipping where, for example, we find Twilight Zone introducing an artist (replete with misspelled name) who was not yet world renowned at the time, though very popular in the New York City scene. David Morales would later go on to become one of the first Grammy-award winners in the genre and a key figure in the modern electronic music scene.

Twilight Zone’s diverse crowds, dedicated dancing space, and novel sound system were available late into the night after other venues had closed.<sup>108</sup> Gritty and raw with graffiti covered walls, Twilight Zone also pioneered the now-commonplace Toronto practice of bringing in

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<sup>106</sup> *Ibid* at 83 (Interview with Albert Assoon).

<sup>107</sup> *Ibid*. Benjamin Boles, “An Oral History of the Legendary 80s Club That Introduced Toronto to House Music”, *thump* (30 May 2016), online: <thump.vice.com>.

<sup>108</sup> *Ibid*; Benson, *supra* note 105 at 83 (Interview with Albert Assoon).

international DJs on Saturdays.<sup>109</sup> In the same vein as Comfort Zone, Twilight Zone was known by its attendees (who, also like today's Comfort Zone attendees, still fondly identify themselves as "Zoners") for its welcoming community and the safe space it provided.<sup>110</sup> As former attendees and community members recount: "There were a lot of people who mourned the Twilight Zone like the death of a best friend. I know some girls who went down there and took pieces of the bricks to have as a memory;"<sup>111</sup> "I was there closing night, right until the end. I ripped a piece of fabric off one of the couches as a memento. There were a lot of tears that night."<sup>112</sup>

Even after the club was forced to close and the community was displaced, to this day the subcultural community that danced within the Twilight Zone space reunites at least once a year at an official gathering to listen to the familiar music that filled the space and to reconnect with the welcoming, diverse, positive, and creative community that was generated and sought after within the space.<sup>113</sup> As one attendee explains about the connection the community had with each other (and still has), "When you saw an ex-Zoner elsewhere, you had a connection. To this day, Zoners are still a sub culture."<sup>114</sup>

Also preceding Comfort Zone in what appears to be the eventual destiny for its originate space, Twilight Zone is now a parking lot, and the area where it was located shifted from an

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<sup>109</sup> Ibid at 75. Some of this graffiti was even created by the Beastie Boys, who had attended when opening for a Madonna concert in Toronto (Benjamin Boles, "An Oral History of the Legendary 80s Club That Introduced Toronto to House Music", *thump* (30 May 2016), online: <thump.vice.com>).

<sup>110</sup> Toronto & East York Community Council, "Twilight Lane Motion" (10 May 2016), online: YouTube <www.youtube.com/watch?v=dJLbePFkUw8>.

<sup>111</sup> Interview with DJ and producer Mitch Winthrop in Benjamin Boles, "An Oral History of the Legendary 80s Club That Introduced Toronto to House Music", *thump* (30 May 2016), online: <thump.vice.com> [Boles, "An Oral History"].

<sup>112</sup> Interview with Mark Oliver in *ibid*.

<sup>113</sup> This recalls Dolores Hayes' descriptions of the powerful endurance of generated place memories and the connection between communities and their potent spaces in the city (*Urban Landscapes as Public History* (Cambridge, Mass: The MIT Press, 1997)).

<sup>114</sup> Interview with Charmaine Gooden in Benson, *supra* note 105 at 83.

industrial garment district full of empty warehouses to a hip area brimming with popular Toronto nightclubs, to what it is now: walls of glass and steel condos.<sup>115</sup>

ii. ***Too Little Too Late: Commemorating the Legacy of Toronto's Lost Spaces of Music as Part of Toronto's Music City Initiative: Commemorative Plaques, Lanes, Alleyways, and Reunion Parties***

The heritage importance of the Twilight Zone has now been commemorated as part of Toronto's Music City initiative that seeks to call attention to the city's unique music heritage assets as a "first step in developing a music tourism strategy."<sup>116</sup> While commemorating lost iconic spaces of music is certainly better than nothing at all, it is no replacement for the space itself, especially while yet other iconic music spaces continue to disappear. Alongside establishing historical plaques and smartphone apps, one of these Toronto's Music-City-oriented initiatives to recognize Toronto's music history, is to name laneways after past iconic music spaces or local music cultures related to specific spaces and neighbourhoods in Toronto.<sup>117</sup> Inspired by this possibility and the history and community of the Twilight Zone, Colm Hogan, a local Toronto-based filmmaker currently preparing a film about Twilight Zone called "Back to the Zone", successfully organized a petition that sought to name a small laneway in Toronto's

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<sup>115</sup> Boles, "An Oral History", *supra* note 111.

<sup>116</sup> International Federation of the Phonographic Industry & Music Canada, "The Mastering of a Music City: Key Elements, Effective Strategies and Why It's Worth Pursuing" (5 June 2015), *Music Canada*, online: <musiccanada.com> at 83, 87, 90 [IFPI & Music Canada, "Mastering a Music City"].

<sup>117</sup> See Toronto Music Advisory Council, "Toronto Music Strategy: Supporting and Growing the City's Music Sector", created for the City of Toronto" (Toronto, February 2016) (adopted by Toronto City Council 31 March 2016) at 8, see online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.ED10.7>; Music Canada, "Proposal to Councillor Thompson" (5 March 2013) *Toronto City Council and Committees*, online: <www.toronto.ca/legdocs>; IFPI & Music Canada, "Mastering a Music City", *supra* note 116 at 83, 87, 90. See also the Reggae Lane Project undertaken by York Eglinton Business Improvement Area and the Laneway Project, online: <www.reggaelaneproject.com>; Dan Taekema, "Side Street Revitalization Honours Toronto's Role in Reggae", *thestar.com* (19 September 2015), online: <www.thestar.com>. See also the plaque commemorating the history (1960s and 70s) of the once vibrant countercultural, gritty, and important but now-disappeared "Yorkville Music Scene" that "inspired a generation of songwriters and led to the rise of a new Canadian sound" (*Toronto's Historical Plaques* (September 2016), online: <torontoplaques.com>), but which was at the time also infamously referred to by Syl Apps, Chair of Parliament's Select Committee on Youth, as a "festering sore in the middle of the city" (Stuart Henderson, "Toronto's Hippie Disease: End Days in the Yorkville Scene, August 1968" (2006) 17:1 *Journal of the Canadian Historical Association* 205 at 205).

Entertainment District after the Twilight Zone just East of the original spot where the club was located.<sup>118</sup> As the Facebook page for Hogan’s documentary and online central space for news about the petition succinctly summarized: “In this current political climate, it is now more clear than ever for cities to take notice, recognize and encourage spaces that promote tolerance and diversity. We need to celebrate communities that allow music, art and performance to flourish because they represent the very best that a city and its citizens have to offer.”<sup>119</sup>

The official unveiling of “Twilight Lane” on October 8, 2016 featured speeches by the Assoon brothers, local Toronto City Council Joe Cressy, who had been a vocal supporter of the initiative, and, of course, music over the speakers for those in attendance to dance—although most of the music and dancing would follow that evening at the annual Twilight Zone reunion party. The support offered by Toronto’s city council in voting for the establishment of Twilight Lane stands in contrast to the historically antagonistic relationship it has often had with Toronto’s nightlife.<sup>120</sup> But here again we see an example of how the intangible cultural heritage of the space was not recognized at the time and only publicly acknowledged after its loss. In addition, we see that no mechanism existed for the operators of the space to resist displacement due to lack of ownership.

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<sup>118</sup> Colm Hogan, “Name a Lane to Honour Toronto’s Twilight Zone Nightclub”, *change.org* (petition), online: <[www.change.org/p/councillor-joe-cressy-ward-20-city-of-toronto-name-a-lane-to-honour-toronto-s-twilight-zone-nightclub](http://www.change.org/p/councillor-joe-cressy-ward-20-city-of-toronto-name-a-lane-to-honour-toronto-s-twilight-zone-nightclub)>.

<sup>119</sup> Back to the Zone, (16 November 2015), posted on *Back to the Zone*, online: Facebook <[www.facebook.com/backtothezonemovie/photos/a.494083594060318.1073741828.478898442245500/708789825923026/?type=3&theater](https://www.facebook.com/backtothezonemovie/photos/a.494083594060318.1073741828.478898442245500/708789825923026/?type=3&theater)>.

<sup>120</sup> Sebastien Darchen & Diane-Gabriel Tremblay, “The Local Governance of Culture-led Regeneration Projects: A Comparison between Montreal and Toronto” (2013) 6:2 *Urban Research & Practice* 140 at 150; Anna Wynveen et al, “Not Zoned for Dancing: A Comprehensive Review of Entertainment in Downtown Toronto” (Toronto: Office of the Chief Planner, 2014); Benjamin Boles, “Fight for Your Right to Party”, *NOWToronto* (15 May 2014), online: <[nowtoronto.com](http://nowtoronto.com)>; Benjamin Boles, “Toronto’s War on Dancing: DJ Culture Facing Attacks from Right and Left at City Hall”, *HuffPost Music, Canada* (5 June 2014), online: <[www.huffingtonpost.ca](http://www.huffingtonpost.ca)>; Ben Spurr, “Parkdale Hit with Bar Ban”, *Now Toronto* (2 November 2012), online: <[nowtoronto.com](http://nowtoronto.com)>; Anna Mehler Paperny, “Toronto Councillor Defends Move to Quiet Queen West”, *The Globe and Mail* (23 December 2009), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>. See also Shawn Jeffords, “Vaughan in Legal Fight with Bar” *Toronto Sun* (10 October 2012), online: <[www.torontosun.com](http://www.torontosun.com)>; Kirk Makin, “Nightclub Sues City for Harassment” *The Globe and Mail* (9 March 2009, updated 10 April 2009), online: <[www.globeandmail.com](http://www.globeandmail.com)>.

**B) Intangible Cultural Heritage to Address Precarity in Operating a Cultural Space Without Ownership: What Does Protection Actually Provide in Practice?**

While not necessarily a perfect solution, greater protection of the intangible cultural merits of a space, beyond the tangible merits of the building, at least works to limit the ability of the building owner to shift the use of the space outside of what imbues it with meaning for the affected communities that use the space. Silver Dollar Room’s heritage designation, for example, and the intangible elements for which it received protection exemplify how intangible cultural heritage acknowledgement and protection can maintain the *use* of the space, in this case, as a live music venue. When the space eventually reopens, it will have to be a music venue. However, protection in this way is usually still not entirely satisfactory to the affected community. As the Silver Dollar Room neared closure, community concerned lamented that there was no guarantee how the Silver Dollar Room would be operated—what kind of music would be played, who it would cater to, would it be accessible financially in the same way that it was before.<sup>121</sup>

As City Councillor Joe Cressy acknowledged when the May 1<sup>st</sup>, 2017 closing date for the Silver Dollar Room began to circulate, even though the owners are legally obliged to ensure the Silver Dollar will be set-up for live music, the City cannot obligate the owner to rent the space to the current operator or any other specific operator, and cannot control the vision a new operator might have for the space.<sup>122</sup> Nonetheless, a separate agreement between the operator of the Silver Dollar Room (which also operated Comfort Zone) and the owner of the building (the Wynn Group) provides the current operator with the right of first refusal when the space reopens.<sup>123</sup> But even though intangible cultural heritage protection might not provide entirely satisfactory

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<sup>121</sup> Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall; Richard Trapunsky, “Farewell to the Silver Dollar”, *NOWToronto* (1 March 2017), online: <nowtoronto.com>.

<sup>122</sup> Carla Gillis, “The Silver Dollar, As You Know It, Is Closing”, *NOWToronto* (31 January 2017), online: <nowtoroto.com>.

<sup>123</sup> *Ibid.*

preservation of the Silver Dollar Room precisely as it is now, it is at least certain that, unlike Brunswick House, or even the Yonge and Dundas Hard Rock Café that, as I stated previously, was pushed out due to massive rent increases to be replaced with yet another chain drugstore location, the Silver Dollar Room will not become another drugstore, nor will it disappear into a parking lot like Comfort Zone or its predecessor Twilight Zone.

**C) Rent Control and Heritage Subsidies to Address Precarity and Sustainable Preservation of Intangible Cultural Heritage Spaces**

Contributing to the problem of sustainability of music and cultural spaces in cities like Toronto, is that while there is some protection from displacement from residential rental property through rent control, rent control does not currently exist for commercial properties—which comprise music venues and other community hubs. This means that there is no upper limit to how much the rent for a commercial property can be raised. However, this is not to say that the application of rent control could not be extended to include cultural and community hubs within a rent-controlled category. For example, San Francisco recently addressed this threat to important cultural spaces through a cultural preservation tool called the Legacy Business Historic Preservation Fund, which emphasizes “living history”.<sup>124</sup> The Legacy Business Historic Fund is a program that subsidizes both the legacy businesses owners (venue operators) and the building owners through municipal revenues so that both parties can create lease terms that are agreeable to both parties in order to preserve the historic or heritage character, including living history, of the business occupying the space in question.<sup>125</sup>

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<sup>124</sup> Buckley & Graves, *supra* note 96 at 160.

<sup>125</sup> *Ibid* at 161.

## **D) Creative Placekeeping Strategies and Conscientious Zoning Practices\***

The term “creative placemaking” first came onto the radar with a 2010 white paper entitled “Creative Placemaking” written by Ann Markusen and Anne Gadwa for the Mayors’ Institute on City Design, a leadership initiative of the US National Endowment for the Arts.<sup>126</sup>

They provide the following definition:

In creative placemaking, partners from public, private, non-profit, and community sectors strategically shape the physical and social character of a neighborhood, town, city, or region around arts and cultural activities. Creative placemaking animates public and private spaces, rejuvenates structures and streetscapes, improves local business viability and public safety, and brings diverse people together to celebrate, inspire, and be inspired.<sup>127</sup>

Further, the UN-Habitat III’s Issue Paper #11 on “Public Space” refers to “placemaking” as “a collaborative process of shaping the public realm in order to maximize shared value. More than promoting better urban design, placemaking facilitates use, paying particular attention to the physical, cultural, and social identities that define a place.”<sup>128</sup>

While the proliferation of culture-based strategy for city development has many positive benefits, its bewitching properties can lead city governance structures to glaze over the problems, or gaps, which remain in the urban governance of culture and spaces of culture. Creative placemaking strategies as enacted by municipal governments have, for example, tended to focus on the revitalization of the urban core and, in particular, the areas deemed to be “decrepit”.<sup>129</sup>

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\* © Sara Ross. Parts of Subsection D, D i, and D ii, were previously published in: Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, art #5.

<sup>126</sup> US, National Endowment for the Arts, *Creative Placemaking* (Washington, DC, 2010), available online: <arts.gov/pub/pubDesign.php>.

<sup>127</sup> *Ibid* at 3.

<sup>128</sup> UN-Habitat, “Public Space”, Issue Paper #11, *Habitat III Issue Papers* (New York, 2015) at 1, online: *UN-HABITAT* <unhabitat.org/issue-papers-and-policy-units/>. For an insightful discussion of the underutilized role of culture in effective place-based lawmaking for communities, see Alexander, *supra* note 41.

<sup>129</sup> See e.g. Shoshannah Goldberg-Miller, *Planning for a City of Culture: Creative Urbanism in Toronto and New York* (New York: Routledge, 2017) at 40.

While the reimagining and rebuilding of these spaces may have bewitchingly led to their perceived reanimation that attracted new residents, businesses, and tourists, these spaces coded as “dysfunctional” were usually not previously empty and unused.

Creative placemaking, in this context, not only has a tendency to displace, but a larger systemic problem is its failure to equitably consider and represent the marginal, relationally non-dominant, vulnerable, or transgressive voices invested in these spaces.<sup>130</sup> In theory, the collaborative essence of creative placemaking should be inclusive and context-sensitive, yet, in reality, oftentimes the kind of reimagining of space that creative placemaking involves—cleansed, vibrant, engaging, safe, and so on—does not necessarily match up with or accommodate alternative views of what is needed or desired within targeted “decrepit” areas of the urban core.

Roberto Bedoya (former executive director of the Tucson Pima Arts Council and art-based civic engagement strategies) provided insight into some of the flaws of creative placemaking with the term he has coined: “creative placekeeping”, which he sources from the community activist Jenny Lee’s term “placekeeping”, and which serves as a counterpoint to creative placemaking.<sup>131</sup> Here, he unseats the focus on “making” to shift the focus to “keeping”.<sup>132</sup> Placekeeping speaks to a greater respect for intangible culture and cultural practices generated within the city space, which must also be equitably represented within urban legal frameworks in the face of gentrification processes and the displacement of cultural and musical venues. As Bedoya writes of placekeeping, it is

not just preserving the facade of the building but also keeping the cultural memories associated with a locale alive, keeping the tree once planted in the memory of a loved

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<sup>130</sup> *Ibid.*

<sup>131</sup> Roberto Bedoya, “Spatial Justice: Rasquachification, Race and the City”, *CreativeTimeReports* (15 September 2015), online: <creativetimereports.org>.

<sup>132</sup> *Ibid.*

one lost in a war and keeping the tenants who have raised their family in an apartment. It is a call to hold on to the stories told on the streets by the locals, and to keep the sounds ringing out in a neighborhood populated by musicians who perform at the corner bar or social hall.<sup>133</sup>

The counterhegemonic qualities that the notion of placekeeping can have within dominant frameworks for culture-oriented redevelopment strategies is picked up in an interview with San Francisco Cultural Affairs Director Tom DeCaigny, who explains that

[a]s important as creative placemaking can be to improving the quality of life of a city, I think we also have to be concerned with creative placekeeping. ... [I]t's really about how do we insure as municipal governments that artists and arts organizations continue to thrive *where they are*. These are the people who have made our neighborhoods unique — that people want to come and be a part of. We want to welcome new people to the party, but we also want to make sure that they're respectful of the people who made this city such a great place to live in and play in in the first place.<sup>134</sup>

Placekeeping, as opposed to placemaking, also speaks to an application of effective place-based law making in cities that must shift from viewing and assessing spaces for their “deficiencies” and what they might lack but, rather, understanding spaces for what they have, and the meaning that they carry for existing (sub)cultural communities.<sup>135</sup> Operationalizing creative placekeeping, however, will require greater attention paid to intangible cultural heritage management and preservation legislation and decisions, better consideration, valuation, and consultation with subcultural community spaces, and changes within the mechanics of spatial governance in the city, such as more conscientious zoning practices, noise by-law revisions, and so on.

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<sup>133</sup> *Ibid.*

<sup>134</sup> Interview of Tom DeCaigny by Cy Musiker (27 November 2015) in “How to Keep a City’s Economic Growth from Destroying its Cultural Soul?”, *KQED Arts*, online: <[www.kqed.org](http://www.kqed.org)> [emphasis added].

<sup>135</sup> See e.g. Alexander, *supra* note 41 at 807.

*i. Assets of Community Value and Article 4 Direction*

Turning briefly away from Toronto to efforts being taken by other cities facing sudden displacement and replacement of intangible cultural heritage spaces, London and other cities and towns in the United Kingdom have seen the application of a number of progressive efforts to curb the alarming rate of disappearing culturally important and community-valued music venues and pubs. Between 2007 and 2015, it was estimated that London lost about thirty-five percent of its grassroots music venues<sup>136</sup>—the same percentage of live music venues Toronto lost during the same period<sup>137</sup>—and English pubs are disappearing at a rate of approximately two dozen pubs per week.<sup>138</sup>

In response to several grassroots awareness raising initiatives and groups, including the Save our Pubs Campaign, Campaign for Real Ale (CAMRA), Music Venue Trust, #Saveourculture, #Savenightlife, among others,<sup>139</sup> some increased attention is currently being paid by municipal legal governance structures in London and the United Kingdom to the disappearance threat that subcultural music spaces and community cultural gathering spaces are facing. Some mechanisms that have been employed to protect these venues and recognize their intangible cultural heritage and community importance can be seen with the “Asset of Community Value” mechanism, highlighted in London’s recent Grassroots Music Venues

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<sup>136</sup> Mayor of London’s Music Venues Taskforce, “Rescue Plan: A Report for the Mayor, Music Industry, Local Authorities, Government, Planners, Developers, Licensers, Police, Economists, Tourism Agencies, Musicians, Culture Funders” (London, UK: Greater London Authority, 2015) at 14 [London’s Music Venues Taskforce, “Rescue Plan”].

<sup>137</sup> Toronto City Council, “Protecting Live Music Venues in Toronto - by Councillor Josh Colle, seconded by Councillor John Filion”, MM22.5, (adopted by City Council 8 November 2016) [Colle & Filion, MM22.5].

<sup>138</sup> See e.g. Rob Davies, “Pub Campaigners Find New Weapons in Fight to Save Locals from Developers”, *the guardian* (20 August 2016), online: <[www.theguardian.com](http://www.theguardian.com)>.

<sup>139</sup> See e.g. *Save Our Pubs* (website), online: <[www.saveourpubs.org.uk](http://www.saveourpubs.org.uk)>; *Campaign for Real Ale* (website), online: <[www.camra.org.uk](http://www.camra.org.uk)>; *MVT Music Venue Trust* (website), online: <[musicvenuetrust.com](http://musicvenuetrust.com)>; *#saveourculture* (website), online: <[www.saveourculture.uk](http://www.saveourculture.uk)>; *#savenightlife* (website), online: <[www.nightlifematters.com](http://www.nightlifematters.com)>.

Rescue Plan, and through what is known as an Article 4 Direction, which will both be explained further subsequently.

The purpose of canvassing these UK mechanisms lies with the manner by which they pointedly address the changes in use of a venue. While in Canada, as we have seen, heritage legislation tends to focus on protecting the tangible built-merits of a space but does not contain much language or developed mechanisms to address the intangible heritage value and (sub)cultural community wealth that a space carries divorced from its material merits. The Asset of Community Value mechanism and Article 4 Direction, on the other hand do place a focus on people and community in defining the importance of preserving a space, and they do unseat the dominance of tangibility and materiality that heritage decision-making suffers from in Toronto and in Canada.

While still far from perfect and requiring further development, these mechanisms are an example of how planning and heritage legislation can become a counterhegemonic legal tool to practically achieve a shift towards a more equitable valuation of the different iterations of heritage that exist within the cityscapes by beginning to recognize the importance of preserving the use-value of spaces and intangible heritage and community cultural wealth that can be generated within a space, dealing with the barriers created by a lack of ownership of (sub)cultural community spaces, and meaningfully engaging with creative *placekeeping* in a city. Not only is demolition taken off the table, but adaptive reuse is also limited by a mandatory preservation of the particular *use* of a space—as opposed to the examples of venues like Brunswick House, which have become chain drugstores, and so on, where the built attributes of a space may remain as a shell, but the intangible merits have been replaced.

a) **Assets of Community Value**

Under Part 5, Chapter 3 of the *Localism Act 2011*, local authorities must maintain a list of the buildings or land—“assets”—that are deemed to be of “community value”.<sup>140</sup> Either “(a) in response to community nomination, or (b) where permitted by regulations made by the appropriate authority,”<sup>141</sup> a building or land can be listed as an Asset of Community Value if:

- a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
- b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.<sup>142</sup>

A building or land may also be deemed to be an Asset of Community Value if:

- a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and
- b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.<sup>143</sup>

If a venue is deemed to be an Asset of Community Value, it will usually remain on the list for a period of five years.<sup>144</sup> This period comprises the third of three conditions that the owner of the Asset of Community Value must meet in order to sell the property.<sup>145</sup> During this five-year period, the owner of an Asset of Community Value must give written notice to the local authority upon the intention to sell—which fulfills Condition A.<sup>146</sup> At that point, a community interest group has six weeks to request in writing to become a potential bidder to the sale of the

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<sup>140</sup> *Localism Act 2011* (UK), c 20, s 87; *The Assets of Community Value (England) Regulations 2012*, SI 2012/2421 [ACV Regulations 2012].

<sup>141</sup> *Ibid*, s 89.

<sup>142</sup> *Ibid*, s 88(1)(a)-(b); *BHL v St Albans City and District Council & Anor*, [2016] UKUT 232 (BAILII) at para 5 (AAC) [*BHL v St Albans City*]

<sup>143</sup> *Localism Act 2011*, *supra* note 140, s 88(2)(c)-(d); *BHL v St Albans City*, *supra* note 142 at para 5, 36.

<sup>144</sup> *Localism Act 2011*, *supra* note 140, s 87(3).

<sup>145</sup> Condition C: *ibid*, s 95(1), (4).

<sup>146</sup> *Ibid*, s 95(2). See also London’s Music Venues Taskforce, “Rescue Plan”, *supra* note 136 at 25

property.<sup>147</sup> If a community interest group makes this request, a six month moratorium period ensues where the property cannot be sold while the community interest group is given time to develop an alternative proposal and raise funds for their bid to buy the property.<sup>148</sup> Condition B is met by the Asset of Community Value owner if both the six week period for potential community interest group bids as well as the six month moratorium period have ended.<sup>149</sup> However, when the moratorium draws to a close, the owner makes the final decision as to who wins the bid and for how much.<sup>150</sup> That said, the *Localism Act* and Asset of Community Value Regulations theoretically allow for compensation if the owner loses money due to the listing of the Asset of Community Value property in question.<sup>151</sup>

While providing for the listing of Asset of Community Value venues threatened by redevelopment has had some success in the United Kingdom<sup>152</sup>—as of Spring 2017, over 18,000 pubs were up for Asset of Community Value nomination by community interest groups and over 2000 were already listed as Assets of Community Value<sup>153</sup>—and is a model that could be applied elsewhere, as noted above, the owner of an Asset of Community Value property is still not

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<sup>147</sup> *Localism Act 2011*, *supra* note, s 95(3)(a): “Community interest group” for the purposes of the *Localism Act 2011*, s 95(3)(a) is defined at s 95(6) of the *Localism Act 2011* and s 12 of the *ASV Regulations 2012* (*supra* note 140).

<sup>148</sup> *Localism Act 2011*, *supra* note 140, s 95(3), (6); *ASV Regulations 2012*, *supra* note 140, s 2(a)(i)-(iii), s 1; *Hawthorn Leisure Ltd v St Edmondsbury Borough Council & Anor (Localism Act 2011)*, [2016] UKFTT CR-2015-0018 (GRC) (BAILII) at para 1 [*Hawthorn Leisure v St Edmondsbury Borough Council*]. See also London’s Music Venues Taskforce, “Rescue Plan”, *supra* note 136 at 25; Rob Davies, “Pub Campaigners Find New Weapons in Fight to Save Locals from Developers”, *the guardian* (20 August 2016), online: <[www.theguardian.com](http://www.theguardian.com)>.

<sup>149</sup> *Localism Act 2011*, *supra* note 140, s 95(3).

<sup>150</sup> See e.g. *Hawthorn Leisure v St Edmondsbury Borough Council*, *supra* note 148 at para 1.

<sup>151</sup> *Localism Act 2011*, *supra* note 140, s 99; *ACV Regulations 2012*, *supra* note 140, s 14.

<sup>152</sup> See e.g. *Hawthorn Leisure v St Edmondsbury Borough Council*, *supra* note 148; Rebecca Taylor, “Thanks To You, We’re Not a Supermarket’: Wheatsheaf Pub in Tooting Celebrates One Year Birthday”, *This is Local London* (20 April 2016), online: <[www.thisislocallondon.co.uk](http://www.thisislocallondon.co.uk)>; Lorna Hughes, “Wirral Pub Customers Fight to Protect Their Local After Fears Over its Future”, *Echo* (15 December 2016), online: <[www.liverpoolecho.co.uk](http://www.liverpoolecho.co.uk)>.

<sup>153</sup> See e.g. “CAMRA Success”, *Campaign for Real Ale* (website), online: <[www.camra.org.uk](http://www.camra.org.uk)>; “Campaigns”: “Protecting Pubs”: “List Your Local”, *Campaign for Real Ale* (website), online: <[www.camra.org.uk](http://www.camra.org.uk)>.

obliged to sell to the community interest group.<sup>154</sup> But even more importantly, even if a venue manages to receive Asset of Community Value listing and a community interest group achieves the six-month moratorium on its sale, it remains very difficult for communities to raise the amount of money necessary to present a competitive bid on the property, especially where property values are high and make the redevelopment and sale of the property even more lucrative for the owner.<sup>155</sup> Nonetheless, this unfortunate reality has the potential to be somewhat mitigated by the English government's launch of the "More than a Pub: The Community Pub Business Support Programme", which provides loans and grants to community interest groups, along with business support and advice, in order to provide groups with the tools to successfully acquire and run an Asset of Community Value pub.<sup>156</sup>

**b) Article 4 Direction**

But, in many cases, Asset of Community Value listing has not been able to protect properties. Not only has there been inconsistent application and enforcement by local authorities but, as noted previously, the overarching barrier faced by communities trying to preserve a local community pub is that they are often unable to raise enough funds to make a competitive bid.<sup>157</sup> The use of an Article 4 Direction, under the *Town and Country Planning (General Permitted Development) Order 1995*, has more teeth in monitoring adaptive reuse practices and preserving the use of the property such that it remains a pub rather than being redeveloped into housing

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<sup>154</sup> See e.g. *Hawthorn Leisure v St Edmondsbury Borough Council*, *supra* note 148 at para 1; Rob Davies, "Pub Campaigners Find New Weapons in Fight to Save Locals from Developers", *the guardian* (20 August 2016), online: <[www.theguardian.com](http://www.theguardian.com)>.

<sup>155</sup> See e.g. *ibid*.

<sup>156</sup> See e.g. Department for Communities & Local Government & Marcus Jones, "New £3.6 Million Programme to Help Communities Take Control of their Local Pub", *gov.uk* (10 March 2016), online: <[www.gov.uk/government/news](http://www.gov.uk/government/news)>; Department for Communities & Local Government & Marcus Jones, "Run Your Local with £1.5 Million Pub Loan Fund", *gov.uk* (11 September 2015), online: <[www.gov.uk/government/news](http://www.gov.uk/government/news)>.

<sup>157</sup> See e.g. Davies, *supra* note 154.

even where the value of the property for housing is much greater than its value as a pub.<sup>158</sup>

Issuing an Article 4 Direction limits national permitted development rights based on a defined zone within a local planning authority's area or limits these rights by restricting certain kinds of development—including demolition—throughout the whole area.<sup>159</sup>

These restrictions generally focus on maintaining the character of an area—in the same way that a Heritage Conservation District in Ontario places limits on what kind of development can occur and how it can occur within the defined zone. In this way, buildings do not necessarily have to be listed as heritage assets to have their use protected.<sup>160</sup> While the use of an Article 4 Direction is usually applied in relation to more exceptional circumstances, it has also been applied to protect pubs within a local authority's area where, for example, the local authority sought to curb the unprecedented number of pub closures underway.<sup>161</sup>

Issuing the Article 4 Direction then obliged the owners of bars and pubs within the area to have to obtain the local authority's permission before demolishing the building in question or changing its use,<sup>162</sup> which, again, is similar to Ontario's Heritage Conservation District structure as well as recent initiatives in Toronto towards the mass heritage listing of all buildings within certain defined areas where their mass demolition and replacement are a concern.<sup>163</sup> In this way, the interests of the community and the preservation of local community gathering spaces and

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<sup>158</sup> *The Town and Country Planning (General Permitted Development) (England) Order 2015* (UK), SI 2015/596, art 4 [GPDO 2015], See e.g. *London Borough of Wandsworth (Public Houses and Bars) Article 4 Direction 2016*, available online: <[www.wandsworth.gov.uk](http://www.wandsworth.gov.uk)> [Wandsworth Article 4 Direction]. See also Davies, *supra* note 154.

<sup>159</sup> GPDO 2015, *supra* note 158, art 4(1). See also *ibid*, Schedule 2, Part 3, paras A-B.

<sup>160</sup> *Ibid*.

<sup>161</sup> See e.g. the *Wandsworth Article 4 Direction*, *supra* note 158; Davies, *supra* note 154.

<sup>162</sup> See e.g. the *Wandsworth Article 4 Direction*, *supra* note 158, which was made in relation to 120 pubs. See also Davies, *supra* note 154.

<sup>163</sup> *Ontario Heritage Act*, *supra* note 9, Part V; see e.g. Keesmaat, "Inclusion on the City of Toronto's Heritage Register", *supra* note 83; Toronto Preservation Board Meeting, "Inclusion on the City of Toronto's Heritage Register", *supra* note 83; Matlow, *supra* note 83; Rieti, *supra* note 83.

their intangible cultural heritage and use-value are shifted to a central position that unseats the interests of redevelopment interests seeking to maximize the exchange-value of the property.

ii. **The Agent of Change Principle, Equalizing Neighbourhood Power Relations to Sustain Originate<sup>164</sup> Subcultural Community Spaces**

A recurring theme in the displacement of music venues—from San Francisco to London, England to Toronto—arises when newcomers to a neighbourhood move in and then proceed to take issue with the existing sound levels, usually during nighttime portions of the day/night continuum.<sup>165</sup> Among other features, applying the agent of change principle can restrict owners of new residences from making noise complaints against music venues in the neighbourhood.<sup>166</sup> At base, the agent of change principle transfers the onus to developers to ensure that new developments incorporate sufficient soundproofing to meet the noise levels characteristic of the neighbourhood in question. Part of what makes the agent of change principle so attractive is that it opens a dialogue between parties that are often seen as having divergent interests—the venue, or originate occupant of a cultural space, and the developer, or incoming actor within the space.

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<sup>164</sup> Rather than the term “original,” I use the term “originate community” to indicate the community or communities that have grown out of a space, flourish in a space, or carry a strong attachment to a particular space. The term “original” imports the idea of the first or earliest claims to space or land, which is not necessarily the correct claim for the sites and venues I am discussing, especially since Toronto is built on traditional Indigenous lands.

<sup>165</sup> See also Davina Cooper, “Far Beyond ‘The Early Morning Crowing of a Farmyard Cock’: Revisiting the Place of Nuisance Within Legal and Political Discourse” (2002) 11:1 Soc & Leg Stud 5 at 10 at 24. There are countless examples of displacement and targeted-harassment generated by these clashes over noise as neighbourhoods shift in land use, zoning ordinances, and demographic-makeup. In line with Valverde’s description of the preferred status property ownership confers at the local, urban, municipal legal level (see e.g. Mariana Valverde (*Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) at 19-22 [Valverde, *Chronotopes*), Zark Fatah (Partner of Capture Group, which owns and operates a number of Toronto nightclubs and restaurants) describes a not unfamiliar scenario faced by music venues in clashes with nearby condo owner/dwellers:

[I]f it’s important to the city to preserve the nightlife and the entertainment scene in Toronto, we need to make sure the condo owners are happy. At the end of the day, condo owners and residents are always going to win. They pay taxes. They vote. A lot of the clubs ... have been pushed out because of noise complaints and incidents involving residents in the area. At one of the clubs I worked at, neighbours from the building next door used to throw water and eggs and tomatoes off their balcony all the time onto the rooftop patio. Somebody dumped a bucket of water off their balcony this past Summer (“Interview with Zark Fatah” in Wynveen et al, *supra* note 120 at 84).

<sup>166</sup> London’s Music Venues Taskforce, “Rescue Plan”, *supra* note 136.

The key component here, and one that is in line with an equal recognition and valuation of different kinds of intangible cultural iterations, spaces, practices, and communities, is that both parties must work together to equitably use the space at all portions of the day/night continuum.<sup>167</sup>

In addition, when implementing something like the agent of change principle, the various spaces and parties within a space must cooperate in the construction and acoustic design and assessment of a space.<sup>168</sup> Not only is the noise emitting venue no longer solely tasked with altering its business operations and/or noise emissions and soundproofing design (where this is both costly to build but also sometimes impossible if dealing with an older tangible heritage building), but the surrounding parties must work with the space to effectively measure noise emissions at the most relevant times in order to arrive at the most accurate calculations needed for precise soundproofing design in the new development.<sup>169</sup>

Rather than the incoming space or associated developer measuring noise emissions without the knowledge of the noise emitting venue in question, the developer must work and liaise with the venue to ascertain times and levels of maximum noise emission and even test the volume levels of noise emission that are beyond usual levels in order to ensure even higher levels of potential noise insulation.<sup>170</sup> In encouraging and facilitating this collaborative neighbourhood equity and civic-engagement project through the agent of change principle, cities can address concerns about the increasing loss of intangible spaces of music and grassroots music culture.

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<sup>167</sup> Matthew Burke & Amy Schmidt, “How Should We Plan and Regulate Live Music in Australian Cities? Learnings from Brisbane” (2012) 50:1 Australian Planner 68 at 69-71, 74. See also Cooper, *supra* note 165 at 13-14, 24.

<sup>168</sup> Sean McArdle, Gillian Lee & Elizabeth Hui, “Live Music and the ‘Agent of Change’ Principle” (Paper prepared for inter.noise 2014, the 43<sup>rd</sup> International Congress on Noise Control Engineering, Nov 16-19, 2014, “Improving the World through Noise Control”) at 6-7, available online: <[www.acoustics.asn.au/conference\\_proceedings/INTERNOISE2014/papers/p792.pdf](http://www.acoustics.asn.au/conference_proceedings/INTERNOISE2014/papers/p792.pdf)>.

<sup>169</sup> *Ibid* at 7.

<sup>170</sup> *Ibid*.

London, England is seen by many as leading the way in beginning to progressively deal with these issues through the agent of change principle that was developed in response to the alarming increase in the loss of grassroots music venues noted previously.<sup>171</sup> Pressure from newly developed grassroots organizations and initiatives like the Music Venue Trust—a charity created in 2014 to “protect the UK live music network by securing the long-term future of iconic grassroots music venues”<sup>172</sup>—led to the implementation of aspects of the agent of change principle into existing nuisance laws in order to deal with the effect that noise complaints have had on preserving established music venues.<sup>173</sup> On April 6<sup>th</sup>, 2016, the Music Venues Trust, Musicians’ Union, and UK Music secured a significant victory when amended legislation came into force that protects vulnerable music venues (“or any other place of public entertainment”) from encroaching development by requiring developers to first attain noise impact approval from the local planning authority before transforming nearby buildings used for office space into residential spaces.<sup>174</sup>

An example of a successful operationalization of the spirit of the agent of change principle is the case of the famous London music venue Ministry of Sound. Here, an easement of noise was entered into by the incoming actor/developer such that noise from the Ministry of Sound could legally pass over the new development without the new residents having recourse to noise complaints pertaining to the legal noise “burden” on their property.<sup>175</sup> As London’s Mayor’s Music Venue Taskforce and related Grassroots Music Venues Rescue Plan recounts:

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<sup>171</sup> London’s Music Venues Taskforce, “Rescue Plan”, *supra* note 136 at 25. See also Emily Sutherland, “Boris Johnson Gets Behind Campaign to Save Music Venues”, *the Publican’s Morning Advertiser* (22 October 2015), online: <[www.morningadvertiser.co.uk](http://www.morningadvertiser.co.uk)>.

<sup>172</sup> See *Music Venue Trust* (website), online: <[musicvenue trust.com](http://musicvenue trust.com)>.

<sup>173</sup> See also London’s Music Venues Task Force, “Rescue Plan”, *supra* note 136.

<sup>174</sup> *Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016*, SI 2016/332, s 7; Emma Garland, “Finally! A Law Has Been Passed That Will Actually Protect UK Music Venues from Developers”, *Noisey* (14 March 2016), online: <[noisey.vice.com](http://noisey.vice.com)>.

<sup>175</sup> London’s Music Venues Taskforce, “Rescue Plan”, *supra* note 136 at 46-47.

This [situation was] faced by Ministry of Sound when the developers of nearby Eileen House sought planning permission for the demolition of an existing office building and its replacement with a tall residential tower. Despite extensive acoustic treatments to the facades, Ministry had legitimate concerns that the sound from its club might nevertheless amount to a nuisance to the new residents, and be the subject of a claim in nuisance against them. If successful, there was a real risk that the Court would require the nuisance to stop, meaning that Ministry's operations would have to close. The land use (planning) consequences of Ministry's closure would have been significant. Clubs and venues have been closing all over London and the loss of the iconic club would have been a further blow to the night-time economy and London's cultural heritage. The solution that was found was elegant but required collaboration between several parties, including the developer, the club and the Local Planning Authorities. A deed of easement of noise was entered into between the owner of Eileen House and Ministry. Its effect was to allow noise (at the nightclub's existing levels) from Ministry (known as the dominant tenement) to lawfully pass over the Eileen House development (known as the servient tenement).

As Ministry now had a lawful right to make the noise at those levels, and for that noise to pass over the Eileen House site, its new residents couldn't then complain about the noise. In short, they would be buying their flats with that legal "burden" already imposed. The right was a proprietary right (i.e. a property right), and was no different in law to many other proprietary rights (e.g. rights of light, rights of support etc). However, no deed of easement of noise had ever been entered into before to the best of anyone's knowledge. In terms of its drafting, however, it was relatively straightforward, as the principles for the drafting of proprietary rights are well-established. The outcome was an excellent example of "good planning". The club was protected and the development could go ahead. Equitable neighbourly relations were established at the outset. In a crowded city, that is a laudable and much-required objective.<sup>176</sup>

While London has yet to fully develop and apply an agent of change law,<sup>177</sup> Australia is useful to consider briefly for its robust application of the agent of change principle to protect and encourage its spaces of music culture within Australian cities. The application of the principle

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<sup>176</sup> *Ibid* at 47

<sup>177</sup> See also *Sturges v Bridgman* (1879) 11 Ch D. 852, an English common law nuisance case where it was found that "a defendant could not rely on the defence that the complainant came to the nuisance. In this instance case law found it doesn't matter who was there first. The overriding concern is whether the noise maker is being unreasonable"; Gwyn Mapp, "The Agent of Change Principle, Noise from Music Venues and Recent Case Law", *Noisewise: Wise About Noise* (28 April 2015), online: <[www.noisewise.com](http://www.noisewise.com)> (while the fact that a claimant "came to the nuisance" may be taken into account in the court's assessment of a noise/nuisance situation, the agent of change principle more effectively accounts for, and protects, the originate occupant within the neighbourhood). For an additional interesting take on noise complaints, see: Mark Davyd, "How to Save Live Music in the UK", (31 August 2014) *Huffington Post* (blog), online: <[www.huffingtonpost.co.uk](http://www.huffingtonpost.co.uk)>.

took effect in 2014 subsequent to an Industry Position Paper by Music Victoria in 2012.<sup>178</sup> Of note in the Australian context, the agent of change principle applies not just to established venues but also to new music venues, which is a very favourable step for cities seeking to truly achieve Music City status.<sup>179</sup>

The Toronto Music Advisory Council has, at various points, discussed the value of applying elements of the agent of change principle to aid music venues in dealing with displacement concerns and changes in neighbourhood composition as areas gentrify. For example, as Toronto looks into future noise by-law revisions, the noise by-law recommendations provided by the Toronto Music Advisory Council call out the stymying effects the current noise by-law has on live music venues.<sup>180</sup> One of the main suggestions forwarded by the Toronto Music Advisory Council is for the adoption of the agent of change principle to safeguard “culturally rich or significant districts from development and gentrification, especially heritage properties and other special use properties such as entertainment establishments and concert halls.”<sup>181</sup>

Addressing the alarming rate of music venue closures that occurred at the beginning of 2017, the Toronto Music Industry Advisory Council passed a motion at their February 13, 2017 meeting that included, as part of their measure to protect venues as important cultural assets, the intention to “[d]evelop a Toronto-specific adaptation of the Agent of Change principle in

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<sup>178</sup> Music Victoria, “Music Industry Position Paper – The Case for Regulatory Reform” (July 2012), online: <musicvictoria.com.au/assets/Documents/Music\_Victoria\_position\_paper\_Li.pdf>

<sup>179</sup> *Ibid.* See also Toronto Music Advisory Council’s (TMAC) “Noise Bylaw Recommendations” (August 2015), at 11, online: <www.toronto.ca/legdocs/mmis/2015/ma/bgrd/backgroundfile-84014.pdf> [TMAC, “Noise Bylaw Recommendations”]; Stephanie Chalkley-Rhoden, “Developers Required to Pay for Sound-Proofing Against Live Music Venues Under New Planning Principle”, *ABC News* (4 August 2014), online: <www.abc.net.au>.

<sup>180</sup> TMAC, “Noise Bylaw Recommendations”, *supra* note 179 at 11. In the past, Toronto has held grassroots music venues and ventures back with things like a facilitation of the complaint mechanisms for citizen noise concerns (Josh O’Kane, “Toronto Venue Owners Have to Deal with Tough Music-Related Bylaws”, *The Globe and Mail* (31 July 2015), online: <www.theglobeandmail.com>).

<sup>181</sup> TMAC, “Noise Bylaw Recommendations”, *supra* note 179 at 11-12; O’Kane, *supra* note 180.

coordination with Planning and Building Standards to protect existing live music venues from conflicts with newer developments.”<sup>182</sup> These agent of change recommendations are in line with, and draw from, the Mastering of a Music City study developed by the City of Toronto—which has become a resource that other cities (including, interestingly, the London, UK music preservation initiatives) seek to follow in their respective quests towards attaining the elusive UNESCO status of a “Music City”<sup>183</sup>

iii. *Preserving Nighttime Culture and the Nighttime Economy Through Context Specific and 24-Hour City Governance Design*

a) *Night Mayors, Night Czars, and Nighttime Commissions*

Where the displacing and replacing effects of city redevelopment and gentrification processes on (sub)cultural community arts and performance spaces and music venues tends to disproportionately affect unruly spaces often associated with the nighttime portion of the day/night continuum of life in the city,<sup>184</sup> unseating the dominance of daytime governance can begin to change how alternative venues are addressed, governed, promoted, and preserved.<sup>185</sup> A facilitator, or facilitating entity of these spaces and cultures that operate primarily at night has been suggested as a potential strategy to bring together the different actors and frameworks that interact with spaces of high subcultural community wealth that operate primarily at night—such as the transportation sector, liquor licensing structures, building and fire code enforcement

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<sup>182</sup> Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall; Toronto Music Advisory Council, “Measures to Protect Live Music Venues in Toronto – Update”, *supra* note 82.

<sup>183</sup> IFPI & Music Canada, “Mastering a Music City”, *supra* note 116 at 42.

<sup>184</sup> See also Valverde, *Chronotopes*, *supra* note 165 at 19-22.

<sup>185</sup> See also Cooper, *supra* note 165 at 7, 12-14, 24.

officers, emergency services, law enforcement organizations, local businesses, residents, and city and neighbourhood associations and planning frameworks.<sup>186</sup>

London, England's Music Venues Taskforce report highlighted the creation of a "Night Mayor" as one of the potential strategies to deal with the loss in music venues that London has experienced.<sup>187</sup> As the successful 2014 implementation of a night mayor in Amsterdam has shown, this individual is in place to "champion the night-time economy" and "bring together night-time businesses, local authorities and the emergency services to ensure that night-time activity can thrive. The Night Mayor would also review and implement strategies to minimise the risks of nuisance, anti-social behaviour or crime."<sup>188</sup> The French cities of Paris and Toulouse, as well as Zurich, are other examples of cities that have implemented similar night mayoral concepts.<sup>189</sup>

These nighttime mayoral positions can not only serve an important role in understanding and representing the needs and interests of nighttime spaces, nighttime culture, and music venues and culture, as well as advocating for the socioeconomic benefits of the nighttime industry and preserving it in order to attract those who seek cities with vibrant 24-hour offerings, but they also serve as an important liaison to arbitrate divergent interests that coexist within the same space but conflict in terms of day/night use patterns.<sup>190</sup>

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<sup>186</sup> See e.g. Hannah Ellis-Petersen, "Save London's Live Music Venues: City-Wide Campaign Launched", *The Guardian* (20 October 2015), online: <[www.theguardian.com](http://www.theguardian.com)>.

<sup>187</sup> London's Music Venues Taskforce, "Rescue Plan", *supra* note 136 at 29. See also Centre for Economics and Business Research, "London's 24 Hour Economy: The Economic Value of London's 24 Hour Economy" (London, UK: London First in association with EY, 2016).

<sup>188</sup> London's Music Venues Taskforce, "Rescue Plan", *supra* note 136 at 29. See also, for e.g. Jon Henley, "The Stuff of Night Mayors: Amsterdam Pioneers New Way to Run Cities After Dark", *the guardian* (21 March 2016), online: <[www.theguardian.com](http://www.theguardian.com)>; Feargus O'Sullivan, "A 'Night Mayor' is Transforming Amsterdam After Dark: The Dutch Capital's Concept is Already Spreading to Other Major Cities", *Citylab* (29 January 2016), online: <[www.citylab.com](http://www.citylab.com)>.

<sup>189</sup> *Ibid.*

<sup>190</sup> BC, "From Dusk 'til Dawn: Arbitration, Cultivating Culture and the Other Stuff of Night Mayors", *The Economist* (24 October 2016), online: <[www.economist.com](http://www.economist.com)>; Katherine Alexandra Newman & Michele Acuto, "New Night Mayors Could Make Cities' Dreams Come True – Here's How", (15 November 2016), *The*

The Music Venues Taskforce report and success of the nighttime mayoral structure in other cities eventually led to the creation of London's first ever "Night Czar" in late 2016 as well as the establishment of a "Night Time Commission" headed by a Chair who is well-versed in licensing, the leisure and nighttime economy, as well as urban planning and redevelopment, and who is to work with the Night Czar to accomplish the goal of growing London into a smoothly functioning 24-hour city.<sup>191</sup>

### **b) 24-Hour City Governance Frameworks**

The establishment of a night mayor, or night czar, also feeds into 24-hour city governance models that are popping up in cities like Melbourne, Australia and which can embody the language of progressive neighbourhood nuisance legal frameworks like we will see with Article 976 of the *Civil Code of Quebec* canvassed later in this section. In the City of Melbourne's description of its "Policy for the 24 Hour City", it highlights the need to balance the competing needs of urban residents in a city that seeks to sustain a vibrant community and cultural life, and it identifies the interests and patterns of the divergent stakeholders that inhabit different portions of the day/night continuum:

The policy recognises that the city progresses through different rhythms over the course of the day and night. For example the rhythm of the city between 8am and 6pm is dominated by the hustle and bustle of commerce, people coming and going from 9-5 jobs, going to meetings, having lunch, attending university, and visiting tourist sites. As people finish work the city develops more relaxed atmosphere,

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*Conversation* (website), online: <theconversation.com>; Rebecca Nicholson, "Drugs, Developers and Diplomacy: London Night Tsar Amy Lamé on the Challenges of the Job", *the guardian* (10 December 2016), online: <www.theguardian.com>. See also Cooper, *supra* note 165 at 12-14, 24.

<sup>191</sup> Newman & Acuto, *supra* note 190; "Mayor Announces Plans for Night Time Commission for the Capital", (15 March 2016), *Mayor of London & London Assembly* (press release), online: <www.london.gov.uk/press-releases>; "Mayor Appoints Philip Kolvin, QC as Chair of the Night Time Commission", (16 December 2016), *Mayor of London & London Assembly* (press release), online: <www.london.gov.uk/press-releases>; *London Night Time Commission* (website), online: <www.london.gov.uk/what-we-do/arts-and-culture/vision-and-strategy/london-night-time-commission>; "24 London: Creating a City That's Always Open", *Mayor of London & London Assembly* (website), online: <www.scroll.london.gov.uk/24hourlondon/>; "Mayor of London Appoints Amy Lamé as UK's First-Ever Night Czar", (4 November 2016), *Music Venue Trust* (website), online: <musicvenuestrust.com>; Nicholson, *supra* note 190.

people meet for dinner, gather to see a show or visit a gallery. Around 11pm or midnight the city's vibe changes. Many visitors and workers have left the city, while others gather to celebrate and engage in live entertainment, drink at the bars or socialise in clubs. The Policy also recognises that the city is home to residents, many of whom need to sleep during this time, even while activity takes place. As the entertainment venues close and the city drains of people, it is time for the city to rest and recuperate for the new day. Late-night shift workers are completing their work, and the city cleaners work to enable the new day to commence afresh.<sup>192</sup>

The intention behind 24-hour governance strategies, such as Melbourne's, is to create a more integrated and context appropriate manner of dealing with the various mechanics and decisions that are unique to divergent portions of the day/night continuum. These strategies seek to accomplish this kind of integrated governance such that no single portion of the day/night continuum is advantaged over the other and that mutually beneficial partnerships are established between the diversity of stakeholders in the city space and their various needs are balanced in planning decisions that engage with land use and amenity issues as well as social issues.<sup>193</sup>

However, much as we have seen with Santos' argument that a *buen vivir* approach to (re)development engaging with subaltern cosmopolitanism requires a concerted shift from the central focus of current frameworks on dominant portions of society, and similar to Laurajane Smith's argument that unseating the faulty dominance of tangibility in heritage matters requires a shift in focus to the intangible, 24-hour governance policies like Melbourne's note that while they may first place an emphasis on shifting the focus to currently marginalized nighttime

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<sup>192</sup> "City of Melbourne Policy for the 24 Hour City: A Framework for Action" (2008), online: <[www.melbourne.vic.gov.au](http://www.melbourne.vic.gov.au)> at 3 ["City of Melbourne Policy for the 24 Hour City"]. Note that while the 2014 report (Wynveen et al, *supra* note 120 at 59) written for the City of Toronto's Office of the Chief Planner (at the time, Jennifer Keesmaat) turned to the 24-hour city concept as applied in Manchester, UK as an example, Manchester has nowhere near the developed frameworks that are being established in Australia. The UK nighttime community is itself turning to Australia's application of the agent of change principle and London's "Night Czar" and Nighttime Commission models in order to fashion Manchester into a competitive 24-hour city (see e.g. Thomas van Berckel, "Night Time Industries Association Campaign for a Manchester Night Czar", (7 April 2017) *Night Time Industries Association* (website), online: <[www.ntia.co.uk](http://www.ntia.co.uk)>; Emily Henward, "Could a 'Night Tzar' Turn Manchester Into a 24-Hour City?", *Manchester Evening News* (4 April 2017), online: <[www.manchestereveningnews.co.uk](http://www.manchestereveningnews.co.uk)>.

<sup>193</sup> See e.g. "City of Melbourne Policy for the 24 Hour City", *supra* note 192 at 6.

concerns, these policies are ultimately “designed to recognise the rhythms of a 24 hour city as it moves from day to night and back again,” and apply to the concerns of *all* users of the city no matter the time of day.<sup>194</sup> Such strategies also work towards unseating dominant spatiotemporal logic and narratives that, as Mariana Valverde identifies, tend to structure the local and municipal legal complexes that ultimately shape the daily lives of urban citizens but so often result in the social and political exclusion of those who do not neatly fit into ordered boxes of “Euro-American urban citizenship.”<sup>195</sup>

*iv. A Retreat to the Daytime Hours of the Day/Night Continuum*

In response to ongoing displacement and the increasing difficulty in securing a space within which to congregate during unruly and transgressive portions of the day/night continuum, another option for subcultural music communities is to attempt to fit into dominant legal and societal frameworks. This form of subcultural retreat from struggles against unequal treatment and valuation of certain iterations and practices of culture over others plays out as a compromise between their desired activities and the time at which these occur within the day/night continuum. This compromise might take the form, for example, of holding music and dancing gatherings and events during less unruly and more accepted daytime hours where the use of the space in this manner remains acceptable and less contested. As one organizer of daytime dance parties in Toronto describes:

One of the side effects of the massive wave of condo developments and gentrification that Toronto has experienced over the past decade is that there just aren't many big empty warehouse spaces left downtown that are suitable for all-night parties. Even if you can find a room that's big enough, good luck locating a spot without nearby neighbours who won't call the cops about the sound of bass pounding through the walls.<sup>196</sup>

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<sup>194</sup> *Ibid* at 4.

<sup>195</sup> Valverde, *Chronotopes*, *supra* note 165 at 19. See also Buckley, Cooke & Fayad, *supra* note 75 at 94-95.

<sup>196</sup> Benjamin Boles, “How Sunday Afternoon Social Became One of Toronto’s Most Unique Parties”, *thump* (3 December 2015), online: <[thump.vice.com](http://thump.vice.com)>.

These kinds of strategies can also be seen to manifest in an almost directly oppositional move from weekend afterhours subcultural events, that creep from the late night into the early morning, to weekday early-rising pre-work morning events that have attendees arriving at traditionally nighttime-oriented venues and nightclub spaces with DJs, music, and dancing, all before heading to a 9-5 job. These attempts to establish early morning mid-week dance parties (sometimes called the “early morning dance movement”) are currently gaining traction in large European and North American cities—such as those offered by Daybreaker in a number of large European and North American cities including Toronto. As opposed to their weekend afterhours oppositional counterparts, weekday subcultural morning music and dancing events do not face nearly as many of the stymying effects of municipal governance structures nor the array of legal barriers. They are, of course, far less “unruly” and fit far better into the dominant spatiotemporal logic and narratives of a city that Valverde describes.”<sup>197</sup>.

Daytime dance parties along with early morning dance parties, though, are a passive “solution” and can be seen to exacerbate the overemphasis on exchange-value of cultural and leisure activities over their use-value, a cleansing of alternative, marginal, and transgressive spaces, as well as an essentialization of transgressive elements that fit the criteria for inclusion in Zukin’s “toolkit” for authenticity<sup>198</sup> and then become ripe marketing tools and attractively commodifiable traits in promoting events to those seeking to ‘touristically’ taste subaltern, transgressive, edgier, and unclesed spaces of culture. Attached to these events is usually an entry price point that is much higher than “traditional” gritty and marginal spaces of music and dance, especially considering the often comparatively protracted duration of the event.

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<sup>197</sup> Valverde, *Chronotopes*, *supra* note 165 at 19. See also Buckley, Cooke & Fayad, *supra* note 75 at 94-95.

<sup>198</sup> Zukin, *supra* note 28 at 121.

There is a tendency to reify and commodify the intersections between the event and spatially transgressive grit—such as the event taking place in a venue explicitly coded as “transgressive”, be it some sort of abandoned warehouse or office building, or boasting a view of graffiti and street art, a “secret” entrance, or some other sort of edgy but glamorous gimmick that allows attendees to escape an otherwise orderly, cleansed spatial experience of the city to become a tourist in the chosen or unchosen marginal spatial realities for other portions of a city’s populace, but who can now explore these spatial realities within the safe temporal confines of daytime hours, free of concerns about the noise complaints attached to nighttime music activities and any unsavoury realities that can accompany nighttime activities and edgy transgressive nighttime outings.

These events also code themselves as health- and wellness-oriented in the food and beverages marketed within the space, the yoga classes sometimes attached to the event, and a general attitude that opposes the consumption of alcohol or other substances often associated spatiotemporally with nighttime music events. To that end, while these events fit the bill for some iterations of culture, music, and dance consumption and creation in the city and their spatiotemporal practice, these events do not reflect the practices, values, or spatiotemporal realities of many others who strongly associate themselves with similar events, but which occur at night.

As Chatterton and Hollands describe in relation to the gentrification of alternative nighttime cultural and nightlife spaces, use, and the reality of what is being displaced:

Alternative marginal nightlife spaces also represent the importance of “use” rather than the “exchange” value of the society. ... Grass-roots independent culture signals a desire to be involved and to produce, not just to consume. ... In many ways, nightlife on the margins is a constant reminder of the need to challenge, resist and transgress the “taken for granted” boundaries of the city. ... [S]quats and free parties subvert established geographies and normative landscapes. They sketch out possible

alternative worlds based upon collective ownership, non-hierarchical decision-making and ecological and social awareness.<sup>199</sup>

Daytime dance parties and the “solution” of retreating to daytime hours, speak more to the commodification of precarious space rather than a solution, and exemplify Appadurai’s aesthetic of diversion and Spooner’s concern with the reification of authenticity that we saw in Chapter 1.<sup>200</sup> This emphasis on exchange-value creation out of reference to authenticity further speaks to Zukin’s concern with the displacing effects that the consumption of “authentic” urban places can have within gentrifying processes.<sup>201</sup> As she discusses, focusing in on the often overused moniker of the “hipster”, “hipster districts”, and “hipster culture” in relation to the craving for authenticity in the city and the commodification of authentic urban spaces in places such as New York City or Brooklyn, “Hipster districts ... connect trendy new cultural consumption to former netherworlds of tradition and transgression.”<sup>202</sup> Or, as Vice journalist Clive Martin expressed in more colourful and outraged terms about parallel processes in the United Kingdom:

Clubbing has traditionally been a sacred refuge of the scum. When the towns and cities of the Western world shut down for the night, the decent, the modest and the square would flee back to their living rooms on the outskirts, far from anywhere that served tequila in pint glasses, and in would flock the louts, the losers, the addicts, the creeps, the chancers and the excited young. ... What's emerged ... is a new style of going out ... often utilising reclaimed, picturesque city locations such as rooftops and riverside spots. These events often have sideshows involving corporate sponsors, street food stalls, marquees, competitions, generic wedding-playlist DJs and all sorts of additional activities on top of the old staples: "Getting fucked and dancing." ..... It's a world where pulled pork replaces pickpocketing; where skyline views replace dirty black walls; where mixologists replace in-house drug dealers. ... Of course, some of them are probably quite good fun when it comes down to it; getting drunk

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<sup>199</sup> Chatterton & Hollands, *supra* note 35 at 238.

<sup>200</sup> Arjun Appadurai, “Introduction: Commodities and the Politics of Value” in Arjun Appadurai, ed, *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge, UK: Cambridge University Press, 1986) 3 at 28-29, 46-47; Brian Spooner, “Weavers and Dealers: The Authenticity of an Oriental Carpet” in Arjun Appadurai, ed, *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge: Cambridge University Press, 1986) 195 at 196-97, 200, 228. See also Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times*, 2nd ed (Boston: Beacon Press, 2001) at ch 6ff.

<sup>201</sup> Zukin, *supra* note 28 at xi-xiii, 3-4.

<sup>202</sup> *Ibid* at 234.

with a view of the city while listening to disco is never going to be a terrible experience.

However, the sheer glut of them, with their no-mark DJs, extortionate ticket prices, microbrewery collaborations and absolute lack of imagination just smacks of soulless organised fun. ... They seem to perpetuate an idea of fun that's derived directly from an EE advert: a bunch of healthy-looking people with quiffs and flawless skin standing on top of a luxury block of flats, drinking Negronis and having a nice time to some nice music. It's something most of us would probably enjoy enough if we ended up there, but what is it really adding to the culture? Plus, not all of us can pay the £15 entry to watch some bloke who once supported Norman Jay play a couple of vinyls. ... The beauty of nightclubs is that you don't need to be in a beautiful or even nice place to have that moment of transgression. The music and the atmosphere should be enough to give you the feeling that the world around you has changed, that you've stepped through something, that your existence has transformed. You can be in a decaying building in Catford on a Friday night, or a basement in Elephant and Castle at 6AM on a Monday morning, and have an experience that challenges, thrills, terrifies and lives with you. .... Sure [this new style of going out is] great for anyone who can afford to eat shellfish at a club night. But it's a terrifying prospect for anyone not involved in that world.<sup>203</sup>

### **III. LEGISLATING TOLERANCE, THE CIVIL CODE OF QUEBEC, NUISANCE LAW, AND ARTICLE 976 AS COUNTERHEGEMONIC LEGAL TOOL\***

Private property, and the quiet enjoyment of property, take different shapes when spaces are shared with individuals with conflicting life/work schedules, contrary leisure and/or cultural practices, businesses that thrive off the nighttime economy, or even where a condo might dramatically face the industrial theater of a working port that ultimately results in the bellowing horns of incoming ships docking at night before the onset of noisy nighttime cargo unloading begins—as we saw, with the Redpath Sugar Refinery in Chapter 4.<sup>204</sup> Cohabiting a

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<sup>203</sup> Clive Martin, “The Tragic New Type of Nightlife Threatening UK Clubbing”, *Vice* (12 August 2015), online: <[www.vice.com](http://www.vice.com)>. EE is a British mobile network operator and internet service provider (see *EE* (website), online: <[ee.co.uk](http://ee.co.uk)>) and Norman Jay is a well-known British DJ (see *Norman Jay* (website), online: <[www.normanjaymbe.com](http://www.normanjaymbe.com)>)

\* © Sara Ross. Parts of Section III were previously published in: Sara Ross, “Legislating Tolerance: Article 976 of the Civil Code of Quebec and its Application to Mixed-Income and Mixed-Use City Redevelopment Projects” (2016) 62:3 *Loyola Law Review* 749.

<sup>204</sup> See e.g. Cooper, *supra* note 165 at 10; Burke & Schmidt, *supra* note 167 at 69. Also of relevance here is Mariana Valverde’s discussion of “[t]he property-owning nuclear family and the legal chronotope of ‘single-family detached’” and the manifestations of hegemonic narratives related to property ownership and “proper” spatiotemporal presence and occupation in the city that pop up in planning law and real estate discourses (Valverde,

neighbourhood with an existing music venue is not something that is desired by all, or may become undesirable subsequent to moving into a neighbourhood. But as with the use of an agent of change type mechanism in preventing the displacement of a venue like the Ministry of Sound in London and working towards a creative placekeeping strategy, other examples of elements of existing legal complexes that apply to city life carry potential for application in music city contexts.

As dense urban cores of large cities like Toronto are increasingly characterized by the close-quarters of mixed-use developments,<sup>205</sup> the agent of change principle embodies the kind of tolerant give-and-take and “good neighbourliness” needed in mixed-use zones if important cultural spaces are to be preserved despite rampant (re)development. But, in searching for other counterhegemonic legal tools in Canada that explicitly engage with the notion of tolerance in dealing with neighbourhood life and the nuisances that can arise in mixed-use settings, a dearth of recognition, or “legislation”, of tolerance meaningfully exists in the legal frameworks of Canada’s common law jurisdictions. The same, however, cannot be said of the *Civil Code of Quebec* (“CCQ”).

As Shauna Van Praagh suggests, nuisance law provides a useful framework for examining neighbourhood relations and the disputes that arise within close shared spaces where distinct narratives, cultures, and ways of life “are forced into explicit coexistence and mutual

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Chronotopes, supra note 165 at 19-22). For the Redpath Sugar Factory in Toronto and the nearby condo development (Megan Marrelli, “Why the Redpath Sugar Factory Isn’t Going Anywhere”, *Torontoist* (9 October 2014), online: <torontoist.com>); Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 49, 57ff [Valverde, *Everyday*]; Port Lands Acceleration Initiative, “Port Lands Planning Framework July 23-24 2014 Charrette Summary Report” at 78 (online: <www.portlandsconsultation.ca>).

<sup>205</sup> See generally Loretta Lees, Garry Butler & Gary Bridge, “Introduction: Gentrification, Social Mix/ing and Mixed Communities” in Gary Bridge, Tim Butler & Loretta Lees, eds, *Mixed Communities: Gentrification by Stealth?* (Bristol: Policy Press, 2012) 1 at 7-8. See also Damaris Rose, “Discourses and Experiences of Social Mix in Gentrifying Neighbourhoods: A Montreal Case Study” (2004) 13:2 *Can J Urban Research* 278.

acknowledgment.”<sup>206</sup> Following this vein of thought, in dealing with nuisance concerns, Article 976 of the CCQ uniquely and distinctly exhibits an explicit acknowledgment of tolerance that carries applicability to mixed-use neighbourhoods.

Nuisance—whether approached through the common law tort of nuisance or through the civilian *troubles de voisinage*—largely arises from and deals with the private conflicts that stem from physical proximity within a space.<sup>207</sup> Within the neighbourhood space, conflicting interests, practices, and lives are free to coexist unconstrained, but only up until the point where the by-products of these interests, practices, and life choices begin to interfere with those of others.<sup>208</sup> It then becomes a question of determining the reasonable thresholds of acceptable interference—usually according to the context or “custom” of the neighbourhood space in question.<sup>209</sup>

This determination must measure the precise fabric of the neighbourhood or context and the appropriate levels of “give-and-take” reasonably expected of the involved parties in order to establish what constitutes behaviour that has exceeded the neighbourhood threshold.<sup>210</sup> Once it is determined that a particular by-product exceeds this threshold, the remedy is usually that the behaviour in question must be stopped<sup>211</sup>—or, at least, limited to the extent that the by-product no longer exceeds the neighbourhood or contextual threshold. Within the mechanics of urban governance, municipal legal complexes, and condo boards, available mechanisms within which neighbourhood residents may frame complaints regarding behaviour or behavioural by-products they find to be intolerable generally include the structure provided by zoning ordinances and the limited language of by-law violations.

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<sup>206</sup> Shauna Van Praagh, “View from the *Succah*: Religion and Neighbourly Relations” in Richard J Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 21 at 25.

<sup>207</sup> *Ibid* at 23; Cooper, *supra* note 165 at 12.

<sup>208</sup> Van Praagh, *supra* note 206; Cooper, *supra* note 165.

<sup>209</sup> *Ibid* at 13-14.

<sup>210</sup> Van Praagh, *supra* note 206; *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 39, [2013] 1 SCR 594 [*Antrim Truck Centre*]. But see also Cooper, *supra* note 165 at 13-14.

<sup>211</sup> Van Praagh, *supra* note 206 at 23.

Legislating tolerance in the neighbourhood context—at a time where tolerance is increasingly important due to the changing structure of life spaces and property use and occupation<sup>212</sup>—may serve as what Santos describes as a counterhegemonic use of a hegemonic tool in order to codify and legislate the much-needed tolerance our cities require.<sup>213</sup> As the Ontario Court of Appeal noted in *Antrim Truck Centre Ltd v Ontario (Transportation)*, “[T]he important principles of tolerance and accommodation necessary to sustain harmony among neighbours in an increasingly dense and complex society require the balancing of the interests of both parties.”<sup>214</sup> Housed within Article 976 of the CCQ is a clear, active reference to the principles of tolerance that are necessary for a sustainable cultural coexistence in the city.<sup>215</sup> Article 976 presents a useful private law mechanism for acknowledging and incorporating the notion of tolerance within the context of neighbourhood nuisance and the civilian notion of *troubles de voisinage*. And its clear language recognizes the give-and-take balance and mutual respect that is needed within the city space.

Found within the *Civil Code of Quebec* in force within Quebec and applied in the province’s jurisdiction over property and civil rights, Article 976 is located within the CCQ’s chapter on the “Special Rules on the Ownership of Immovables” in the book on ownership.<sup>216</sup> Article 976 reads:

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<sup>212</sup> *Declaration of Principles on Tolerance*, UNESCOR, 28th Sess, SHS-96/WS-5 (adopted on 16 November 1995), art 3 [*Declaration of Principles on Tolerance*].

<sup>213</sup> Santos, *Toward*, *supra* note 7 at 466-67.

<sup>214</sup> 2011 ONCA 419 at para 109, 106 OR (3d) 81, rev’d on other grounds, 2013 SCC 13, [2013] 1 SCR 594.

<sup>215</sup> See also the *Declaration of Principles on Tolerance*, *supra* note 212.

<sup>216</sup> It was placed within the book on ownership despite early suggestions in prior drafts of the CCQ that it be included in the book on obligations—likely due to the fact that Article 976 essentially deals with neighbourhood relations. This is interesting considering the fact that Article 976, as will be discussed subsequently, does not stipulate ownership as a necessary prerequisite to applying Article 976 and places no primacy in ownership rights (see also Dorian Needham, “Beyond Geography: Nuisance in Virtual Communities” (2011) 42 *Ottawa L Rev* 189 at 215). As noted by the SCC, the location of a provision or rule within the CCQ, and in the context of codification generally, is important to consider as “[t]he organization of rules is an essential feature of codification” (*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 14, [2007] 2 SCR 801; *St Lawrence Cement Inc v Barrette*, 2008 SCC 64 at para 72, [2008] 3 SCR 392 [*St Lawrence Cement*]).

Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

*Les voisins doivent accepter les inconvénients normaux du voisinage qui n'excèdent pas les limites de la tolérance qu'ils se doivent, suivant la nature ou la situation de leurs fonds, ou suivant les usages locaux.*

As Van Praagh succinctly suggests, embodied by Article 976 is a “picture of the neighbourhood mosaic” that underlies “the language of bylaw violations, condominium conditions, and assertions of individual rights and freedoms.”<sup>217</sup>

#### **A) The History of Article 976 CCQ**

In order to unpack Article 976, it is helpful to trace its history. Article 976 did not have an equivalent provision in the *Civil Code of Lower Canada* (the previous civil code in force until the CCQ came into force on 1 January 1994). In applying Article 976 in the Supreme Court case of *St Lawrence Cement v Barrette*, Justices Lebel and Deschamps, writing for the majority, refer to the commentary of the Minister of Justice regarding the new CCQ and the chapter on the Ownership of Immovables within which Article 976 is found.<sup>218</sup> They note that Article 976 finds its origins in judge-made law and legal rules that Quebec courts had generated in response to the concept of abuse of rights, specifically in the context of neighbourhood disturbances. Quoting the Minister’s commentary, the following explanation for Article 976 is provided:

This article is new. It refers to the principle that tolerance must be shown in neighbourhood relations and codifies that principle in a general provision that heads up and underlies the entire chapter. It thus codifies the academic commentaries and case law on neighbourhood disturbances, which were originally founded primarily on abuse of the right of ownership before a specific framework was established for neighbourhood disturbances.<sup>219</sup>

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<sup>217</sup> Van Praagh, *supra* note 206 at 25.

<sup>218</sup> *St Lawrence Cement*, *supra* note 216 at para 58; Quebec, Ministère de la justice, *Commentaires du ministre de la justice: Le Code civil du Québec — Un mouvement de société*, vol 1, 2 (Quebec: Publications du Québec, 1993).

<sup>219</sup> *Ibid* at 573; *St Lawrence Cement*, *supra* note 216 at 58 [translation from *St Lawrence Cement*].

## B) The Unique Elements of Article 976 CCQ

While Article 976 of the CCQ is distinct within Canadian law dealing with nuisance,<sup>220</sup> its use of the language of tolerance is particularly unique in its potential for displacing the centrality of dominant neighbourhood norms and property concerns when these clash with norms of non-dominant, marginal groups or individuals—especially where the relational non-dominance of these norms is exacerbated by weaker property claims to the neighbourhood space.<sup>221</sup> Not only does the CCQ provide a codification of the notion of tolerance with Article 976, but more importantly, Article 976 clearly expresses a *duty* to tolerate. The duty to tolerate that is expressed in Article 976 does not entirely transfer the nuisance creator’s responsibility to avoid creating a nuisance onto the individual who must now tolerate, or endure, the nuisance up to “the limit of tolerance [the neighbourhood parties] owe each other, according to the nature or location of their land or local custom.”<sup>222</sup> Rather, Article 976 effectively introduces a balance—or a “give and take”<sup>223</sup>—to the treatment of nuisance within a neighbourhood where both the party creating the nuisance and the party experiencing, or tolerating, the nuisance share the responsibility of harmony in the neighbourhood.

In addition to the Canadian context, Article 976’s use of the language of tolerance as a consideration within neighbourhood nuisance beyond just a context-based assessment of the local customs of the neighbourhood, is distinct among corresponding provisions in other civil

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<sup>220</sup> For a further discussion of Canadian nuisance law, see e.g. *ibid* at para 77; Gregory S Pun & Margaret Isabel Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis, 2010).

<sup>221</sup> This is also in line with the principles of *buen vivir*, which calls for a displacing of the centrality of dominant knowledges, ways of knowing, and lifeworlds. See e.g. Eduardo Gudynas, “Buen Vivir” in D’Alisa, Giacomo, Federica Demaria & Giorgos Kallis, eds, *Degrowth: A Vocabulary for a New Era* (Abingdon, Oxon: Routledge, 2015) 201 at 202; Santos, *Epistemologies*, *supra* note 5 at ix; Eduardo Gudynas, “Buen Vivir: Today’s Tomorrow” (2011) 54:4 *Development* 441 at 445 [Gudynas, “Today’s Tomorrow”]. See also Boaventura de Sousa Santos, “Public Sphere and Epistemologies of the South” (2012) 37:1 *Africa Development* 43, where Santos explains that cognitive injustice is the basis of social injustice (*ibid* at 57).

<sup>222</sup> Article 976 CCQ.

<sup>223</sup> *Antrim Truck Centre*, *supra* note 210 at para 39.

code examples, such as the civil codes of France or Louisiana, where these provisions instead focus on the applicable limitations on ownership and the use and control of property. Without descending into an exhaustive survey of all of the world's many civil codes, but simply for the purposes of comparative illustration, the French *Civil Code* provides at Article 544:

Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law.

*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*<sup>224</sup>

With regard to other civil codes within mixed jurisdictions in North America, the *Louisiana Civil Code* provides the following:

Art. 667. Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

Art. 668. Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

Art. 669. If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke

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<sup>224</sup> Art 544 C civ.

or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.<sup>225</sup>

As opposed to Article 976, these examples do not introduce the language of tolerance, nor a comparable duty towards a balanced give-and-take reciprocal obligation between neighbourhood parties.<sup>226</sup>

Nonetheless, in the context of this balance expressed within Article 976, the party creating the nuisance is only given leeway to create nuisance up to a certain level, in accordance with the character and custom of the neighbourhood, while the party experiencing the nuisance has a duty to tolerate the nuisance created up to this level. While permitting this leeway for nuisance, within the underlying fabric of Article 976 remains an implicit acknowledgement of the duty not to harm third parties—neighbours in particular.<sup>227</sup>

In one of the few pieces of scholarship that address Article 976, Adrian Popovici suggests that the key to interpreting Article 976, and understanding the context of the neighbourhood community, is to acknowledge the expressed obligation to tolerate abnormal annoyances, as opposed to the obligation to repair (or halt) abnormal annoyances.<sup>228</sup> Article 976 embodies the idea that what might be considered to be unacceptable or illicit behaviour by a third party becomes acceptable—or at least tolerable—once the context of the neighbourhood and one’s neighbour is engaged.<sup>229</sup> Or, as Popovici suggests, Article 976 creates a certain level of

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<sup>225</sup> Arts 667-69.

<sup>226</sup> Article 976 would also appear to correspond to Pothier’s reference to the neighbourhood as a quasi-contract that imports reciprocal obligations between neighbours (Robert Joseph Pothier, *Treatise: Contract of Partnership; With the Civil Code and Code of Commerce Relating to that Subject, in the Same Order*, vol 3, (Paris Ed 1835) at 549, cited in *Higgins Oil and Fuel Co v Guaranty Oil Co*, 82 So 206 (La 1919)).

<sup>227</sup> Adrian Popovici, “La poule et l’homme: sur l’article 976 CcQ” (1997) 99 R du N 214 at 226.

<sup>228</sup> *Ibid* at fn 35. Here, Popovici refers to the formula used by Jean Carbonnier in approaching Article 976: « *Le principe n’est point l’obligation de réparer les inconvénients anormaux, mais bien l’obligation de supporter les inconvénients normaux. Là est l’idée maîtresse de la communauté de voisinage.* » (*Droit civil, Vol 3: Les biens*, 12th ed (puf, 1988) at 264, fn 59).

<sup>229</sup> Popovici, *supra* note 227 at fn 57.

“acceptable” or “tolerable” damages or harm that can be inflicted within the context of a neighbour and neighbourhood that would not be acceptable to expect to inflict on another third party.<sup>230</sup>

This crystallizes into an obligation of “good neighbourliness” and tolerance that speaks to what is needed for neighbourhood mosaics of diverging lifeworlds and distinct cultures. The high consideration that is accorded to tolerance and codified within Article 976 reads as a fundamental premise of humanity and carries with it a quintessentially human essence applicable beyond Quebec’s civil code, and beyond civil law. Echoing Popovici’s assertion, Article 976 espouses the fundamentals of what should exist between two neighbours—a minimum level of mutual tolerance of annoyances, differences, and acceptance.<sup>231</sup>

### **C) Ownership, the Tenant, and Article 976 CCQ**

Another unique element of Article 976 and how it may be especially suited to dealing with mixed areas of ownership and rental and the power imbalances that can result in having one’s voice heard,<sup>232</sup> is that Article 976 allows for claims by both owners and tenants without favouring the property rights embodied in ownership versus rental. Article 976 makes no mention of ownership. The primacy of ownership is displaced by the desire for harmonious relations between neighbours where “any holder of a real right of usage, or of a personal right of lease, can bring an action in nuisance if her enjoyment of property is infringed abnormally.”<sup>233</sup>

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<sup>230</sup> *Ibid* at fn 37.

<sup>231</sup> Popovici, *supra* note 227 at 253.

<sup>232</sup> See e.g. Cooper, *supra* note 165 at 13-14.

<sup>233</sup> Needham, *supra* note 216 at 215. This is in contrast to the CCQ’s relative—France’s *Code civil*. See its Article 544, *supra* note 224. See also the aforementioned *Louisiana Civil Code*, *supra* note \_\_, arts 667-69. It is, however, also important to note that Article 976 does not protect a real right in immovable property. The Supreme Court of Canada in *St Lawrence Cement* (*supra* note 225 at paras 81-84) clarified this point by holding that an action pursuant to Article 976 (*troubles de voisinage*) is linked to personal rights rather than a real right in immovable property. See also Needham, *supra* note 216 at 216.

As Popovici explains, Article 976 reaches beyond the owner and ownership in order to include renters, tenants, and lessees.<sup>234</sup>

#### **D) Subaltern Cosmopolitanism and the Application of Article 976 CCQ**

Drawing our discussion back to Santos and his call for an equality of differences within the contact zones characterized by subaltern cosmopolitan legal struggles for equality and recognition in the face of dominant groups, tolerance within these contact zones is also important if they are to function as spaces for intercultural translation that paves the way for this equality of differences.<sup>235</sup> Intercultural translation within these zones can begin to mitigate differences by questioning “the reified dichotomies among alternative knowledges,” the unequal valuation, and abstract status assignment received by different knowledges in order to “enable us to cope with diversity and conflict.”<sup>236</sup> To complement intercultural translation, within the contact zones generated by mixed-use spaces, it is possible that a more concerted effort to incorporate the principles of tolerance into municipal law and legislation could provide viable options that displace the primacy of dominant groups, individuals entities, or property interests within mixed community redevelopment projects.<sup>237</sup> While the identity of Article 976 as a hegemonic legal tool is due to its presence within the framework of dominant state law and private law that structure law in the city, the language of tolerance and duty to tolerate that it explicitly incorporates makes it ripe with potential for counterhegemonic application.

As mixed-use developments proliferate, the relatively underdeveloped use of Article 976 in this manner should be further explored as an option in addition to current struggles for rights and freedoms in relation to particular practices, behaviours, and life choices within the city space:

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<sup>234</sup> Popovici, *supra* note 227 at 241-42.

<sup>235</sup> Santos, *Epistemologies*, *supra* note 5 at 227; Santos, *Toward*, *supra* note 7 at 472-73.

<sup>236</sup> Santos, *Epistemologies*, *supra* note 5 at 212-13. For the dynamics and potential of intercultural translation within the contact zone, see also *ibid* at 213-35

<sup>237</sup> Santos, “Beyond Neoliberal Governance”, *supra* note 6 at 29-30.

This is especially relevant where Santos favours the counterhegemonic application of existing legal tools and frameworks, regardless of their hegemonic coding, as an alternative to completely altering existing frameworks through which knowledges, cultures, and cultural practices must be negotiated. Rather, the counterhegemonic use of hegemonic legal tool strives for a recalibration of these framework in order to establish a tolerance for the plurality of legal knowledges and diversity that can further level out inequitable treatment and injustice.<sup>238</sup> Deploying a legislated tolerance, such as that found in Article 976 as well as within the agent of change principle and the other legal mechanisms explored above, provide paths towards recalibrating what equality and a creative placekeeping strategy should look like in the city.

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<sup>238</sup> Santos, *Epistemologies*, *supra* note 5 at 42-43; Gudynas, “Today’s Tomorrow”, *supra* note 221 at 445.

## **CHAPTER EIGHT: CONSULTATION AND PARTICIPATION IN CULTURAL HERITAGE MANAGEMENT AND URBAN PLANNING AND (RE)DEVELOPMENT DECISION-MAKING PROCESSES**

“So much surveying, fact gathering, desk research, analysis and policy-making leaves out the very things, the nuances, that make a place significant to people who know it well.”<sup>1</sup>

### **I. UNSEATING DOMINANT PARTIES FROM PUBLIC CONSULTATION PROCESSES AND ARNSTEIN’S LADDER OF CITIZEN PARTICIPATION**

In the wake of the October 2016 official adoption of the New Urban Agenda<sup>2</sup> that took place during the United Nations Conference on Housing and Sustainable Development (Habitat III) and which occurs only once every twenty years, a new framework for sustainable urban development was set for the next two decades. Where municipal and city governments play a key role in balancing tensions between development versus preservation interests through mechanisms like land-use planning and development approvals, the local level of governance is an important focal point for research into the reality of processes leading up to decision-making that affects urban space and urban citizens.<sup>3</sup> Moving beyond Habitat III and the fruitful discussions that took place, the question is now how the New Urban Agenda will be meaningfully put into practice by cities, their local governments and urban law through planning and design decisions. Improving social justice within cities requires municipal legal complexes,

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<sup>1</sup> Sue Clifford, “Local Distinctiveness: Everyday Places and How to Find Them” in John Schofield & Rosy Szymanski, eds, *Local Heritage, Global Context: Cultural Perspectives on Sense of Place* (Surrey: Ashgate, 2011) 11 at 15.

<sup>2</sup> *Draft Outcome Document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)*, HABITATIIIOR, Annex, Agenda Item 10, UN Doc A.Conf.226.4 (2016) [New Urban Agenda].

<sup>3</sup> Kristal Buckley, Steven Cooke & Susan Fayad, “Using the Historic Urban Landscape to Re-Imagine Ballarat: The Local Context” in Sophia Labadi & William Logan, eds, *Urban Heritage, Development and Sustainability* (London, UK: Routledge, 2016) 93 at 94-95.

and the urban development designed, to better represent, sustain, and celebrate the distinctive cultures and communities that make up a city.<sup>4</sup>

In Sherry Arnstein’s seminal article “A Ladder of Citizen Participation”, she lays out a spectrum of eight types of citizen participation that range from “non-participation” on the lower rungs of the ladder, to “tokenism” in the middle, to “citizen power” on the upper rungs.<sup>5</sup> Within “non-participation” we find “manipulation” and then “therapy”—essentially created as an illusion to genuine participation.<sup>6</sup> Within the “degrees of tokenism”, we find three levels of increased participation from “informing”, then “consultation”, and then “placation”—where participants are heard but there is no mechanism to ensure that their views will be accounted for in decision-making processes.<sup>7</sup> At the top of the ladder we find increasing “degrees of citizen power” that begin with “partnership”—where there is room for negotiation between traditionally dominant/non-dominant parties in decision-making processes—and then on to “delegated power”, and the uppermost rung of “citizen control”.<sup>8</sup> Within these two top rungs, the power, or, centrality of dominant values and opinions have been displaced to the extent that marginalized values and opinions are at the center of decision-making processes.<sup>9</sup> Arnstein acknowledges that these divisions are certainly flexible, but function as general categories.<sup>10</sup>

In applying the New Urban Agenda’s focus on promoting participatory urban policies, civic engagement, and people-centered approaches to development and striving for the top rungs

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<sup>4</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 227, 240. See also Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2014) at 219 [Santos, *Epistemologies*]: “the ideal of equality is the ideal of equal differences.”

<sup>4</sup> UN-Habitat, “Urban Culture and Heritage”, Issue Paper 4, *Habitat III Issue Papers* (New York, 2015) at 4, online: *UN-HABITAT* <[unhabitat.org/issue-papers-and-policy-units/](http://unhabitat.org/issue-papers-and-policy-units/)>.

<sup>5</sup> Sherry R Arnstein, “A Ladder of Citizen Participation” (1969) 35:4 *Journal of the American Institute of Planners* 216 at 217.

<sup>6</sup> *Ibid* at 217, 218-19.

<sup>7</sup> *Ibid* at 217, 219-21.

<sup>8</sup> *Ibid* at 217, 221-22.

<sup>9</sup> *Ibid* at 217, 222-24.

<sup>10</sup> *Ibid* at 217-18.

of Arnstein's ladder,<sup>11</sup> seeking first to meaningfully involve and consult local groups (the practicing communities) in heritage and redevelopment related decision-making processes that affect the city spaces they use can provide the necessary intermediaries, or access points, to reveal more of who should be consulted, how and when to access them, and displace the dominance of already-empowered voices within public consultation processes.<sup>12</sup> Displacing the centrality of dominant actors in terms of who is consulted speaks to an approach to development and preservation in the city where no (or, at least, less) portions of the city's diverse groups, communities, cultural practices and spaces are devalued or ignored.<sup>13</sup> This unseating of traditionally dominant actors in consultation processes also strives for a better balance amongst the competing interests and power dynamics in a city.<sup>14</sup>

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<sup>11</sup> See e.g. New Urban Agenda, *supra* note 2, ss 13(b), 14(a), 16, 26, 31, 33, 41, 48, 61, 72, 81, 86, 92, 97, 138, 148, 155-56.

<sup>12</sup> See also Mariana Valverde, "How to Consult in Gentrifying Neighbourhoods", *Spacing: Canadian Urbanism Uncovered* (17 November 2015), online: <spacing.ca> [Valverde, "How to Consult"]. Note that I focus here on the public consultation mechanism as this is the key tool that is used in Toronto for citizen engagement efforts since Toronto has been the overarching case site for this research. There are, certainly, other mechanisms for citizen engagement and other progressive models for urban governance such as, for example, urban collaborative governance, that have been suggested as bearing potential in achieving the upper rungs of Arnstein's ladder—namely, partnership, delegated power, and citizen control (see e.g. Sheila R Foster & Christian Iaione, "The City as Commons" (2016) 34 *Yale L & Pol'y Rev* 281 at 334-49 [Foster & Iaione, "City as Commons"]; Sheila R Foster & Christian Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons* (Routledge, 2018) [forthcoming] [Foster & Iaione, *Ostrom*]). A discussion of these alternative systems for urban governance is, however, presently beyond the scope of this dissertation. My focus here is on how to narrow in on and improve the mechanics of carrying out and designing consultation processes with affected urban citizens in order to ensure that the full spectrum of community residents and other stakeholders can be first identified (*who* are they), and efforts can be made to design context-based engagement strategies in order to engage, sample, and represent this diversity of viewpoints from vulnerable to dominant. Nonetheless, regardless of the governance model that is chosen and the level of citizen collaboration, citizen engagement that represents a full spectrum of those affected, including underrepresented groups, remains a challenge that I argue the ethnographic research tools discussed in this chapter can begin to address (Foster & Iaione, "City as Commons", *supra* note 12 at 340).

<sup>13</sup> See also Patrick McAuslan, *The Ideologies of Planning Law* (Oxford, Pergamon Press, 1980) at 6.

<sup>14</sup> *Ibid.* This balancing can also involve non-consensus groups, among which predatory actors may be present. However, as the third and most recent report of the *Special Rapporteur in the field of cultural rights* (UNHRCOR, 37th Sess, UN Doc A/HRC/37/55 (2018)) notes:

Hateful ideologies, including diverse forms of fundamentalism and extremism, represent grave threats to human rights and their universality in general and to cultural rights and respect for diversity in particular. Ideologies based on monolithic world views and enmity toward "the other" divide societies between those who adhere to the advocated mindset and all the others, who are not to be tolerated. Full implementation of cultural rights is a critical tool to counter the rise of these ideologies. Investments in the field of culture and in the conditions that allow people to

Here, more nuanced consultation practices and methodology should also seek to account for subalternity as well as inter- and intra- generational dynamics within marginalized, peripheral, and non-dominant groups—acknowledging that initial access points into local, community, and subcultural knowledge must not be taken to represent a uniform whole.<sup>15</sup> In the next section I discuss a few other local neighbourhood examples of local Toronto city consultation processes that were underway during the research period for my dissertation project, one of which took place in the neighbourhood I lived in, as well as visual (vocal) resistance to faulty consultation practices. I include these examples in order to provide other examples and additional perspectives of the reality of public consultation design in Toronto and how it is experienced on the ground where not all segments of a neighbourhood, community, or those who use a space targeted for redevelopment are effectively included or accessed. In terms of methodology, I sought out these processes in order to triangulate and gain a better understanding of what I was observing and studying regarding Toronto’s culture-led redevelopment processes and its Music City strategies.

## **II. TORONTO NEIGHBOURHOODS, REDEVELOPMENT, THE REALITIES OF CONSULTATION PRACTICES, AND RESISTANCE**

### **A) Keele Finch Plus**

In 2015, neighbourhood planning consultations began in my own Toronto neighbourhood (the Finch corridor on the eastern border of Jane-Finch and the southern border of the York

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learn, develop their creativity, experience the humanity of others and exercise their critical thinking are necessary to create cultural democracies and foster civic engagement (at para 22 [references omitted]).

<sup>15</sup> Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd ed (London, UK: Butterworths LexisNexis, 2002) at 473 [Santos, *Toward*]. See also David Throsby, “Cultural Capital and Sustainability Concepts in the Economics of Cultural Heritage” in Marta de la Torre, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 101 at 107, 109; *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 [2013 *Burra Charter*]. See generally Gayatri Chakravorty Spivak, "Can the Subaltern Speak" in Cary Nelson & Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (London: Macmillan, 1988) 271.

University campus) in relation to the new Keele Finch (Finch West) subway stop that was projected for completion by the end of 2017, along with the new Metrolinx Finch West Light Rail Transit line (LRT) set to begin construction in 2017 with completion projected for 2021.<sup>16</sup> The purpose of the first “Keele Finch Plus Planning Study” consultation was to get a feeling for what the community envisioned for itself once the subway stop opened.<sup>17</sup> Should there be intensification? How should the neighbourhood grow? What should change? What should stay the same? What kinds of future sidewalks are preferred? What should they look like? What about the inclusion of green spaces? What kind of green space did the community envision?

At the first open house workshop and public consultation and the one that would follow (both held in the late afternoon to evening portion of the day spanning a period of about four hours), in surveying those attending it was impossible not to notice that of the sixty to seventy that attended each event, none of the families that lived near me were there—an impossible to ignore visually striking gap where the majority of the neighbourhood is racialized, with many early- to mid-twenties aged individuals, yet those attending to make their views known were almost entirely (at least in appearance) white individuals, middle-aged, or older. Many concerns represented were those strongly associated with property ownership, leading to another less visually striking but nonetheless obvious gap in representation of the many tenants who live in the neighbourhood. Nonetheless, both official consultation summaries released after the first two events simplistically summarized that “[y]ounger and older people attended, as well as renters and homeowners, business people, students, community organizations, architects and developers,

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<sup>16</sup> See e.g. *Keele Finch Plus* (website), online: <[www1.toronto.ca/wps/portal/contentonly?vgnextoid=57f21159537d2510VgnVCM10000071d60f89RCRD](http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=57f21159537d2510VgnVCM10000071d60f89RCRD)>.

<sup>17</sup> See e.g. *ibid.*

and people of diverse cultural and linguistic backgrounds.”<sup>18</sup> The same verbatim statement also appeared in the consultation summary released after the third open house workshop and public consultation event that occurred in September 2017.<sup>19</sup>

In addition to poster displays relating to future developments in the area and the brief and tightly managed presentations on plans for the Keele Finch corridor as well as the purpose of the consultations, various activities were used to gather the views of those attending. The first consultation had, among a few other similar activities, participants place sticky notes on important local areas as well as write descriptions of aspects of the neighbourhood they liked, and thought should be known. At the second consultation, most of the time was spent with attendees participating in what is known as a design charrette. The particular exercise for that evening involved small-group roundtable discussions where the focus for each table was to create a series of overlays on maps that represented where participants saw future possible roads, traffic lights, paths, and so on.

At this consultation, other overlaid drawings were created by participants to map out how and where they viewed appropriate future intensification in the neighbourhood—what kind of buildings should be built in the future, where, and the appropriate height restrictions for these future buildings. The significant percentage of those at the roundtable I participated in were not even from the neighbourhood. Rather, the table was comprised of a few planning students who lived elsewhere, an individual from an environmental conservancy group who lived elsewhere, a

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<sup>18</sup> City of Toronto, “Keele Finch Plus—First Open House & Public Consultation: Consultation Summary”, *Keele Finch Plus* at 1, online: <[web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/](http://web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/)> [Keele Finch Plus, 21 June 2016]; City of Toronto, “Keele Finch Plus—March 7, 2017 Open House & Public Workshop: Consultation Summary”, *Keele Finch Plus* at 2, online: <[web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/](http://web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/)> [Keele Finch Plus, 7 March 2017].

<sup>19</sup> City of Toronto, “Keele Finch Plus—September 28, 2017 Open House & Public Workshop: Consultation Summary”, *Keele Finch Plus* at 2, online: <[web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/](http://web.toronto.ca/city-government/planning-development/planning-studies-initiatives/keele-finch-plus/)> [Keele Finch Plus, 28 September 2017].

representative of a local grassroots community coalition working to address poverty in the neighbourhood (Jane Finch Action Against Poverty), an individual who used to live in the neighbourhood, myself, and another local resident who accompanied me. While the table worked at creating these overlaid drawings, the table's facilitator urged us to "think big" in terms of intensification. The overarching points the facilitator continued to allude to were that intensification was inevitable and that all that could really be done now was to attempt to shape how we preferred the intensification to occur—along which roads, intersections, and so on. At the end of the roundtable period, hours into the consultation that wound up lasting an extra hour into the evening, many in the room had already left, but those remaining then took part in a debriefing session where each table presented their work. All of the consultations provided half-page comment sheets for additional comments as well as a comment section in the Discussion Guide made available, and a survey was also made available at the second consultation, which resulted in twenty-one completed surveys out of the estimated sixty who had attended at some point in the four-hour period.<sup>20</sup>

As the consultations progressed and the opinions of the community were gathered and began shaping the plans for the neighbourhood, it was impossible not to wonder about meaningful neighbourhood representation and any additional efforts that were being made to ensure that the missing balance of the neighbourhood was being effectively engaged. As a tenant in the neighbourhood, I only found out about the consultation during my daily social media forays on Twitter. Somehow this was the only outreach attempt that effectively reached me, even though I was actively seeking out information and occasions to become more involved, especially in matters concerning the neighbourhood I was living in.

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<sup>20</sup> Keele Finch Plus, 21 June 2016, *supra* note 18 at 2, 6; Keele Finch Plus, 7 March 2017, *supra* note 18 at 2, 12; Keele Finch Plus, 28 September 2017, *supra* note 18 at 2, 9.

After the fact, the official consultation summaries nonetheless revealed that promotion initiatives for these events had involved a few ads taken out in two local neighbourhood and community newspapers; electronic and social media means noted previously like Twitter as well as through the website dedicated to the Keele Finch Plus project and its listserv; a flyer strategy that saw flyers distributed to rental units, homes, and businesses, and then subsequently sought to re-engage those who had attended the first and second consultations if the attendee had provided a physical address; and encouragement that local “centres of influence” like community organizations and groups, the local BIA, and the local city councillor’s office share news of the consultation events. But, as in-person observation at the events revealed, these promotion initiatives were not translating into consultation attendance from a full spectrum of the neighbourhood. The lack of familiarity with the neighbourhood was highlighted further when representatives from the City, there to facilitate the first neighbourhood consultation, were not even familiar with the name of the school where the consultation was being held.

Some additional efforts at engaging with the community’s desires for the neighbourhood once the subway stop would be completed gestured positively towards the development of more effective consultation practices, such as, the application of Toronto’s “PiPS” (Planners in Public Spaces) initiative in the months following each open house and public consultation. As part of the Keele Finch Plus Study, a series of “pop-up” style consultations took place that were in line with the PiPS mandate to “*bring planners to the people* and provide opportunities for the public to engage with City Planners, one-on-one, on issues that affect the City and specific concerns they may have about development and policy in the city.”<sup>21</sup> They first occurred in four different locations—at the local community center (about a twenty-minute walk from the intersection of Keele and Finch), the local community public library (about a twenty-minute walk from Keele

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<sup>21</sup> City of Toronto, City Planning, “What is PiPS”, online: <[www1.toronto.ca](http://www1.toronto.ca)> [emphasis in original].

and Finch), in front of the Tim Hortons close to where the new Keele Finch subway stop would be located—in order to engage with the community as they went about their everyday lives.<sup>22</sup>

The pop-up in front of the Tim Hortons also sought to engage with those grabbing their morning coffee en route to work who might not live in the community but would nonetheless be affected by the Jane Finch Plus developments. Another later pop-up at York University attempted to engage with those who would frequent that subway stop (the next stop after the Keele and Finch stop along the new subway extension), although it took place on May 27, 2017, during the summer when most students are not on campus, and it also occurred on a Saturday afternoon, when the vast majority of both York University staff and students would never be passing through the space.

The third series of pop-ups occurred about a year-and-a-half into the planning study after the third public workshop and consultation event. These pop-ups took strides towards better and more nuanced location selection in terms of daily patterns of local everyday life and errands. These pop-up style consultations took place at the Jane Finch Mall in front of the local chain drugstore Shoppers Drug Mart (about a thirty-minute walk from Keele and Finch) and at a small local grocery store (about a ten-minute walk from Keele and Finch). While initiatives and strategies like PiPS and pop-up style consultations are very much heading in the right direction towards more meaningful public consultation, as we will see below, more must still be done in terms of methods to further engage with subalternity in the city and with those who continue fall between the cracks in current public consultation efforts.

In terms of the intangible culture and community cultural wealth existing within community and neighbourhood spaces, trying to determine what to preserve versus what to develop, and trying to determine what the community values within the existing space and why,

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<sup>22</sup> See also City of Toronto, City Planning, Keele Finch Plus, “Get Involved”, online: <[www1.toronto.ca](http://www1.toronto.ca)>.

effectively engaging a rich strata of the local practicing community is essential.<sup>23</sup> Someone with a more nuanced knowledge of the neighbourhood and community might have identified more effective and efficient access points and access times for better community engagement beyond the public library, community center, Tim Hortons, and university subway during its off-hours, such as those going about their days and nights in the neighbourhood within times of peak use and within spaces like the local community garden; the neighbourhood pubs and bars; the hair salons and barber shops; the numerous little family-owned takeout joints serving a wide array of food from all over the world; at the little grocery store with the often-expired food, sometimes fuzzy discolored produce, but excellent selection of fruit, veggies, and meat so long as you bought it before it sat in the store for too many weeks, along with the well-curated array of spices, sauces, and generally difficult-to-find-in-a-mainstream grocery store stuff. About a year-and-a-half into the Keele Finch Plus Planning Study, and after comments highlighting this oversight, one PiPS pop-up style consultation finally took place near this grocery store for a three-hour period on a Tuesday afternoon in early October 2017.

## **B) Moss Park**

Numerous other illustrations of this kind of ineffective sampling appear in neighbourhoods around Toronto. Moving us inwards towards the urban core of Toronto and away from Toronto's inner suburbs, in 2016, an ongoing consultation process was underway in Moss Park, a traditionally LGBTQ-friendly community that serviced working class individuals for whom most of the rest of Toronto's downtown core no longer provided affordable or accessible living space. Despite the traditional character of the neighbourhood, and the stated resistance of the community and the Queer Trans Community Defence to the neighbourhood's

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<sup>23</sup> Harriet Deacon et al, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage* (Cape Town: HSRC Publishers, 2004) at 42.

gentrification, similar complaints as to what I had observed in the Keele Finch Plus and Music City consultations arose regarding the lack of effective consultation in Moss Park, where the representation of marginalized groups and subgroups tended “to get lost in [a] ‘classless’ notion of ‘community’.”<sup>24</sup>

As the Queer Trans Community Defence Fund asked about the redevelopment of Moss Park: “Whose ‘Redevelopment’” was the city talking about, and “Whose ‘Consultation’” were they seeking?<sup>25</sup> When ineffective consultation takes place, whether or not this is the case, it can often seem as if the city may be doing it on purpose, rather than due to outdated or ineffective consultation methods and design. The mistrust that can grow from weak consultation design or a misapplication of consultation practices often further adds to the issues the city initially sought to address. Instead of making things better (or equitable), badly executed consultations can actually make things worse.

### **C) Fantastical Buildings, Artistic Protest, and the Visual Manifestations of Faulty Attempts to “Consult”**

One of the telltale visual indications of the public consultation process used in Toronto, is the posting of black and white “Development Proposal” signs at sites under consideration for development or redevelopment. These are ubiquitous in the city; they pop up all over Toronto and are intended to solicit public participation in upcoming rezoning hearings and so on. They are so much a part of the urban landscape of Toronto that they begin to simply blend into the background. The bland proliferation of these signs, however, was spiced up in October 2016 when these signs were transformed into artistic expressions of protest against what they

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<sup>24</sup> Queer Trans Community Defence - Toronto, “Moss Park: Whose ‘Redevelopment’? Whose ‘Consultation’?” (17 September 2016), posted on *Queer Trans Community Defence - Toronto*, online: Facebook <[www.facebook.com/queertranscommunitydefence/](http://www.facebook.com/queertranscommunitydefence/)>.

<sup>25</sup> *Ibid.* See also their blog focusing on resistance to gentrifying forces in Moss Park: *No Pride in Gentrification* (blog), online: <[queertranscommunitydefence.blogspot.ca/](http://queertranscommunitydefence.blogspot.ca/)>.

represent, and two self-described Toronto-based urban interventionists, Glo’erm and Tuggy, took Toronto by storm.<sup>26</sup>

Glo’erm and Tuggy noted, in the explication of their work, that there is a sense of finality to these development proposal signs—a sense that “this is happening” and that the sign advertising public consultation is merely a formality.<sup>27</sup> At the bottom of each sign there is the announcement of an upcoming statutory meeting, but oftentimes this simply reads that the meeting date is yet to be announced. Other times, the date will have already passed. In their work, Glo’erm and Tuggy threw these issues into a stark visual reality and into the public eye. They created mock and outrageous development proposal signs that they then proceeded to place in front of key Toronto landmarks. The first one to garner major public attention was the mock black and white “Development Proposal” at 60 Queen Street West—Toronto’s Old City Hall.<sup>28</sup>

The realistic looking sign announced an upcoming statutory public meeting for which further information would be posted once the meeting was scheduled. It detailed the supposed plans for the Toronto heritage landmark: “An application to amend Zoning By-law 204-86 to construct a 90-storey residential tower with 1198 units. The application proposes to convert the existing heritage building into a 4-storey parking garage and incorporate its façade into the tower. The front plaza would be managed as a Privately Owned Public Space (POPS).”<sup>29</sup>

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<sup>26</sup> Email from Glo’erm & Tuggy (23 October 2016) (artists’ real names excluded per their request), See also Laura Howells, “Condos in the CN Tower? Why Artists Are Trolling Toronto with Fake Development Proposal Signs: Satirical Signs Ask Toronto to Take ‘Critical Look’ at Recent Development Projects”, *CBC News* (23 October 2016), online: <[www.cbc.ca](http://www.cbc.ca)>.

<sup>27</sup> Daniel Rotsztain, “Why I Pranked Torontonians with Fake Condo Signs”, *The Globe and Mail* (27 October 2016), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>28</sup> Howells, *supra* note 26; Derek Flack, “Someone is Hilariously Trolling Toronto Condo Proposals”, *blogTO* (23 October 2016), online: <[www.blogto.com](http://www.blogto.com)>.

<sup>29</sup> Howells, *supra* note 26. See also the artists’ Tumblr page: Glo’erm & Tuggy, “Development Proposal: An Application to Permit Consideration of the Development of the City of Toronto”, online: <[developmentproposal.tumblr.com](http://developmentproposal.tumblr.com)> [Glo’erm & Tuggy, “Development Proposal”]. The mention of POPS (privately owned public spaces) cleverly appears and was particularly poignant at the time as it called to mind a recent controversy in Toronto over these spaces for the public to use, congregate, and enjoy, but which are privately owned and subject to the rules of the operating private interests—thus often over-representing the private interests of those

Considering that the redevelopment of spaces that wind up as condo buildings seems to increasingly be the fate of many of Toronto's heritage and otherwise valuable properties, that this fate would now befall Toronto's historic Old City Hall actually seemed plausible. But besides the tellingly satirical nature of the details of the proposal, a few other distinguishing elements betrayed its inauthenticity, like the plain wooden posts holding it up, and the Tumblr link at the bottom of the sign where the City of Toronto's website would usually appear.<sup>30</sup>

Similar signs designed by Glo'erm and Tuggy began to pop up with even more outrageous proposals for redevelopment projects targeting other cherished Toronto heritage properties and landmark buildings, such as the CN Tower, Casa Loma, and the Rogers Center.<sup>31</sup> The development proposal targeting the CN Tower at 301 Front Street West moved into particularly extreme territory.<sup>32</sup> The drafted image of the proposal portrayed a condo tower construction sprouting out from a new platform addition that jutted out from the CN Tower's observation deck. The "Development Proposal" was accompanied by the following description: "An application to amend Zoning By-law 201-A6 to construct a 40-storey residential tower including a 4-storey parking podium. The existing tower will remain open during construction, and its south-west quadrant will be permanently converted into the condominium's entrance

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who own or control the space over the public accessing the space. In addition, the mention of the parking spaces to be included in the project recalls the many important cultural spaces (of nighttime music or disruptive culture, and others) that have been lost over the years to parking lots (as we have seen previously): See e.g. Luke Simcoe, "'We Want our Space Back': Toronto Restaurant Faces Backlash for Public Space Patio", *Metro* (14 August 2016), online: <[www.metronews.ca](http://www.metronews.ca)>; Andrea Janus, "Table for Everybody: City Says La Carnita Patio 'Not Acceptable,' Must Ensure Public Access", *CBC News* (13 August 2016), online: <[www.cbcnews.ca](http://www.cbcnews.ca)>; Geoffrey Vendeville, "La Carnita's Private Patio on Public Space Angers Condo Owners", *thestar.com* (16 August 2016), online: <[www.thestar.com](http://www.thestar.com)>. See generally Mariana Valverde, "Taking 'Land Use' Seriously: Toward an Ontology of Municipal Law" (2005) 9:1 *Law, Text, Culture* 34 [Valverde, "Land Use"]. See also Bradley L. Garrett, "The Privatisation of Cities' Public Spaces is Escalating. It is Time to Take a Stand", *The Guardian* (4 August 2015), online: <[www.theguardian.com](http://www.theguardian.com)>.

<sup>30</sup> Howells, *supra* note 26; Flack, *supra* note 28.

<sup>31</sup> Howells, *supra* note 26; Glo'erm & Tuggy, "Development Proposal", *supra* note 29.

<sup>32</sup> Howells, *supra* note 26. See also Glo'erm & Tuggy, "Development Proposal", *supra* note 29.

lobby and gym, and one elevator bank will be dedicated to residential use.”<sup>33</sup> So many people were confused (and genuinely concerned) by the signs that the City of Toronto had to issue a statement that these signs were not real.<sup>34</sup>

As Glo’erm and Tuggy explained during an email exchange I had with them the day the signs received major news coverage, their urban art interventions helped demonstrate the reality of how these development proposal signs, which are purported to intend to notify and engage affected or concerned Torontonians in the decision-making processes in relation to development, ultimately wind up blending into the urban environment and do not effectively accomplish their purpose.<sup>35</sup> Even if these signs are or can be read—they are only in English, skew towards pedestrian traffic, and presume literacy—whether or not those passing by will even be able to attend the one-time upcoming consultation meeting that will be eventually announced is perhaps an even more pressing concern. Thinking about the many assumptions that these development signs are premised on in order to apparently achieve engagement and consultation with affected urban citizens foreshadows the reality of their utility.

In this way, the urban art interventions by Glo’erm and Tuggy call out the reality behind a lot of (re)development projects that have resulted from these seemingly innocuous black and white signs—developments that have led to replaced historic sites or replaced sites of high community value without a meaningful consultation as to heritage merit, which have often occurred with a dearth of *effective* engagement with the community as to the community importance of the space (as we saw with the examples of Comfort Zone, the Government, and Brunswick House). As one of the artists asked, “How many of us are meaningfully included in

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<sup>33</sup> Howells, *supra* note 26. See also Glo’erm & Tuggy, “Development Proposal”, *supra* note 29.

<sup>34</sup> See e.g. Faiza Amin, “Outrageous (and Fake) Condo Development Proposals Causing a Stir Across Toronto”, *City News* (23 October 2016), online: <[www.citynews.ca](http://www.citynews.ca)>.

<sup>35</sup> Email from Glo’erm & Tuggy (23 October 2016); Rotsztain, *supra* note 27.

the shaping of Toronto?”<sup>36</sup> In unpacking a few more of the elements of the mock sign in front of the Old City Hall in particular, there is also the allusion to a common strategy that maintains the built heritage merit of the façade of the building (like Brunswick House), but ultimately alters the use of the space and key characteristics that brought meaning to a space beyond its visible aesthetics.<sup>37</sup>

As Glo’erm and Tuggy explained about the work put into their project and the meaning behind it, “The aim is to spark conversation about the kind of city we are building and whose voice counts in this process.”<sup>38</sup> They echoed the sentiments of many Torontonians and the urban citizens of many other cities undergoing similar processes when they stated further, “We want the city to go beyond a sign when it comes to development proposals.”<sup>39</sup>

### **III. APPLYING PROGRESSIVE HERITAGE PRESERVATION AND DECOLONIAL SUSTAINBLE DEVELOPMENT THEORY FOR BETTER PUBLIC CONSULTATION PRACTICES IN URBAN (RE)DEVELOPMENT PROCESSES**

#### **A) The 2013 Burra Charter**

The *Australia ICOMOS Charter for Places of Cultural Significance*—commonly known as the *Burra Charter*—provides a set of principles and “good” practices for identifying and preserving important cultural heritage spaces.<sup>40</sup> As we saw previously, while the 2013 *Burra Charter* has been adopted and applied nationally in Australia, it also served and continues to serve an important guiding role internationally as its definition of “heritage value” (used interchangeably with “cultural significance” in the 2013 *Burra Charter*) has been incorporated

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<sup>36</sup> *Ibid.*

<sup>37</sup> See e.g. Simcoe, *supra* note 29; Janus, *supra* note 29; Vendeville, *supra* note 29. See generally Valverde, “Land Use”, *supra* note 29. See also Garrett, *supra* note 29.

<sup>38</sup> Email from Glo’erm & Tuggy (23 October 2016).

<sup>39</sup> Rotsztain, *supra* note 27.

<sup>40</sup> 2013 *Burra Charter*, *supra* note 15.

into the heritage conservation frameworks of countries like Canada, for example.<sup>41</sup> Notably, the 2013 *Burra Charter* also made important strides in signalling the centrality of community participation and inclusivity in heritage decision-making practices.

In relation to the notion of determining value within heritage determinations, Article 5.1 provides that “*Conservation of a place should identify and take into consideration all aspects of cultural and natural significance without unwarranted emphasis on any one value at the expense of others.*”<sup>42</sup> Further, Article 13 provides that the “Co-existence of cultural values should always be recognised, respected and encouraged. This is especially important in cases where they conflict.”<sup>43</sup> The 2013 *Burra Charter*’s Practice Note takes the principles of inclusivity and community participation further.<sup>44</sup> It explains that well-designed context-sensitive public consultation is necessary for effectively and equitably assessing cultural heritage, and that the kind of design that may adequately assess social value can be accomplished through a variety of social science research methods including “established research techniques such as interviews, group discussions and surveys.”<sup>45</sup>

A key component to these methods of effectively consulting affected parties is moving beyond focusing on the primary “practicing community” affected (“a community that has created and/or practised an intangible cultural form”),<sup>46</sup> in order to actively and diligently seek out additional practicing communities—especially those that may be overlooked by an outside eye in order to ensure they too are consulted in decision-making processes.<sup>47</sup> Here, professional

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<sup>41</sup> Canadian Register of Historic Places, “Writing Statements of Significance” (Parks Canada, 2006) at 10-11, online: <[www.historicplaces.ca](http://www.historicplaces.ca)>; 2013 *Burra Charter*, *supra* note 15, s 1.2.

<sup>42</sup> *Ibid* [emphasis in original].

<sup>43</sup> *Ibid*.

<sup>44</sup> “Practice Note: Understanding and Assessing Cultural Significance”, version 1, Nov 2013, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, 2013 [2013 *Burra Charter*, “Practice Note”].

<sup>45</sup> *Ibid* at 8-9.

<sup>46</sup> Deacon et al, *supra* note 23 at 42.

<sup>47</sup> See also Valverde, “How to Consult”, *supra* note 12.

consultants or city employees involved in governance or planning processes, and so on, are unlikely to have the nuanced context-specific knowledge to effectively identify the additional practicing communities that should be consulted in decision-making processes.<sup>48</sup>

Critics have, however, despite the progressive guidance of the 2013 *Burra Charter's* Practice Note, suggested that the 2013 *Burra Charter* still falls short in terms of community participation “as there is no active sense of what community participation actually means.”<sup>49</sup> For this reason, it is important to turn to the mechanics of what meaningfully community participation could look like in heritage and development decision-making processes that occur at the city and neighbourhood level in order to work towards a bottom-up approach that focuses on partnerships with communities in making these decisions that ultimately affect the daily lived experience of city and neighbourhood life.

### **B) A *Buen Vivir* Approach to Consultation and Citizen Participation: Unseating the Dominance of Property Owners Over Tenants**

The unseating of the traditionally dominant in public consultation processes speaks to a *buen vivir* approach to development in the city where dominant groups or individuals would be

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<sup>48</sup> See also *ibid.*

<sup>49</sup> Laurajane Smith, *Uses of Heritage* (London: Routledge, 2006) at 104-105. See also Emma Waterton, Laurajane Smith & Gary Campbell, “The Utility of Discourse Analysis to Heritage Studies: The Burra Charter and Social Inclusion” (2006) 12:4 *International Journal of Heritage Studies* 339. But see recent pilot programs exploring how to more effectively operationalize the *Burra Charter* as well as the *Recommendation on the Historic Urban Landscape* (GC Rec, UNESCO, 36th Sess (adopted on 10 November 2011)) in this manner: Buckley, Cooke & Fayad, *supra* note 3 at 107; World Heritage Institute of Training and Research for Asia and the Pacific (WHITR-AP), and the results of which will be reported to UNESCO’s Executive Board and General Conference (World Heritage Institute of Training and Research in Asia and the Pacific, “The Historic Urban Landscape” (2014) (website), online: <historicurbanlandscape.com> [WHITR\_AP]; City of Ballarat, “Ballarat and UNESCO’s Historic Urban Landscape Approach” (Ballarat: City of Ballarat, 2013). See also *The Florence Declaration on Heritage and Landscapes as Human Values: Declaration of the Principles and Recommendations on the Value of Cultural Heritage and Landscapes for Promoting Peace and Democratic Societies*, ICOMOS, 18<sup>th</sup> GA (adopted October 2014), art 2.1, 4.1-4.2, online: ICOMOS <www.icomos.org/images/DOCUMENTS/Secretariat/2015/GA\_2014\_results/GA2014\_Symposium\_FlorenceDeclaration\_EN\_final\_20150318.pdf> [*Florence Declaration*]

decentered from public consultation and citizen participation processes, thus redistributing power to those often invisible or unaware of public consultations during redevelopment decisions.<sup>50</sup>

Patrick McAuslan describes three different and competing ideological approaches to planning law: 1) the “traditional common law approach to the role of law” where the law is seen to exist for the purpose of protecting private property and the institutions associated with private property; 2) “the orthodox public administration and planning approach to the role of law” where the law is seen to exist for the purpose of advancing public interest even if this is done to the detriment of private property interests; and 3) what McAuslan suggests might be labelled “the radical or populist approach to the role of law” where the law is seen to exist for the purpose of advancing “the cause of public participation against both the orthodox public administration and planning approach to the public interest and the common law approach to the overriding importance of private property.”<sup>51</sup> McAuslan reminds us that these three ideologies shape planning law and the legal complexes that govern space, buildings, people, and property in the city and materialize in three key areas of the planning system that intersect with the law and “legal input”: “public participation and debate; public development and initiatives and public regulation of private development and activities.”<sup>52</sup>

Of particular relevance to a *buen vivir* approach to consultation in planning processes is the third ideology that focuses on the importance of participation. In line with neighbourhood

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<sup>50</sup> For a more detailed discussion of this topic, see Sara Ross, “*Buen Vivir* and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach” (2015) 5:1 City University of Hong Kong Law Review 55. This remains a concern even within other urban governance designs such as, for example, collaborative urban governance, which may or may not utilize the public consultation mechanism that is in use within this dissertation’s overarching case site of Toronto (Foster & Iaione, “City as Commons”, *supra* note 12 at 340). Citizen engagement that is substantively equal and moves beyond replicating the interests of dominant groups and individuals must be revised and apply innovative techniques to avoid replicating the tendency to overrepresent the interests of dominant groups and individuals and must first be able to identify the wide spectrum of stakeholders before being able to engage them (see also *ibid*).

<sup>51</sup> McAuslan, *supra* note 13 at 2.

<sup>52</sup> *Ibid*.

nuisance management that is suggested in Quebec's *Civil Code* at Article 976 where the rights and interests of ownership are not privileged over those of non-owning resident, the ideology of public participation seeks to balance the interests of all of those invested in a space that is the subject of redevelopment interests.<sup>53</sup> As McAuslan asserts, the law is seen as “the provider of rights of participation in the land use planning process not by virtue of the ownership of property but by virtue of the more abstract principles of democracy and justice.”<sup>54</sup>

McAuslan explains that the right of participation in redevelopment and planning decisions and proposals should be extended to “all who are likely to be affected by or who have, for whatever reason, an interest or concern in a proposed development of land or change in the environment ... just because they might be affected or are interested.”<sup>55</sup> It is, however, important to point out that the ideology of public participation is distinct from a pure focus on public interest by, as McAuslan explains, “denying that the public interest can be identified and acted upon by public servants on the basis of their own views and assumptions as to what is right and wrong.”<sup>56</sup> As a result, consultation processes are crucial in order to effectively engage the views of those affected by decisions—and not only the traditionally dominant voices, as we will see below with different strategies that seek to engage the diversities of groups and individuals affected by redevelopment decisions regarding spaces of high community value and intangible cultural heritage. McAuslan also warns that “[p]ublic servants should act only after full public

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<sup>53</sup> Sara Ross, “Legislating Tolerance: Article 976 of the *Civil Code of Quebec* and its Application to Mixed-Income and Mixed-Use City Redevelopment Projects” (2016) 62:3 *Loyola Law Review* 749; Adrian Popovici, “La poule et l’homme: sur l’article 976 CcQ” (1997) 99 *R du N* 214. It is also necessary for citizen engagement processes to be able to identify who these stakeholders are and balance the interests of non-consensus parties. Part of this, within an overarching framework of valued and respected diversity, may nonetheless involve the management of “[h]ateful ideologies, including diverse forms of fundamentalism and extremism” such that the human rights and cultural diversity of others is not threatened (see the 2018 *Report of the Special Rapporteur in the field of cultural rights*, *supra* note 14 at para 22).

<sup>54</sup> McAuslan, *supra* note 13 at 5. Written as it was in 1980, McAuslan points us to JR Lucas, *Democracy and Participation* (Penguin Books, 1976) “for the best modern statement of this position.” See also Foster & Iaione, “City as Commons”, *supra* note 12; Foster & Iaione, *Ostrom*, *supra* note 12.

<sup>55</sup> McAuslan, *supra* note 13 at 5.

<sup>56</sup> *Ibid.*

debate (and by public debate is meant a debate in which the general public can take a direct part) and subject always to continuous consultation with the public.”<sup>57</sup>

In line with the strategies outlined below, the ideology of public participation described by McAuslan manifests both procedurally in terms of how consultations are designed and carried out as well as substantively in terms of developing the appropriate frameworks and decision-making processes within which social, community, and cultural interests in the city can be more equally valued and better balanced with economic interests.<sup>58</sup> As a result, a focus on public participation, both procedurally and substantively, works towards better establishing a balance between competing and overlapping use-values and exchange-values within city spaces, which is especially relevant when dealing with spaces of high community cultural and subcultural wealth that simultaneously house a high potential exchange-value where redevelopment interests are concerned.

### **C) Arnstein and the Mechanics of Citizen Participation and Consultation**

Arnstein’s ladder of citizen participation discussed at the outset of this section, presents a similar rationale for understanding and approaching citizen participation and consultation. Engaging with Arnstein’s work, Julie-Anne Boudreau, Roger Keil, and Douglas Young’s study of urban governance and neoliberalism in Toronto further affirm Glo’erm and Tuggy’s observation that the black-and-white development proposals seem merely to announce what is inevitably happening rather meaningfully engaging the community: “Much so-called participation is little more than a token gesture of informing without actually involving the

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* at 6.

citizenry in any significant way in decision-making.”<sup>59</sup> As Arnstein argues, “There is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.”<sup>60</sup> Mariana Valverde also notes that Toronto’s consultation processes have a tendency to simply reinforce existing power structures.<sup>61</sup>

Similarly, as we have seen, despite some effort to avoid this, Toronto’s Music Advisory Council suffers from the same maintenance of existing dominant voices in their operations, community engagement, as well as within the composition of the Council in the first place. While Toronto has acknowledged and attempted to address the lack of effective engagement with the diversity of its residents—one recent example being the creation of the Toronto Planning Review Panel—these initiatives speak to larger redevelopment and planning projects in Toronto rather than the many consultations that occur daily in relation to particular spaces and neighbourhoods, and the nuanced micro-contextual knowledge needed to determine the value of specific spaces and venues.<sup>62</sup>

To guard against the manifestations of Arnstein’s tokenism at play in Toronto, decisions affecting communities and heritage require active negotiation in undertaking, utilizing, and designing community consultation.<sup>63</sup> In order to move away from tokenism and work towards a pluralistic equality of differences in the city space that recognizes and manages non-consensus groups, more active community negotiation, participation, and consultation is required for communities, cultural, and subcultural groups associated with a space of high cultural and

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<sup>59</sup> Julie-Anne Boudreau, Roger Keil & Douglas Young, *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009) at 110. For a discussion of collaborative urban governance, see e.g. Foster & Iaione, “City as Commons”, *supra* note 12 at 334-49; Foster & Iaione, *Ostrom*, *supra* note 12.

<sup>60</sup> Arnstein, *supra* note 7 at 216.

<sup>61</sup> Valverde, “How to Consult”, *supra* note 12.

<sup>62</sup> The creation of this 32-person panel is an experiment designed to supplement public consultation and has gone to great strategic lengths to select a random yet adequately representatively diverse sampling of Toronto’s population to serve for a two-term period. See the City’s website for the Toronto Planning Review Panel, online: <[www.toronto.ca/city-government/planning-development/outreach-engagement/toronto-planning-review-panel/](http://www.toronto.ca/city-government/planning-development/outreach-engagement/toronto-planning-review-panel/)>.

<sup>63</sup> Smith, *supra* note 49.

community wealth when this space is targeted for redevelopment. But, as Arnstein suggests, while no one is really against the notion of citizen participation, the reality of effective citizen participation may not be as palatable or important to relationally dominant individuals and groups whose views and preferences are unseated and diluted by effective citizen participation that engages relationally non-dominant individuals and groups in decision-making processes.<sup>64</sup>

Arnstein's depiction of and proposal for the ladder of citizen participation is useful because it "juxtaposes powerless citizens with the powerful in order to highlight the fundamental divisions between them."<sup>65</sup> This is important where values of different groups and stakeholders within a space of culture can overlap and clash within the same space, and there is a tendency to lump those with a different opinion into just one category. For example, oftentimes those who value a cultural space and view it as an asset of community cultural wealth, along with those who may wish to preserve the space for another use or reason, can be lumped together as preservationists resisting change, which is an oversight, and vice versa for those interested in the exchange-value merits of the space.

The ladder of citizen participation depicts a breakdown of homogenous blocks and enables a more nuanced understanding of the group with the "opposite" opinion and acknowledges that there are various reasons and motivations behind different ways of valuing a space of culture in the city.<sup>66</sup> Again, Arnstein's ladder is particularly relevant to city redevelopment approaches where clashing values in terms of preservation/non-preservation and use-value/exchange-value occur, but the next task is to think about strategies for finding, listening to, documenting, and incorporating displaced marginalized values and interests within

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<sup>64</sup> Arnstein, *supra* note 7 at 216

<sup>65</sup> *Ibid* at 217.

<sup>66</sup> *Ibid*.

redevelopment processes that target spaces of high community cultural wealth—and, first, determining the existence of these spaces and their attached affected stakeholders.

#### **IV. APPLYING ARNSTEIN’S LADDER OF CITIZEN PARTICIPATION**

##### **A) Developing a Complete and Meaningful Understanding of the Affected Space and Community Through Access Points**

Similar to what took place during the Keele Finch Plus consultation, Valverde observes of Toronto that “[e]very municipal planner knows that when the City convenes a public meeting to consult a community about a proposed project, the people who tend to show up are well-educated, middle-aged, home-owning residents. Young people, tenants of all ages, newer immigrants, and those who are marginally housed, often stay away. If a young person of colour shows up at a meeting, the odds are that s/he is a planning student.”<sup>67</sup> In dealing with the question of transgressive cultural spaces, the compounding reality is that those who are affected often do not have any ownership stakes in the space as we are dealing with community cultural value in a space *used* by attendees and where, in addition, the operators of the space usually do not own the venue and it can be redeveloped or sold out from under them—as we saw with Government, Comfort Zone, and Brunswick House.<sup>68</sup>

In terms of the mechanics of engaging groups that may use and occupy a space at unconventional times or in unconventional ways, an investigation of a space to determine local communities and stakeholders that use a space must first be done in order to develop an access

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<sup>67</sup> Valverde, “How to Consult”, *supra* note 12. See also Mariana Valverde, “A Tale of Two – or Three – Cities: Gentrification and Community Consultation” in Jay Pitter & John Lorinc, eds, *Subdivided: City-Building in an Age of Hyper-Diversity* (Toronto: Coach House Books, 2016) 219 [Valverde, “A Tale”].

<sup>68</sup> I have discussed this process in relation to Toronto elsewhere: Sara Ross, “Development Versus Preservation Interests in the Making of a Music City: A Case Study of Select Iconic Toronto Music Venues and the Treatment of their Intangible Cultural Heritage Value” (2017) 24:1 *International Journal of Cultural Property* 31; Sara Ross, “Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping” (2017) 7:1 *Western Journal of Legal Studies*, Article 5.

point, group, or individual privy to local knowledge. Subsequently, a more inclusive and encompassing consultation design can be developed with guidance *from within communities* in designing and deploying an effective consultation strategy.

While initial access points can be difficult to determine, locating effective access points is essential to determining what practicing communities exist within the space, and to pinpoint methods of communication and engagement with these practicing communities in order to determine where, when, and with whom consultations might best be organized. As the Queer Trans Community Defence group asserted in relation to the Moss Park redevelopment and what they identify as gentrification in the area, “Any real process of ‘consultation’ must be open-ended and up to people in the local community to define.”<sup>69</sup>

The logical overarching first step in this process is for the actual space in question to be observed at different periods of the day/night continuum. The next step is to engage those using the space in order to access information about the space and its use. The key points here are the importance of “going to” the site at *different points* during its use-pattern—both day and night—and engaging the practicing community. As we will see below, the utility of engaging local, community, cultural, and subcultural actors is an invaluable knowledge resource from which to shape equitable decision making processes, and that these knowledges and values are often made known when the community mobilizes to have itself heard, such as the Queer Trans Community Defence in advocating against gentrifying forces in Moss Park and ineffective consultation processes, or when a local councillor effectively represents the interests of a space they have been made aware of, which is what occurred for the Silver Dollar Room. But, as we will see, other mechanisms, such as Rapid Ethnographic Assessment Procedures (REAP), are available to crystalize these processes and formally institute them within redevelopment decision-making

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<sup>69</sup> Queer Trans Community Defence – Toronto, *supra* note 24.

processes in order to ensure that spaces of intangible cultural heritage and high community cultural wealth have a chance to be protected regardless of whether the community or local councillor mobilizes.<sup>70</sup>

**B) An Example of Engaging with Access Points: Planning South Riverdale in Action**

Two kilometres east of Moss Park down Toronto’s Queen Street East, the work of Planning South Riverdale (a volunteer and community-based independent group) provides a pertinent example of community consultation design that sought to include and gather meaningful information from marginalized neighbourhood residents who the group of volunteers knew were unlikely to attend a public meeting regarding redevelopment and heritage in the area and, in particular, related to the closure of the infamous and historical strip bar called Jilly’s, the old hotel/living space above (the Broadview Hotel), and the resulting changes to the neighbourhood.<sup>71</sup>

Originally constructed as Dingman’s Hall in 1891-92, the landmark property at 704 Queen’s Street East served as an important community social gathering space, and was then transformed into a hotel in 1907.<sup>72</sup> Since then, the Broadview Hotel had gradually shifted into use as a boarding house/SRO (Single Room Occupancy)—not unlike other recently closed historic spaces in Toronto such as the Waverly Hotel and the space above Brunswick House<sup>73</sup>—with a strip club on main floor called Jilly’s. The Broadview Hotel was listed as a heritage

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<sup>70</sup> Setha M Low, “Anthropological-Ethnographic Methods for the Assessment of Cultural Values in Heritage Conservation” in de la Torre, Marta, ed, *Assessing the Values of Cultural Heritage: Research Report* (Los Angeles: Getty Conservation Institute, 2002) 31.

<sup>71</sup> Valverde, “How to Consult”, *supra* note 12; Valverde, “A Tale”, *supra* note 67 at 224; Planning South Riverdale, “Supporting a Main Street for Everybody: A Report on the Loss of Inclusive and Affordable Retail on Queen St E” (2015) online: South Riverdale Community Health Center <www.srchc.ca> [Planning South Riverdale, “Supporting”]; Planning South Riverdale. “Results of Consultations About Local Development Issues with Marginalized Community Members” (2014), online: <spacing.ca> [Planning South Riverdale, “Results”].

<sup>72</sup> City of Toronto, By-law No 605-2015, *To designate the property at 704 Queen Street East (Dingman’s Hall) as being of cultural heritage value or interest* (12 June 2015) [By-law No 605-2015]; Jamie Bradburn, “From Dingman’s Hall to Jilly’s”, *Torontoist* (13 May 2014), online: <torontoist.com>.

<sup>73</sup> By-law No 605-2015, *supra* note 72. See also Bradburn, *supra* note 72.

property on December 10<sup>th</sup>, 1975 and received official designation for its cultural heritage value or interest on June 12<sup>th</sup>, 2015.<sup>74</sup>

The Planning South Riverdale initiative took shape after the City had held an open house and other public meetings regarding a Heritage Conservation District designation study.<sup>75</sup> Like the Keele Finch Plus open houses, these were held at a local school.<sup>76</sup> Also similar to Keele Finch Plus study, an array of technical information was presented to attendees that can be hard to engage with unless one has a background, or well-developed personal hobby, in city planning or architecture.<sup>77</sup> Noticeably, these open houses and public consultations had a gap mirroring that which I observed during the Keele Finch Plus consultation processes—the many low-income tenants living in the area were not represented and neither were they sought out for their opinions.<sup>78</sup> Despite being open to all public consultations are not necessarily accessible for many including shift workers, parents without childcare, non-English speakers, and so on.<sup>79</sup>

As opposed to the city-generated community engagement, Planning South Riverdale actually went to the places in the neighbourhood frequented by the most marginalized community members rather than expecting them to show up to public meetings if they wanted to make their views heard.<sup>80</sup> Planning South Riverdale also shifted the questions being asked of participants. Similar to the questions asked at the Keele Finch Plus consultations that focused generally on what participants liked best about their neighbourhood or what they wanted to see

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<sup>74</sup> City of Toronto, By-law No 605-2015, *supra* note 72; “Alterations to a Designated Heritage Property and Authority to Enter into a Heritage Easement Agreement – 704 Queen Street East (Broadview Hotel)”, *Staff Report Action Required* (8 May 2015), online: <[www.toronto.ca/legdocs/mmis/2015/pb/bgrd/backgroundfile-80143.pdf](http://www.toronto.ca/legdocs/mmis/2015/pb/bgrd/backgroundfile-80143.pdf)>.

<sup>75</sup> Valverde, “A Tale”, *supra* note 67 at 221.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at 222.

<sup>79</sup> *Ibid* at 223.

<sup>80</sup> *Ibid* at 224. This is the kind of strategy that is useful regardless of urban governance strategy. Even with, for example, an urban collaborative governance design, there is no guarantee that marginalized community members will have their views heard without these efforts (see also Foster & Iaione, “City as Commons”, *supra* note 12).

improved, Planning South Riverdale also asked community members more nuanced questions about existing services and businesses in the neighbourhood.<sup>81</sup>

Planning South Riverdale represents the kind of access point necessary to establish in order to carry out effective consultations that target marginalized affected communities and groups who, as Planning South Riverdale's work reveals, do not always "feel welcome" in the spaces and businesses that arise as the neighbourhood shifts, redevelops, and gentrifies.<sup>82</sup> A community, culture, and subculture "creates its own geography, a set of places or sites ... through which it gains cohesion and identity," and a spirit of community and belonging can be generated by attending and participating within community spaces, which can include businesses that cater to repeat attendees who share cultural reference points, preferences, and tastes.<sup>83</sup> It is important that redevelopment decisions that affect these spaces take them into account, but the engagement of the community is often necessary to be able to identify these spaces in the first place. Planning South Riverdale's access to and consultation with the individuals and groups that frequent the neighbourhood spaces reveals the kind of richly nuanced opinions and views of the kinds of spaces and the characteristics of different spaces that are valued and why—the kind that is sorely needed when redevelopment decisions are made so that dominant and traditionally vocal views can be displaced and equitably take into account the often overlooked.<sup>84</sup>

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<sup>81</sup> Valverde, "A Tale", *supra* note 67 at 224.

<sup>82</sup> Valverde, "How to Consult" *supra* note 12; Planning South Riverdale, "Supporting", *supra* note 71; Planning South Riverdale, "Results", *supra* note 71; Valverde, "A Tale", *supra* note 67 at 225

<sup>83</sup> Ken Gelder, *Subcultures: Cultural Histories and Social Practice* (London, UK: Routledge, 2007) at 2; Katherine N Rankin, Kuni Kamizake & Heather McLean ("Toronto's Changing Neighborhoods: Gentrification of Shopping Streets" in Sharon Zukin, Philip Kasinitz & Xiangming Chen, eds, *Global Cities, Local Streets: Everyday Diversity from New York to Shanghai* (New York: Routledge, 2016) 140 at 154, 159) demonstrate this in their interaction with shopkeepers in a study of Toronto's Bloordale and Mount Dennis neighbourhoods. See also James Michael Buckley & Donna Graves, "Tangible Benefits from Intangible Resources: Using Social and Cultural History to Plan Neighborhood Futures" (2016) 82:2 *Journal of the American Planning Association* 152 at 160-62. See also Jane Jacobs, "The Missing Link in City Redevelopment", (June 1956) *Architectural Forum*.

<sup>84</sup> See e.g.: "The most frequent complaint was the absence of any Tim Horton-style coffee shop: the residents reported that they felt alienated not only by the high price of lattes but by the feel of upmarket espresso bars. Someone noted that a small park behind the Jilly's hotel had been used to socialize and smoke by people living in

As Valverde suggests, “In an increasingly unequal city, planners need to find new ways – to ensure that those most at risk of being displaced and disempowered have their voices heard – even if that means going to where they are, and relying on intermediaries who have the right local knowledge.”<sup>85</sup> On that note, in terms of new approaches to equitably accounting for the diversity of views, opinions, and values in a city—and where access points to these views and opinions is crucial but can be difficult to locate—Valverde suggests that “parts of some planning consultations could be contracted out to community groups and centres, rather than professional consultants.”<sup>86</sup>

These groups, like Planning South Riverdale, whether linked to a neighbourhood community or a subcultural community, often have access to the knowledge needed to make well-informed redevelopment decisions and know how to access those that should be consulted in attaining this knowledge.<sup>87</sup> Either way, it is these kinds of attentive and locally-based grassroots approaches to consultation that have not been effectively used in dealing with

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nearby supportive housing, but when condo owners with dogs pressured the city to create a fenced-in dog park, an important public space was lost” (Valverde, “How to Consult”, *supra* note 12; Planning South Riverdale, “Supporting”, *supra* note 71; Planning South Riverdale, “Results”, *supra* note 71; Valverde, “A Tale”, *supra* note 67 at 224-26). See also McAuslan, *supra* note 13 at 6. For the power of place memories and urban preservation, see also Dolores Hayes, *Urban Landscapes as Public History* (Cambridge, Mass: The MIT Press, 1997).

<sup>85</sup> Valverde, “How to Consult”, *supra* note 12. See also Valverde, “A Tale”, *supra* note 67 at 227-28. This need remains relevant even where alternative governance models may be sought out to structure urban and community planning (see e.g. Foster & Iaione, “City as Commons”, *supra* note 12; Foster & Iaione, *Ostrom*, *supra* note 12). The land trust model, as an example of this, nonetheless requires dominant actors within a space to heed Valverde’s suggestion for a continuous need to revise mechanisms for ensuring the inclusion of displaced and disempowered voices and use interests within a space (while a fulsome discussion of the community land trust model is beyond the scope of this project, for an example of the application of the community land trust tools in Toronto, see the work of the *Parkdale Neighbourhood Land Trust*, (website), online: <[www.pnlt.ca](http://www.pnlt.ca)>).

<sup>86</sup> Valverde, “How to Consult”, *supra* note 12. See also Valverde, “A Tale”, *supra* note 67 at 227-28. While the focus here is on the effective gathering of information through consultation mechanisms that includes vulnerable and marginal stakeholders who nonetheless have interests in a space targeted for redevelopment, the use of these groups is also applicable within alternative governance models that focus on collaboration that may or may not include the type of consultation mechanism favoured in cities such as Toronto (Foster & Iaione, “City as Commons”, *supra* note 12 at 34-49). Nonetheless, the use of these community groups or a more collaborative urban governance model will still benefit from the approach of identifying and going to vulnerable and marginal groups rather than assuming comfort, interest, and ability to attend a space chosen by dominant actors where collaborative discussions and exercises can take place (see e.g. *ibid* at 345-46 where this approach applies to the second phase outlined by Foster and Iaione but especially to the “collaboration camp” that would take place in the second phase in a “co-city” protocol).

<sup>87</sup> Valverde, “How to Consult”, *supra* note 12; Valverde, “A Tale”, *supra* note 67.

Toronto’s disappearing music venues, even while other aspects of Toronto’s redevelopment strategies, such as the Music City initiative, seek to preserve spaces—the existence of which can be established through better consultation practices and better identification and use of access points in order to establish these kinds of consultations.

**C) Rapid Ethnographic Assessment Procedures (REAP): An Effective Application of Social Science Research Methods to Public Consultation Practices**

REAP (Rapid Ethnographic Assessment Procedures) methodology provides a tested model for effectively weighing clashing values and interests in decisions relating to cultural heritage, preservation, and redevelopment interests. As described by Setha Low in a seminal report out of the Getty Conservation Institute, REAP is in line with both the focus of the New Urban Agenda as well as the Practice Note to the 2013 *Burra Charter*’s call for an effective application of social science research methods.<sup>88</sup> Extolling the merits of qualitative methods in anthropology for what they can provide for assessing the sociocultural values found within heritage spaces, Low suggests that ethnographic approaches in particular are best for understanding the current users of a space or site.<sup>89</sup> As Low summarizes, “Ethnographic and

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<sup>88</sup> Low, *supra* note 70. See also Dana E Taplin et al, “Rapid Ethnographic Assessment in Urban Parks: A Case Study of Independence National Parks” (2002) 61:1 *Human Organization* 80; 2013 *Burra Charter*, “Practice Note”, *supra* note 44 at 8-9; New Urban Agenda, *supra* note 2. REAP methodology also bears similarities in purpose and design to strategies deployed successfully in pilot programs that have explored a more meaningful operationalization of the *Burra Charter* as well as the *Recommendation on the Historic Urban Landscape* (*supra* note 49) in managing urban change affecting urban heritage and citizens, and doing so through action-oriented research that seeks to unseat the dominance of existing practices and assumptions in development decisions affecting heritage places in order to build a broader citizen consensus of “limits of acceptable change.” Strategies have included a central focus on bottom-up local community inclusion and consultation balanced with a lessened reliance on heritage practitioners, an enhanced collaborative focus incorporating academics, consultants, planners, community organizations, and consultants, attempts to better work across different silos within municipal governance frameworks, and the welcoming of innovative approaches to large-scale data collection and synthesis of diverse data mapping of the more broadly defined heritage interests and values of local citizens (Buckley, Cooke & Fayad, *supra* note 3 at 107; WHITR\_AP, *supra* note 49; City of Ballarat, *supra* note 49. See also the *Florence Declaration*, *supra* note 49, art 2.1, 4.1-4.2. See also Hayes, *supra* note 84.

<sup>89</sup> Low, *supra* note 70 at 31, 32.

observational approaches seem most appropriate to the heritage conservation task because of their individual and group level analysis.”<sup>90</sup>

As such, Low proposes REAP methodology as “the most inclusive and useful for solving heritage conservation problems.”<sup>91</sup> The fundamentals of REAP transport us back to early examples of mapping and observation of how space is used in term of behaviour and activity patterns.<sup>92</sup> Low asks us to recall the observational films of William “Holly” Whyte’s Street Life Project taken from atop the Rockefeller Center, the analysis of which shaped the urban design principles of New York City, were used to structure how the zoning of urban public space was governed, and continue to inform placemaking strategies (and, arguably, placekeeping) in cities across the world.<sup>93</sup>

REAP methodology is distinct in its utilization of a team approach in order to better collate, discuss, and understand the nuances of a space and situation as information is gathered.<sup>94</sup> One of its key characteristics and attributes is the speed at which the qualitative data can be collected and potential for applicability to gathering local knowledge from small social and urban spaces.<sup>95</sup> REAP can displace the primacy of historical (and tangible heritage) focuses in order to reveal the contemporary intangible heritage importance of spaces to communities, and moves away from “privileging historical meanings over those of the geographically and/or

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<sup>90</sup> *Ibid* at 31. See also *ibid* at 33.

<sup>91</sup> *Ibid* at 31. Note that REAP is a methodology that can be applied not only within Toronto’s use of public consultations as part of its existing urban governance structure, but that REAP is also applicable as a methodological tool for equitable knowledge gathering that be used within other urban governance structures.

<sup>92</sup> *Ibid* at 32.

<sup>93</sup> *Ibid*; William Holly Whyte, *The Social Life of Small Urban Spaces* (Washington: Conservation Foundation, 1980). See also Project for Public Spaces (PPS), online: <[www.pps.org](http://www.pps.org)>. For a discussion of placekeeping versus placemaking, see Roberto Bedoya, “Spatial Justice: Rasquachification, Race and the City”, *CreativeTimeReports* (15 September 2015), online: <[creativetimereports.org](http://creativetimereports.org)>; Interview of Tom DeCaigny by Cy Musiker (27 November 2015) in “How to Keep a City’s Economic Growth from Destroying its Cultural Soul?”, *KQED Arts*, online: <[ww2.kqed.org](http://ww2.kqed.org)>.

<sup>94</sup> Low, *supra* note 70 at 36.

<sup>95</sup> *Ibid* at 33, 35; Taplin et al, *supra* note 88. Certainly the speed at which data is collected can also lead to disadvantages.

culturally associated communities.”<sup>96</sup> The nuanced local knowledge produced by REAP methodology can also mitigate local conflicts and other conflicts pertaining to the redevelopment or replacement of spaces with intangible and/or tangible heritage merit. REAP methodology is also useful for identifying conflicts between parties with competing interests and/or values within the same space in order to seek out possible compromises as well as to ideally generate a collaborative approach between the affected community and decision-makers/decision-making entities.<sup>97</sup>

A variety of methods are drawn on in order to generate a diversity of data from an assortment of sources, which can then be cross-verified and triangulated in order to validate the data collected and develop a full assessment of the site in question.<sup>98</sup> These methods, slightly adapted here for the sake of the object of study, would be useful in determining the existence of community cultural and subcultural wealth and modern urban intangible cultural heritage merits and values within spaces and/or venues slated for redevelopment or targeted by zoning by-law amendments and development proposals. These methods would include:

- (1) physical traces mapping—these maps of the targeted space or venue would be based on data, or traces of activity, collected early each morning;
- (2) behavioural mapping—these maps would locate people and their activities within the targeted space or venue as well within different points in time;
- (3) transect walks—these would document the descriptions, observations, and remarks of an access-point individual or individuals identified for their membership in the affected community or group as they navigate the space in question and guide the researcher(s) through the space;
- (4) individual interviews—which would be conducted with those identified as individuals who use the space in question;
- (5) expert interviews—which would be conducted with those identified as leaders or key individuals within a group or community;
- (6) impromptu group interviews—these would be open-ended, inclusive, and seek discussion within the space in a group context as individuals who use the space

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<sup>96</sup> Low, *supra* note 70 at 37.

<sup>97</sup> *Ibid* at 36.

<sup>98</sup> *Ibid* at 37.

are gathered there during a time (or times) when they frequent the space in question;

- (7) focus groups—these would comprise groups of about 6-10 and would be constructed in order to attempt to represent the various sub-interests identified within a group, especially more relationally vulnerable sub-groups, and would likely be optimally facilitated by an individual familiar with the interests and “language” of the community or group;
- (8) participant observation—which would record the descriptions and thoughts of a researcher as they observe the everyday and everynight life of the space or venue in question to provide context to the other data gathered; and
- (9) historical, archival, and other documents—in addition to “official” historic information, as well as newspapers and magazines, this would include the gathering of unconventional written sources and information such as attendee reviews of the venue(s) associated with the space and online and social media commentary pertaining to the space or venue.<sup>99</sup>

This data would then be gathered together by coding responses, comparing and combining these with the various maps that have been developed and the transect walks data, and utilizing ethnographic data, interviews, and observations to provide the necessary context for nuanced interpretation of information collected.<sup>100</sup>

Low suggests that subsequent analysis within this kind of REAP methodology would proceed in four steps by 1) overlaying the different maps; then 2) gathering the general observations noted by the researchers about the information learned in the interviews in order to hone the particular coding strategies and theoretical approaches to be used; then 3) by applying the coding strategy to these general observations, the interview questions themselves, and the other data gathered via interviews and maps (after coding them) in order to analyze the field notes of the researchers; and finally 4) by triangulating all of this information in order to seek out patterns, common elements, and conflicts in the data.<sup>101</sup>

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<sup>99</sup> *Ibid* at 37-38.

<sup>100</sup> See also *ibid* at 38.

<sup>101</sup> *Ibid* at 38.

## **V. DRAWING TOGETHER ARNSTEIN, LOCAL COMMUNITY GROUPS, AND REAP**

While the public consultation approaches outlined above begin with the idea that it is first necessary to physically “go to” the neighbourhood or community to seek to understand and seek participation, this is only the first step in teasing out who is being omitted from consultation or other citizen engagement processes before being able to determine how to include a fuller spectrum of affected stakeholders within the space—including displaced, disempowered, or vulnerable voices. Where REAP methodology seeks to involve those who use and value the space or building in question and identified community leaders alongside local elected officials and researchers,<sup>102</sup> this speaks to the importance of identifying the access points needed in order to know who is affected by redevelopment decisions and how to engage them, and also reflects Valverde’s observation of how community groups provide access point partners for better understanding community space. As Low notes and Valverde alludes to, outside researchers and professional consultants are unlikely to “know the right questions in advance.”<sup>103</sup> Low suggests that “most preservation problems in cultural landscapes ... could be prevented with more dialogue between the community and the governmental agency” and, as an aspect of this, it is here that the focus of REAP methodology on active listening and discussion carries great potential.<sup>104</sup>

REAP, alongside Valverde’s discussion of the importance of engaging local community groups (or access points and knowledge bearers) in guiding consultation processes, works towards breaking down the tendency that consultation processes have within a range of existing or, even, more collaborative urban governance models in simply reinforcing existing power

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<sup>102</sup> *Ibid* at 36.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

structures within planning law and the legal complexes that shape the design and experience of life and culture in the city.<sup>105</sup> They both also reflect McAuslan’s description of the ideology of public participation in planning law in terms of how this could play out meaningfully in the methodology applied to consultation practices that actually engage what Deacon et al describe as “practising communities” and their members, which might include physically proximate users of a space in the immediate neighbourhood, or remote users who visit the space from elsewhere in the city.<sup>106</sup> The unseating of dominant voices in consultation processes that are frequently used as a tool in range of urban governance models and lead up to redevelopment and heritage preservation decisions is also crucial for effectively acknowledging the *intangible* cultural heritage of groups in the city, especially since “the historic resources of marginalized populations are often more ‘intangible’ than traditional landmarks.”<sup>107</sup>

Awareness of intangible cultural heritage spaces in the city requires effective engagement with community knowledge of spaces or else intangible merits can be easily overlooked. Further, meaningful engagement with the full strata of a city’s urban citizenry speaks not only to the upper rungs of Arnstein’s ladder of citizen participation, bottom-up people-centered *buen vivir* approaches to urban development, but it is also what is necessary for cities to implement the focus on participatory urban policies called for by the New Urban Agenda.

## **VI. TOKENISTIC CONSULTATION, PUBLIC ENGAGEMENT, AND TORONTO’S MUSIC CITY STRATEGY**

### **A) Music City Public Engagement, Panels, and Consultation Practices**

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<sup>105</sup> Valverde, “How to Consult”, *supra* note 12; Valverde, “A Tale”, *supra* note 64.

<sup>106</sup> McAuslan, *supra* note 13 at 2. Deacon et al, *supra* note 23 at 42.

<sup>107</sup> Buckley & Graves (*supra* note 83 at 152) note this barrier in their study of the recent efforts in San Francisco of planners and preservationists to “protect cultural practices that contribute to the city’s diversity” and “encourage greater participation of marginalized populations in the local planning process.”

Turning back to Toronto's Music City aspirations, ineffective consultations that do not effectively engage affected portions of the city's population in decisions pertaining to city redevelopment are a recurring trend happening beyond the failure to effectively recognize and engage subcultural communities within the examples we have seen, such as those whose community cultural wealth was bound up within Government's space, those invested in the intangible heritage generated in Comfort Zone, and those to whom the use-value of Brunswick House's preservation as a music venue may have trumped the exchange-value of its transformation into the outpost of a drugstore pharmacy chain. Consider, even, the 2014 "Not Zoned for Dancing" study commissioned by the Office of the Chief Planner conducted on the role of entertainment in Toronto's downtown core and potential clashes between the use of space for entertainment uses versus residential uses in developing future municipal planning strategies.<sup>108</sup>

Certainly a study that centers around events and spaces predominantly associated with nighttime and unconventional hours is a helpful tool, but in examining the study, one cannot help but notice that the list of identified stakeholders as well as those interviewed reveals a gap in consultation with the actual attendees of entertainment and nightlife spaces.<sup>109</sup> Consultants, data collectors, nightlife and entertainment entrepreneurs, local government and politicians, heads of

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<sup>108</sup> Anna Wynveen et al, "Not Zoned for Dancing: A Comprehensive Review of Entertainment in Downtown Toronto" (Toronto: Office of the Chief Planner, 2014) at 11. I emphasize the lack of engagement with the kinds of spaces canvassed in this dissertation's case studies where their presence within a space and the lack of consultation with their attendees remains a concern even within alternatives for more collaborative urban governance structures, such as the one described by, for example, Foster & Iaione ("City as Commons", *supra* note 12; Foster & Iaione, *Ostrom, supra* note 12). While more collaborative approaches to structuring urban governance may emphasize the collaboration of the community and redistribution of urban governance power to a model of co-creation, co-design, co-implementation of planning policy, as Foster & Iaione note, one remaining concern within these progressive models is related to social equality and the potential persistence of dominant voices even within these more collaborative settings: "[A]re collaboration arenas able to guarantee equal access by underrepresented groups who are too often unable to access political and larger decision making processes, or can the potential of such collaborative processes represent a significant step towards a more egalitarian process than currently exists? How can we avoid the risk that the collaborative ecosystem produces output that results in a patchwork, instead of a network, of governance arrangements for the urban commons?" ("City as Commons", *supra* note 12 at 340).

<sup>109</sup> Wynveen et al, *supra* note 108 at 76-77.

neighbourhood BIAs (Business Investment Associations), individuals in supporting industries (taxis and late-night food providers, for example), along with experts and academics in various areas, such as cultural economics, were consulted, but attendees and those using entertainment and nightlife spaces were underrepresented.<sup>110</sup>

While there are some semi-progressive initiatives occurring as a result of Toronto's new Music Office and linked to Toronto's Music City strategy, these are still highly flawed. First of all, the distinction here is that these initiatives are primarily linked to growing the future of the music entrepreneurs and music in Toronto, and do not address, do not attempt to address, and are disconnected from other issues of concern to the different music communities in Toronto such as, music history or the virtue of existing music spaces beyond their use as current and future performance and rehearsal venue.<sup>111</sup> Even though commemorating music history and heritage designation is an element of the official Toronto Music Strategy, as we saw, the main areas where there has been a recognition of Toronto's rich music heritage so far has been mostly in the creation of named laneways, such as Reggae Lane or Twilight Lane, and in Heritage Toronto's plaque program.<sup>112</sup>

In terms of the interaction between the Toronto Music Advisory Council and Toronto's music cultures and communities, before the uptick in community attendance at Toronto Music Advisory Council meetings that began in early 2017 with the increase in grassroots music venue

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<sup>110</sup> *Ibid.*

<sup>111</sup> Toronto Music Advisory Council, "Toronto Music Strategy: Supporting and Growing the City's Music Sector", created for the City of Toronto (Toronto, February 2016) (adopted by Toronto City Council 31 March 2016) at 12, see online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.ED10.7](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.ED10.7)> [TMAC, "Toronto Music Strategy"]. This oversight is replicated in the "2016-2017 Implementation of the Toronto Music Strategy", available online: City of Toronto <[apps.toronto.ca](http://apps.toronto.ca)>.

<sup>112</sup> See the Reggae Lane Project undertaken by York Eglinton Business Improvement Area and the Laneway Project, online: <[www.reggaelaneproject.com](http://www.reggaelaneproject.com)>; Dan Taekema, "Side Street Revitalization Honours Toronto's Role in Reggae", *thestar.com* (19 September 2015), online: <[www.thestar.com](http://www.thestar.com)>. See also *Toronto's Historical Plaques* (September 2016), online: <[torontoplaques.com](http://torontoplaques.com)>. TMAC, "Toronto Music Strategy", *supra* note 111; "2016-2017 Implementation of the Toronto Music Strategy", *supra* note 111.

closures, a key attempt at public engagement occurred on April 25<sup>th</sup>, 2015. The Toronto Music Office and the new Music City Officer held a “panel”—the “Toronto Music City Town Hall Meeting”—at The Garrison (a music venue that often features live music including local and visiting musicians and indie bands and artists). Mike Tanner, as Toronto’s Music City Sector Development Officer, was one of the featured participants in the discussion and there were many question for him.<sup>113</sup>

While the overarching intent of the open-format meeting was to ask: 1) “What are the expectations for a Toronto Music Office” as well as, 2) “What is Toronto Music”,<sup>114</sup> the event was also intended to introduce Tanner to Toronto’s music community and industry and lay out the purpose of the newly created position as well as explain why it been created by the City: to encourage the flourishing of the local music scene, to identify barriers in the City’s regulatory infrastructure to the economic development of Toronto’s local music industry, and help work with the local music industry and the City in overcoming these barriers.<sup>115</sup> Over the few hours that the Music City Town Hall ran, it ultimately was not much different from the 2014 “Toronto Music Moment” panel and the 2016 “What It Takes to Become a Music City” panel held at the Markham House City Building Lab, or even the 2015 “Youth in Toronto Music: Trends, Barriers and Experiences” panel at University of Toronto’s Hart House.<sup>116</sup>

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<sup>113</sup> The Music Officer position was one of the key elements of Toronto’s Music City strategy that it implemented subsequent to recommendations derived from studying Austin, Texas’s music policies and governance frameworks (see e.g. International Federation of the Phonographic Industry & Music Canada, “The Mastering of a Music City: Key Elements, Effective Strategies and Why It’s Worth Pursuing” (5 June 2015), *Music Canada*, online: <musiccanada.com> at 14 [IFPI & Music Canada, “Mastering a Music City”]; Titan Music Group, “Accelerating Toronto’s Music Industry Growth: Leveraging Best Practices from Austin, Texas” (March 2012), *Music Canada*, online: <musiccanada.com>).

<sup>114</sup> “Toronto Music City Town Hall Meeting” *blogTO: Events* <www.blogto.com/events/toronto-music-city-town-hall-meeting/>

<sup>115</sup> Benjamin Boles, “Music City Town Hall Highlights Tension between Council and the Music Community: Could This be the Beginning of a Positive Dialogue”, *NOWToronto* (27 April 2015), online: <nowtoronto.com>.

<sup>116</sup> The meeting was streamed live on Toronto Radio Project (TRP was an independent, underground Toronto radio station at the time) and a recording can be found) on the TRP on their Mixcloud profile online: <www.mixcloud.com/trparchives/music-city-town-hall-meeting-streamed-live-on-trp>

While the panels have been designed for the audience to participate freely, do provide an opportunity for the City's Music Officer to "go to" music spaces and communities, and listen to concerned parties, they have, by and large, turned into venting sessions where those who are able to and choose to attend voice their frustration over a plethora of issues including low pay, access to funding, zoning restrictions, permitting processes for events, noise conflicts with neighbours, and other such problems and barriers that exist, but at this point, the consensus seems to be that there have been a lot of these panels on Toronto's Music City aspirations that target Toronto's music community, but not much has been done to meaningfully address the barriers identified or create actionable plans moving forward.<sup>117</sup> Wavelength has since organized a few other discussion panels, such as the Music as Disruption panel on March 5, 2017,<sup>118</sup> and Now Magazine held a Vanishing Venues panel at CSI on March 31, 2017.<sup>119</sup> But these are have not been city-led initiatives.

#### **B) Toronto Music Advisory Council Meetings \***

While Toronto Music Advisory Council meetings, held four times a year on a weekday at varying times, are open to the public, they are not well-advertised and maintain the same attendance obstacles noted previously in terms of language barriers, conflicts with work obligations, access to childcare, and so on. As music community attendees at these meetings have noted, the composition of the Toronto Music Advisory Council is further problematic as it tends to be populated by dominant figures from Toronto and Ontario's music industry without

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<sup>117</sup> See e.g. Michael Rancic, "Toronto Knows What It Needs to Become A Music City, So What's Next?: Wavelength's Third Panel on the Topic Made us Wonder if All this Talk is Getting us Anywhere", *NOWToronto* (1 February 2016), online: <nowtoronto.com>

<sup>118</sup> For a recording of the event see Wavelength Music, "Music as Disruption" (5 March 2017), online: Soundcloud <soundcloud.com/wavelengthtoronto/music-as-disruption-part-1-panel-discussion>.

<sup>119</sup> Wavelength is a Toronto-based non-profit grassroots music and arts organization.

\* © Sara Ross. Parts of Subsection B were previously published in: Sara Ross, "Making a Music City: The Commodification of Culture in Toronto's Urban Redevelopment, Tensions between Use-Value and Exchange-Value, and the Counterproductive Treatment of Alternative Cultures within Municipal Legal Frameworks", (Fall 2017) vol. 27 *Journal of Law and Social Policy* 126.

concerted attention to the inclusion of marginal actors.<sup>120</sup> This, however, is not entirely surprising as the Toronto Music Advisory Council is intended to connect City Hall to music industry needs, which does not necessarily reflect the concerns of subaltern portions of the City's music community, music communities, or music entrepreneurs.

At the 2016 panel on "What Makes a Music City", the Executive Vice President of Music Canada Amy Terrill (and future Toronto Music Advisory Council member) even noted the Council's lack of transparency and called on it to remedy this in order to more effectively connect to artists, the music community, and address the needs and interests of "stakeholders".<sup>121</sup> The lack of transparency is most noticeable in the Toronto Music Advisory Council's three (recently reduced from six) groups/subcommittees on various issues.<sup>122</sup> While attendance at the general meetings is possible despite attendance barriers and it is possible to keep abreast of the meeting dates via the City of Toronto website for the Toronto Music Advisory Council, the same cannot be said for the subcommittee meetings. These are not advertised and there is even less effort at inclusiveness and community engagement, yet it is at these meetings that the material eventually proposed via motions at the general meeting are developed.

Nonetheless, despite the noticeable disconnect between the public attendees and Toronto Music Advisory Council members at meetings, both parties not only seem to recognize this, but also recognize that something must be done in terms of better representation of Toronto's actual music community participants and consumers on the Council, in addition to the inclusion of marginal communities and racialized communities. Discontent, however, with the Toronto Music

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<sup>120</sup> Toronto Music Advisory Council meeting, (5 June 2017) at Toronto City Hall; Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall.

<sup>121</sup> Michael Rancic, "Toronto Knows What It Needs to Become A Music City, So What's Next?: Wavelength's Third Panel on the Topic Made us Wonder if All this Talk is Getting us Anywhere", *NOWToronto* (1 February 2016), online: <nowtoronto.com>.

<sup>122</sup> Toronto Music Industry Advisory Council, "Toronto Music Industry Advisory Council Priorities and Working Groups", Motion MA8.1 (adopted with amendments 5 June 2017), online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MA8.1>

Advisory Council and growing community concern with disappearing music venues in particular, came to a head at the February 13, 2017 Toronto Music Advisory Council meeting, where a sizeable portion of Toronto’s DIY music community and live music community showed up, as did the owner of the Matador—who was there to advocate for the removal of the red tape barring its opening, along with a sizeable group who showed up to oppose the Matador’s opening (even though TMAC had no ability to address the concerns they were voicing).

Many music community members gave depositions regarding their concern with the abrupt increase in closing music venues that the beginning of 2017 had brought with it. These deputations wound up comprising most of the meeting and the rest of the agenda (including discussion surrounding Toronto’s ongoing noise by-law review) was shifted to the June 5<sup>th</sup>, 2017 meeting. Toronto Music Advisory Council members in attendance at this meeting, and other Council meetings, responded to attendee concerns in a variety of ways. Those connected to the live music scene in Toronto—mostly venue owners—were very sympathetic, as were many of the independent artist members. Those connected to larger and more formal music organizations such as the Royal Conservatory of Music, generally responded in a less sympathetic manner and did not seem to understand why some other music scenes and venues are struggling while others prosper.

The February 13, 2017 TMAC meeting’s focus on the uptick in disappearing music venues and need to develop measures to protect music venues in Toronto eventually culminated in the passing of a motion by the Council as the meeting drew to a close.<sup>123</sup> But the overarching theme expressed by concerned community attendees also revolved around the disconnect between city governance and the realities of operating and attending grassroots music venues as

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<sup>123</sup> Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall; Toronto Music Advisory Council, “Measures to Protect Live Music Venues in Toronto – Update” (Motion) (adopted 13 February 2017).

well as more commercial music establishments. Notably, the enforcement process was of particular concern. Community members spoke of how certain music spaces defined by specific (and often incorrectly presumed) demographics were disproportionately targeted for the enforcement of fire code regulations, noise by-law measures, and liquor licensing and special event permit spot checking. In addition, where many community music spaces exist as safe havens for marginal and transgressive groups and communities, the enforcement of fire codes, noise by-laws, and liquor licenses and special events licensing was often done in a forceful and unfriendly manner that community members found to be threatening.

Further, when smaller, transgressive music venues and production companies had at times worked with larger city-backed and development focused arts and performance-oriented organizations like Artscape, they noted that there were many more resources available to ensure in advance of an event that the venue in question would be able to meet the requirements of a visit from fire code, noise, or liquor license enforcement officers.<sup>124</sup> In discussing these occurrences, community attendees and the Toronto Music Advisory Council members noted that a positive step moving forward in addressing the sustainability, promotion, and protection of Toronto grassroots music venues in meaningfully working towards Toronto's Music City aspirations would require the development of governance structures, licensing and enforcement that better understood and responded to the specific context of music venues as well as nighttime venues and gatherings.<sup>125</sup> Ultimately, as noted previously, a motion was passed that crystallized

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<sup>124</sup> Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall. Artscape is a Toronto-based not-for-profit development organization that focuses on creating spaces for and using creativity for community development, see online: <[www.torontoartscape.org](http://www.torontoartscape.org)>.

<sup>125</sup> Toronto Music Advisory Council meeting, (13 February 2017) at Toronto City Hall.

some of the concerns raised by the attending communities' concerns and narrowed in on how better governance of Toronto's music venues might be achieved.<sup>126</sup> For example:

The Toronto Music Industry Advisory Council:

1. Requested the General Manager, Economic Development and Culture and the Chief Planner and Executive Director, City Planning to consider, as part of the Council requested report on Item MM22.5, the following actions for the City to take to help protect music venues:
  - a. Recognize Music Venues by creating a Live Music Venue Registry that would identify current music venues meeting clearly defined criteria in order to:
    1. Recognize businesses as Music Venues independently of their primary license type.
    2. Legitimize the operation of live music venues by working with Municipal Licensing and Standards to remove restrictions around floor space and seating.
    3. Allow registered venues to apply for designation of municipal significance to selectively permit extended hours for the sale and service of alcohol.
  - b. Encourage music sector growth with improvements to Toronto By-laws:
    1. Re-evaluate "Employment Lands" zoning to identify potential new areas for music venues and entertainment.<sup>127</sup>
    2. Review the Noise By-laws to encourage the successful operation of music venues, including reasonable, objective dB limits, clearly defined point of measurement, ambient noise, and mitigation of the enforcement process.
  - ...
  - d. Promote Toronto's vibrant Music Culture:
    1. Create a Music Tourism Strategy to promote the live music as one of Toronto's greatest cultural assets.
    2. Endorse special events that reflect the diversity of music in Toronto.
    3. Facilitate event organizers who bring international music artists to ensure Toronto continues to be a world-leading destination for live music.

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<sup>126</sup> Toronto Music Advisory Council, "Measures to Protect Live Music Venues in Toronto – Update", *supra* note 120.

<sup>127</sup> On this particular point, see also Carl Grodach, Justin O'Connor & Chris Gibson, "Manufacturing and Cultural Production: Towards a Progressive Policy Agenda for the Cultural Economy" (2017) City, Culture & Society at 5 (of "article in press" version) [forthcoming] for a discussion as to how this kind of approach to post-industrializing spaces is important for cities to keep in mind as they redevelop.

4. Create financial incentives for residents and visitors to experience music, such as transit discounts.<sup>128</sup>

The elements covered in the above motion were then picked up on in Mayor John Tory's introductory speech on April 21<sup>st</sup>, 2017 at the "Mastering of a Music City" Music Cities Summit at the 2017 Canadian Music Week.<sup>129</sup> In truly establishing Toronto as a Music city, the bottom line that Mayor Tory alluded to would be that the various divisions within the City's administrative structure—i.e. City Planning, Economic Development and Culture, Municipal Licensing and Standards, Heritage Preservation, and so on—would have to better work together in order to not only grow into a better Music City, but also meaningfully preserve the cultural, heritage, and musical assets that Toronto current has.<sup>130</sup>

Yet even as identified problems and strategies were crystallized within official City Hall documents, the city's legal complexes, and Mayoral statements, and even where outlined strategies carry merit and potential for more context-sensitive and inclusiveness for marginal music spaces and communities, barriers to actual implementation remain problematic. These steps forward during the February meeting somehow wound up leading to a motion at the next meeting on June 5<sup>th</sup>, 2017 to commission a new study in relation to protecting live music venues (specifically, local grassroots venues and DIY spaces) and "to gather data about the various impacts of live music venues including economic, social, cultural and music industry"—although a number of Toronto Music Advisory Council members did somewhat acknowledge the

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<sup>128</sup> Toronto Music Advisory Council, "Measures to Protect Live Music Venues in Toronto – Update", *supra* note 120.

<sup>129</sup> John Tory, "Introduction to 'Mastering of a Music City'" (Delivered at the Music Cities Summit, 2017 Canadian Music Week, Sheraton Center Hotel, Toronto, 21 April 2017) [unpublished].

<sup>130</sup> *Ibid.*

emptiness of yet another study when many of the recommendations from the last study had yet to be addressed or implemented.<sup>131</sup>

While the utility of reports and studies should not be diminished, there was a noticeable frustration in the room with the protracted timeline that would necessarily result in another study and further research into the situation while local grassroots music venues and DIY spaces continued to close at a disconcertingly regular pace.<sup>132</sup> There was a desire for some sort of action beyond motions for commissioning further studies and for finding funding for the studies. It was also striking to see the Toronto Music Advisory Council members in the “official” space of the room debating the merits of a study while the attendees in the audience/observer portion of the room comprised many who likely eventually become the object of the proposed report and, many of whom, had come that day to give depositions based on their experiences and concerns.

So, with the numerous already existing commissioned reports—both by the Toronto Music Advisory Council and further reports which had been created by other branches of Toronto’s planning framework, even though these seemed to be regularly overlooked by the Toronto Music Advisory Council—in addition to the many members of local music communities and (sub)cultures attempting to participate in the Council’s mission and purpose, and the use of Toronto’s prior reports on music venues and Music City strategies internationally by other cities as a guide for their own music communities and cultural (re)development, the focus on creating yet additional reports by Council members at this June meeting showed that despite engagement with affected communities, discussions amongst various bodies of a city’s governance structure

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<sup>131</sup> Toronto Music Advisory Council, “Protection of Live Music Venues”, Motion MA8.2 (adopted with amendments 5 June 2017), online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MA8.2](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MA8.2)>; Toronto Music Advisory Council meeting, (5 June 2017) at Toronto City Hall. For the past report, see TMAC, “Toronto Music Strategy”, *supra* note 111. See also Wynveen et al, *supra* note 108. While it is unclear why the latter was not mentioned, and its existence seems to have been completely overlooked by TMAC, it contains relevant information that supplements the initial report commissioned by TMAC.

<sup>132</sup> Toronto Music Advisory Council meeting, (5 June 2017) at Toronto City Hall.

can veer towards tokenism without a concerted efforts towards developing actual legislative change.<sup>133</sup> It also showed a lack of awareness of the value of meaningfully engaging with the music community members in attendance at the Council meeting. The discussion also did not include any word of improving public consultation methods or an acknowledgement they may have failed in the past.

This kind of wheel spinning only serves to increase existing skepticism amongst the various groups and individuals who make up Toronto’s music communities and (sub)cultures that their concerns, their participation and deputations at Toronto Music Advisory Council meetings, and so on, will not actually result in meaningful change in policies affecting music communities in Toronto—not necessarily attributable directly to the Toronto Music Advisory Council itself, but certainly a question mark as to the effectiveness of the Toronto Music Advisory Council’s creation and purpose in the first place, and its public engagement and consultation practices.

### **C) Consultation via Social Media and Online Surveys**

Other Music City consultations have occurred via online surveys, such as that which was used to draft Toronto’s Music City Strategy and received 6100 responses.<sup>134</sup> Consultation via social media is certainly a way to involve individuals who are users of a space and generate and find high cultural value within the space in question but may not live in physical proximity. But this method misses out some key elements of the REAP methodology as well as the importance of access points in delving deep into the community for pertinent information. It is also

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<sup>133</sup> *Ibid*; TMAC, “Toronto Music Strategy”, *supra* note 111; Wynveen et al, *supra* note 108; IFPI & Music Canada, “Mastering a Music City”, *supra* note 113; Titan Music Group, *supra* note 113; Music Canada, “The Next Big Bang: A New Direction for Music in Canada” (2013), online: *Music Canada* <musiccanada.com>.

<sup>134</sup> TMAC, “Toronto Music Strategy”, *supra* note 111 at 1. Michael Rancic, “Council Unanimously Votes to Make Toronto a Music City: But Whether or Not the City's Official Music Strategy Becomes a Reality Will Depend on the 2017 Budget”, *NOWToronto* (4 April 2016), online: <nowtoronto.com>.

problematic in that without careful and concerted effort, consultation via social media is likely to, as with other consultation processes, simply reflect and reaffirm the views of dominant voices as well as those who habitually make themselves heard, which is contrary to attempts to meaningfully apply an ideology of inclusive public participation to planning and development in a city.<sup>135</sup> A true diversity of perspectives can be difficult to represent with a limited format such as the online survey, and it is unlikely that marginalized music subcultures and subaltern members of these communities will be effectively accessed and represented in results due to the limited nature of the consultation.<sup>136</sup>

As we saw above with the use of Twitter to advertise the Keele Finch Plus consultation, Twitter will not necessarily reach an effective sampling of an affected group and, again, has a tendency to reassert the centrality of dominant voices in consultation processes—not everyone has access to or interest in having a computer, a smartphone, or social media, and not everyone can participate in the English language structure of surveys and so on. The use of social media and online surveys (as was done leading up to Toronto Music Advisory Council and the City of Toronto’s creation and finalization of Toronto’s Official Music Strategy) also places the onus on the community who is being consulted to participate and express their perspectives as opposed to, for example, REAP methodology which is more proactive in involving affected communities.<sup>137</sup> A further targeted approach to involving different components of an affected community is again important in dealing with intangible heritage where intangible heritage assets tends to be more strongly linked to marginalized communities and subaltern elements than to tangible heritage assets.<sup>138</sup>

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<sup>135</sup> McAuslan, *supra* note 13 at 6.

<sup>136</sup> Valverde, “How to Consult”, *supra* note 12. See also Valverde, “A Tale”, *supra* note 64.

<sup>137</sup> TMAC, “Toronto Music Strategy, *supra* note 111 at 1.

<sup>138</sup> Buckley & Graves, *supra* note 83 at 152.

#### **D) Moving Beyond Degrees of Tokenism**

The bottom line is that, beyond Music City strategies and creative city modelled rejuvenation, many of Toronto's consultation practices do not effectively engage those who are affected by redevelopment decisions—especially when the individuals in question are the users, occupiers, or attendees of a space, rather than the owners, and when this use occurs at unconventional times of the day/night continuum and in peripheral, marginal, and transgressive ways. In terms of Arnstein's ladder of citizen participation, oftentimes these types of interactions, panels, and meetings canvassed previously would appear to correspond to the “degrees of tokenism” rungs of “informing”, “consultation”, and “placation”—where participants are heard but there is no mechanism to ensure that their views will be accounted for in decision-making processes.<sup>139</sup>

The importance of methodologies like REAP that focus on becoming immersed in a site and emphasize designing a careful and efficient yet thorough assessment of not only the tangible but also the intangible heritage merits of a space can be shown in situations where local councillors and governance bodies have attempted to demonstrate the importance a venue or space can carry to communities, cultures, and subcultures. The Silver Dollar Room for example, as we saw previously, benefitted by the attention of the local councillors and neighbourhood association, which contrasts with Comfort Zone and Brunswick House as well as Government. Present and past efforts have begun with and rely on local grassroots efforts to protest redevelopment and find ways to use existing legal frameworks creatively and counterhegemonically to argue for the protection of tangible and intangible heritage where these frameworks have either not been designed for this purpose or, at least, have not been optimally designed for this purpose.

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<sup>139</sup> Arnstein, *supra* note 7 at 217, 219-21.

To move beyond the need to counterhegemonically use existing legal tools to gerrymander protection from the bottom up, more effective consultation practices incorporated from the top down, but which emphasize a reliance on the localized knowledge and access to knowledge that exists with community knowledge-bearers and access points is needed. Better consultation in redevelopment decisions, processes, and urban governance models in general creates a more equitable environment where highly valuable cultural spaces that are not the beneficiaries of grassroots mobilization may still be assessed for their value and have a chance of being preserved—which is especially pertinent where mobilization or protest of the removal or alteration of a space does not occur due to a community or (sub)culture’s inability to mobilize, inability to make themselves heard, or even their lack of being aware that contestation is possible.

Better consultation and investigation of these spaces and their use and value would in turn ensure that there is increased regard for social and community matters where more power is shifted through participation to those who are affected by decisions.<sup>140</sup> This approach speaks to what McAuslan describes in approaching planning law from an ideology of public participation where this must be approached procedurally, as we saw above with these strategies, but also substantively by incorporating the importance of seeking out and acknowledging local

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<sup>140</sup> On the ideology of public participation in planning law see McAuslan, *supra* note 7 at 7. Even where power is shifted within urban governance models to more collaborative community forms, better engagement practices and tools that canvas a full spectrum of stakeholders (including vulnerable, marginalized, or ignored voices) within a space are still necessary to shift the power for a substantive equality amongst stakeholder perspectives. Certainly this may require the management and acceptance of pluralism and non-consensus groups and management of potentially predatory actors (in managing this, see above at Chapter 7.III; see also Foster & Iaione, “City as Commons”, *supra* note 12 at 345-49; *Report of the Special Rapporteur in the field of cultural rights*, *supra* note 14 at 22), but this is part of the process of working towards an equality of differences in the city (see also Santos, *Toward*, *supra* note 15 at 473; Santos, *Epistemologies*, *supra* note 4 at 219).

perspectives and cultural concerns within the frameworks that govern redevelopment decision-making processes.<sup>141</sup>

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<sup>141</sup> McAuslan, *supra* note 7 at 6.

## **CONCLUSION**

The series of music venues examined in this dissertation, while each unique in their own story, bear commonalities that reveal flaws in the way different iterations of culture, cultural heritage, and intangible cultural heritage are valued within the municipal legal frameworks that govern redevelopment processes in the city. With the Brunswick House we saw a venue that has been replaced through adaptive reuse and is now yet another outpost of a drugstore chain. While the building itself had received heritage listing, the listing only protected tangible heritage merits of the space. Even though the local residents' association was able to organize and express some of its views in the time period leading up to the building's transformation, this was dominated by one group and mostly involved thoughts about a potential patio in relation to prior plans for the space that did not ultimately manifest. There were, however, a number of other groups besides the local residents' association who used and placed value in the Brunswick House space. But especially considering the objectives of Toronto's Music City initiatives that seek to acknowledge Toronto's musical past while maintaining and creating spaces for the ongoing flourishing of music in Toronto, the quiet disappearance of the Brunswick House as a historic live music venue leads to questions about what kinds of inquiries are being made into the heritage value of spaces beyond solely their tangible merit. It also leads to questions about the effectiveness of the Music City apparatuses that Toronto has developed where there was no engagement with the disappearance of this space even though its continued existence aligned with much of Toronto's Music City vision.

The Silver Dollar Room presented us with an encouraging example where local mobilization and the active participation of the local Toronto city councillor (a series of them, in fact, as the process spanned numerous years) was able to gain a measure of protection for the

space beyond its tangible built merits. Here we saw the acknowledgment of the intangible cultural heritage of this historic music venue through a reading in of intangibility into provisions that acknowledged the associative, historical, and contextual value of the space. The result of the protection is that the *use* of the space must be maintained as a live music venue, which is in line with the heritage protection it received and the historical legacy of the building. But while the Silver Dollar Room's heritage protection is laudable, it also reveals the remaining challenges in effective preservation of spaces that are currently of high community (sub)cultural wealth and use-value.

With its (temporary) closure due to the redevelopment of the surrounding Waverly Hotel and the rejuvenation that the music venue will also undergo itself (subject to the limits set out in By-law 57-2015), existing music communities who used the Silver Dollar Room heavily question whether it will still provide the same accessible and welcoming community music space that it did prior to closure. The answer to this question will remain unanswered until the venue eventually reopens, but it also reveals the limits that heritage protection—even with the acknowledgment of intangibility—can have for preserving the nuances of use of a space that shape its importance. More broadly, however, these questions from the music community and their overarching lack of awareness of the heritage battle that was underway for several years to protect the Silver Dollar Room's music heritage and the redevelopment threat it faced also demonstrates a disconnect between heritage management and redevelopment decision-making processes and the communities that are affected. There is a serious lack of effective community engagement and consultation with those who frequent spaces like the Silver Dollar Room.

Delving further into the matter of a lack of engagement and consultation with affected (sub)cultural community members when their cultural and community gathering space is

threatened by redevelopment processes, Comfort Zone provides an example. While decisions leading up to the Silver Dollar Room's heritage designation and the Wynn Group's development application for the Waverly Hotel did not effectively engage with those who found heritage value and community cultural wealth in those spaces, questions about displacement, heritage, and community were never asked at any point about the Comfort Zone's space. There was even less awareness by the community that their music space was facing imminent removal, and there was no discussion of this within the Music City frameworks developed by the city, especially since it was all handled out of true public view in terms of effective public consultation. The temporary closure of the Silver Dollar Room generated a flurry of protest—especially as its impending closure occurred at the same time as a rash of other grassroots music venue closures at the beginning of 2017—that resonated in Toronto Music Advisory Council meetings and was recognized as problematic by the formal Music City structures in place. It even spurred a statement by Toronto's Mayor regarding the rash of music venue closures.

Yet the closure of Comfort Zone remained unrecognized and no efforts were made to engage with Comfort Zone's community despite the highly active nature, strength of the community, and the relevance of Comfort Zone to Toronto's music past as well as to Toronto's objectives for sustaining and growing music and music "assets" in Toronto. As the case study of Comfort Zone revealed, this venue existed further on the margins in terms of dominant spatiotemporal patterns in the city as it was an afterhours venue where electronic music is mixed live by a DJ and it is different in terms of traditional perceptions of "live music". It was (and is) not only tightly connected to "underground" (sub)cultural communities and dance and music culture but was also found physically underneath the Silver Dollar Room and the Waverly Hotel. Comfort Zone represents a farther remove in "desirable" music culture and space in terms of the

selectivity at play in Music City strategies, Toronto's "growth machine", and more generally by culture-based city redesign projects.

The Government also held a similar spot in terms of its spatiotemporal coding, but its immense warehouse space was far more visually obvious present along Toronto's post-industrializing waterfront than Comfort Zone's discrete entrance along Spadina Avenue. Again, as we saw with Comfort Zone, the displacement of Government's community, and those who used its space along the waterfront during predominantly nighttime hours, were not engaged in the decision-making processes that led up to its eventual demolition and Mayor-lauded replacement by a mixed-use residential, arts, and education space.

The Government example in particular highlights the disconnect between Toronto's Music City strategies and objectives and other counteractive redevelopment forces and strategies, such as Toronto's ongoing large-scale waterfront redevelopment. On the one hand, Government represented the size and format of a venue that addressed the practical needs of the Music City, and it also represented a hub of development for Toronto's music communities, up-and-coming musicians and DJs as well as an important place in the development of electronic dance music community and culture in Toronto and Canada. But, on the other hand, even while Toronto's Music City initiative was being heavily promoted, the city's other culture-based regeneration strategies somehow managed to be blind to Government's demise, even though Government represented the kind of existing internationally recognized cultural space the city was (and is) seeking to generate.

The Government, Silver Dollar Room, Comfort Zone, and a number of the other venues referenced throughout this dissertation also speak to the precarity cultural venues face as tenants or lessees of a space that can easily be sold out from under them for a number of reasons and

processes—whether the owner is responding to neighbourhood changes that allow them to capture a higher rent from a new tenant or whether the owner is responding to increased property taxes, also often due to changes (or, “gentrification”) in a neighbourhood. As canvassed previously, a city’s heritage management tools may provide strategies for addressing this precarity moving forward, but the precarity of unruly cultural spaces is also contributed to by nuisance clashes, out-of-touch zoning ordinances, and other neighbourhood and local space-based clashes. The case of the Matador Ballroom exemplified some of the barriers faced for music venues—and Music City strategies—when mixed in with dense residential space in the urban cores of cities. Where do unruly spaces now go in cities that are retaking former industrial zones and rezoning of these spaces tends towards residential rather than employment use?

As we saw, internationally there have been useful developments to address the displacement of high use-value cultural and music spaces that are important to the “practicing communities” who use the space and where community cultural wealth is generated but become unwelcome within the neighbourhoods they are found. In line with the premise behind creative placekeeping, not only does the UK’s use of Assets of Community Value and Article 4 Directions provide guidance for rethinking how venues can be meaningfully acknowledged and preserved within a neighbourhood space, but the UK and Australia’s application of the Agent of Change Principle also provides an excellent framework—one which has been picked up on by the Toronto Music Advisory Council in recommendations moving forward with Music City plans in Toronto.

Progressive and the counterhegemonic use of legal tools such as the latter can be further supplemented with more context sensitive governance of cultural practices that occur outside of dominant spatiotemporal life patterns in the city. 24-hour city governance and night-specific

governance speak to the kind of overhaul that is needed to shape municipal policy, governance, and legal frameworks that equitably provide for the full spectrum of cultural and subcultural affiliations and practices that occur at different times of the day/night continuum. This need for better and more context appropriate nighttime and cultural governance design continues to be reflected in the requests and concerns heard from Toronto's subcultural music communities at Toronto Music Advisory Council meetings. Further, the call for more context-sensitive governance of various iterations of life and culture in the city reflects what a shift towards an equality of differences in the city would look like, a legislating of tolerance, as well as a shift towards cities where redevelopment and ongoing cultural governance are more in line with a *buen vivir* structure for decolonizing (re)development processes, governance, and community participation in the city.

As we have seen, "culture", heritage, and *intangible* culture and heritage play a crucial role in our experience of cities. But more must be done to ensure that what is understood by "culture" and "heritage" is expansive and inclusive, especially when it comes to marginalized, unruly, transgressive, and relationally vulnerable iterations of culture and heritage. UN-Habitat's work on highlighting the urban citizen's right to culture in the city is not only reflected in the *New Urban Agenda*, as we saw, but it is also seen elsewhere in the creation of city-based human rights charters where this right to culture is acknowledged—such as within the *Montreal City Charter*. However, while "culture" is increasingly seen for the merits it can bring to city (re)development, there can often be an overdeveloped focus by city policy and municipal legal frameworks on the commodification of culture and "authenticity" where culture is seen more for its exchange-value potential in attracting economic investment, inter- and intra-city tourism, and so on. But this overlooks, overwhelms, and often works to the detriment of the understanding of

what culture is and what it can be that is at the root of international frameworks seeking to acknowledge the importance of culture and heritage, such as UNESCO's *Convention on the Safeguarding of the Intangible Cultural Heritage*, the 2013 *Burra Charter*, UNESCO's *Universal Declaration on Cultural Diversity*, and so on.

As far as the final actionable conclusions that this dissertation has arrived at, in terms of the use of urban legal anthropology to investigate gaps in equitable treatment of (sub)culture(s) in the city by its legal complexes, the methods outlined in Chapter 2 that were deployed in gathering and writing up the research that comprised this dissertation project were successful in unearthing valuable data that can be used in moving towards addressing these identified gaps. In addition, public consultation practices and tools within urban governance models must be redesigned to more effectively access and include a fuller range of individuals affected by redevelopment and heritage decision-making and unseat the dominance of voices and views of those who are able to keep abreast of consultation dates and online surveys, access these, understand them, and feel comfortable communicating in these environments.

A large part of this requires a shift in the onus of facilitating responsible and equitable community engagement practices from community participants and stakeholders onto the city. Importantly, a revision of the use of public consultation as part of local community public engagement practices would be well-served by incorporating ethnographic methodology, such as that of REAP (Rapid Ethnographic Assessment Procedures). This leads to the second key area for revision, the lynchpin of which is the notion of "heritage value" and how it must be better understood to include the intangible in managing Toronto and Canada's urban intangible heritage.

Better consultation practices will lead to this more inclusive understanding and representation of the “heritage value” of spaces facing redevelopment, but must also be accompanied by a revamping of provincial legislation and cultural policies, namely those which deal with Canada’s urban intangible cultural heritage. A more fulsome incorporation of the *Burra Charter*’s guide for determining heritage value will be instructive in this endeavour. Finally, in addition to the potential of legal tools that manage heritage in the city, such as heritage value determinations in Heritage Conservation District studies, there are other existing legal tools that can be deployed counterhegemonically for equitable representation and valuation of diverse and transgressive iterations of culture and subculture in the city.

Here, the examples of how other cities are dealing with similar heritage, use, and exchange-value clashes provide guidance for incorporation into the municipal legal frameworks of Canadian cities—such as the Agent of Change Principle, Assets of Community Value, 24-hour city governance strategies, and so on. In terms of the central case study—Toronto, Music City—that was the focus of this dissertation, it remains to be seen whether Toronto’s current legal complexes are up to the counterhegemonic use that will be required to arrive at an iteration of the Music City that equitably represents all of a city’s stakeholders, or at least more meaningfully moves towards this, and address the many counteractive processes at play between the use-value and exchange-value interests at work within the city space.

The City of Toronto used to publish an annual “City of Toronto Municipal Handbook”. As the foreword for many of the annual handbooks summarizes, the intent of this annual compilation was to

furnish the citizens of Toronto and others, with official information relative to the administration of the City. It is presented in the hope that its perusal may stimulate and encourage the citizens generally to take a greater interest in the communal life of

their City and in good municipal government, which, in the last analysis, is the basis of sound democratic government.<sup>1</sup>

While this “hope” is certainly laudable, it is time to move beyond passively hoping for citizen participation and instead not only (and first of all) *actively* work to engage, access, and research citizen interests, but also the diverse spectrum of urban citizens.

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<sup>1</sup> City of Toronto, Council of the Corporation of the City of Toronto, “City of Toronto Municipal Handbook, 1958” (Toronto: City of Toronto, 1958) at 3.

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