

Powers of Canadian Cities - The legal framework

Report prepared by the City Solicitor, City of Toronto June, 2000 (updated October 2001)

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1. Constitutional Status of Canadian Cities

- The Canadian Constitution gives the provinces exclusive control over cities and other municipalities, subject to the limited exceptions summarized below. ⁱ
- Therefore, the powers a city possesses depend almost entirely on the powers the province wishes to grant. Similarly, a province can, at will, take away or change any municipal power previously granted.
- A province cannot, however, grant a municipality a power the province itself does not possess under the Constitution. ⁱⁱ
- As a creature of a province, a city has no inherent powers - only the powers given by the province, generally in a statute.
- Given the provinces' exclusive control over "municipal institutions," the power of the federal government to deal directly with municipalities is limited, unless the province gives permission, which is rare. ⁱⁱⁱ
- Federal government action and legislation can, however, legally impact municipalities if the federal government is exercising one of its exclusive powers under the Constitution. The power giving most potential for direct federal-municipal interaction is the spending power, ^{iv} together with the powers of Peace, Order, and good Government, The Regulation of Trade and Commerce, Navigation and Shipping and Banking, Incorporation of Banks, and the Issue of Paper Money. ^v

2. Variation in Treatment of Municipalities Across Canada

- Because the powers of cities depend on the political will of the province concerned, municipal powers vary greatly across Canada. Like a parent, one

province can allow municipalities little discretion while another allows extensive independence.

- For example, municipalities in some provinces (including Ontario) operate under "laundry list" legislation: their governing legislation spells out every power. If the power is not listed or necessarily implied, the municipalities do not have the power. The "laundry list" legislation is the most restrictive way a province can grant powers to a municipality: it often prevents a municipality from easily and efficiently adapting to changing conditions: each change requires the municipality to apply to the province for amending legislation.
- In contrast, in 1995, Alberta introduced "natural person" power legislation, which gives municipalities the powers of a natural person, unless specifically excluded by the legislation.
- British Columbia has taken yet a different approach by creating what amounts to a "bill of rights" for municipalities. It passed legislation in 1998 recognizing that "local government is an independent, responsible and accountable order of government" and committing to provide a new legislative foundation for local government.^{vii} British Columbia subsequently passed legislation broadening municipal powers by, for example, facilitating public-private partnerships and giving more flexible revenue-raising authority.^{viii} The province plans to provide more authority and autonomy to municipal governments through its proposed Community Charter legislation.
- In other cases, urban areas are recognized in various ways as being different from other municipalities. For example, Vancouver, Winnipeg, Montreal and Saint John are all Charter cities: the subject of Charter Cities is addressed in the following section of this report.
- Another trend is for the special importance of urban areas to be recognized in contracts. For example, Vancouver and Winnipeg have tri-partite agreements between the federal, provincial and urban governments, where all three levels of government agree to work together to solve urban challenges.

3. Charter Cities

(a) Charter Cities

- Vancouver, Winnipeg, Montreal and Saint John are all Charter Cities.
- Rather than being subject to a municipal act of general application to other municipalities in the province, each of these four cities is governed by its own "stand alone" legislation, its Charter.^{viii}
- Each Charter codifies the laws applicable to the particular city and contains powers and responsibilities not given to other municipalities in the province concerned, as the following examples illustrate.
- Saint John is the oldest Charter City, having been established by Royal Charter in 1785. Unlike other NB municipalities, Saint John has natural person powers and possesses, subject to general provincial and federal laws, a very broad authority: for example, it could establish an airport.
- Montreal has all the powers of other Quebec municipalities, together with the power to deal with any assets (including the power to pledge and mortgage an asset), the power to raise money by any kind of security and "the right to exercise all other powers necessary for the performance of its obligations and functions".

- By virtue of its Charter, Winnipeg has powers that other municipalities do not: remedial health and sanitary measures, greater autonomy to raise money and an independent property assessment system and planning administration.
- The primary characteristic of and purpose for having a Charter is to recognize the uniqueness of a city and to customize the legislation to an individual city's responsibilities and needs: provincial policies and programmes that are designed for province-wide operations often do not fit the needs or operations of a major urban area.

(b) Some Reasons for Establishing Toronto as a Charter City

- The characteristics of the City, being the largest City in the country and the economic centre of Canada;
- The huge volume of special legislation that the Province has given to the City of Toronto over the years, in recognition of it being different from other municipalities: a Charter would allow this to be consolidated;
- Provincial policies and programs that are designed for application province-wide do not always fit the needs or operations of the City;
- Likewise, the City's needs and responsibilities are often not shared by other municipalities;
- The City is unique in that, due to its need to compete with nearby North American cities, it needs tools that are different from other municipalities, in areas such as taxation, incentives to business, areas of responsibility, etc.

4. The Legal Status of Ontario Cities

- Ontario cities are governed primarily by the Municipal Act, which applies to all Ontario municipalities of every size.
- Toronto is also governed by the City of Toronto Act, 1997 and the City of Toronto Act, 1997 (no. 2), but neither statute grants the City greater powers than other municipalities over policy-making or finances.
- The current Ontario Municipal Act is of the "laundry list" variety and, therefore slow to adapt to new realities - because any change requires the municipality to ask the Provincial legislature to pass amending legislation.
- A new Ontario Municipal Act is expected to be introduced in the Legislature in October 2001. Like an earlier 1998 draft, the new Act is expected to give municipalities "natural person powers". In the 1998 draft these powers were far more circumscribed than those given to Alberta municipalities. Furthermore, under the 1998 draft legislation, the Ontario government would have had an unprecedented level of regulatory power over municipalities.
- Unlike the Charter Cities, there is no specific recognition of any Ontario city either in legislation or by contract.

5. Municipal Sources of Revenue Across Canada

- Provinces can raise money only by direct taxation. Therefore, legally the Provinces can only authorize municipalities to levy direct taxes.
- The essential difference between direct and indirect taxation is as follows:

Direct Taxation: the person/entity taxed is the one that ultimately pays the tax i.e. the taxpayer cannot easily pass on the tax to someone else (e.g. income tax)

Indirect Taxation: the person/entity taxed is expected to pass on the tax (e.g. GST and customs and excise taxes).^{xii}

- Generally, provinces have allowed municipalities limited powers to levy even direct taxes. Municipal taxing powers have generally been restricted to property taxes.
- In addition, provinces have given municipalities the authority to raise money by user fees: i.e. charges for services.
- Some cities, however, have access to other types of revenue. For example, Calgary and Edmonton are receiving a road infrastructure grant based on fuel consumption in their cities. In addition, the Vancouver and Winnipeg tri-partite agreements give those cities some access to additional funding for specific problems from the two levels of government.

6. Sources of Revenue Available to Ontario Municipalities

- Ontario cities and other municipalities are limited to property taxes, user fees and licence charges.
- Courts have recently struck down some user fees as being taxes, rather than fees. The main difference between a fee and a tax is that a fee is for a service or use of an asset and there must be a nexus between the cost of the service or value of the use of the asset and the amount of the fee.^{xiii} Therefore, fees cannot be used to add to general revenues. The Ontario government could resolve this problem by delegating to municipalities the right to raise types of direct taxes other than property taxes - but have not yet done so.

7. Other Financial and Commercial Constraints in Ontario

- The lack of "natural person" powers has a number of ramifications for Ontario municipalities. A significant result is that Ontario municipalities cannot form business corporations, non-share or not-for-profit corporations. This can impede outsourcing and partnerships with the private sector. In contrast, Alberta municipalities can form corporations with the approval of the appropriate Minister.
- Another impediment to outsourcing and public-private partnerships is the restriction upon disposing of assets. Ontario municipalities cannot generally dispose of assets while they are still required for municipal purposes. This effectively prevents the City from taking advantage of features often found in public-private partnerships, such as the sale and leaseback of assets.
- Ontario municipalities are also generally prohibited from attracting (or keeping) business and industry through financial incentives. (The exception is where the private sector is to provide a capital facility that is used for municipal purposes.) This prohibition can restrict economic development initiatives. Alberta municipalities, for example, face no similar restriction.

8. Limits on Financing by Ontario Municipalities

- Ontario municipalities can raise money only by way of debentures or short-term debt. No debt can be secured.
- Since Ontario municipalities cannot give security (e.g. a mortgage), they are not permitted to raise money for capital building projects using specific assets. This prevents the underlying value of existing assets being used to finance new infrastructure.
- Except for debt raised by debentures, municipalities are required by law to break even every year.
- The terms of municipal debentures are very restricted (e.g. as to interest rates and repayment schedules).
- Financing rules are the same for small villages and large urban areas.

9. Secession from the Province of Ontario

- Subsection 42(1)(f) of the Constitution Act provides that amendments to the Constitution of Canada to establish a new province are to be made in accordance with the general amending procedure set out in section 38. This procedure requires resolutions of the Senate, the House of Commons and at least two thirds of the provinces having at least 50% of the population of all the provinces.
- Subsection 38(2) provides that where a constitutional amendment is made under 38(1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province, the resolutions referred to in the previous bullet must be supported by a majority of the members of each of the Senate, the House of Commons and the Legislative Assemblies required under subsection (1). In other words, a majority of all members of these bodies must support the amendment, not just the majority of those present and voting.
- Subsection 38(3) provides that when the majority of the members of a Legislative Assembly rejects a resolution for a constitutional amendment that would derogate from the powers, rights or privileges of that Assembly, the government of that province can opt out.
- Consequently, an amendment to the Constitution Act to create Toronto as a new province would require support from the Province of Ontario.

10. Secession from Canada

- There is no precedent for a municipality applying to secede from Canada. However, the Supreme Court of Canada ruled on the Province of Quebec seceding from Canada in Reference re: secession of Quebec, [1998] 2 S.C.R. 217. The Court stated that a province could not unilaterally secede.
- The Court also found that secession from Canada would require an amendment to the Constitution, which would involve similar considerations to those discussed in #9 above.
- The Supreme Court also ruled that a substantial number of people would have to support secession, with a "clear majority" and that the question in a referendum, if used, needed to be free from ambiguity.
- The Court found that there was no legal obligation on the rest of Canada to accede to secession but would have to negotiate in good faith.

- Since the Quebec reference dealt with the secession of a province, the findings of the Court may not apply to the secession of a municipality.

Notes:

i) However, there is no question, as with secession from Ontario, that Ontario's approval would be paramount. Other provinces would be likely to step in line with Ontario's wishes, if only because they would not want to help set a precedent which might result in their losing their own cities and, with them, significant tax revenues. Under the Canadian Constitution, municipalities are not recognized as a separate order of government. Instead, paragraph 8 of section 92 of the Constitution Act, 1867 (formerly known as the British North America Act,) gives the provinces exclusive control over "Municipal Institutions in the Province." In addition, provinces are given exclusive power over the "Property and Civil Rights in the Province (paragraph 13 of section 92) and "Generally all matters of a merely local or private nature in the Province" (paragraph 16 of section 92)

ii) For example, a province cannot grant a municipality the power to levy taxes - see Section 4 below.

iii) The Trudeau government tried to create direct links between the federal government and municipalities through creating a Minister of State for Urban Affairs in 1971 but the initiative was eventually shelved primarily because of lack of provincial co-operation. (See William R. Young, Municipalities, the Constitution, and the Canadian Federal System, Library of Parliament, October 1991)

iv) See Peter Hogg, Constitutional Law of Canada, Chapter 6

v) Constitutional Act, 1867, Section 91 and paragraphs 22, 10 and 15 of Section 91.

vi) Protocol of Recognition Sub-agreement on a New Legislative Foundation for Local Government between the Government of British Columbia and the Union of British Columbia Municipalities.

vii) Local Government Statutes Amendment Act, 1998 (Bill 31) and Local Government Statutes Amendment Act, 1999 (Bill 88)

viii) The City of Montreal is established under the Charter of the City of Montreal, 1960 (being an Act to revise and consolidate the Charter of the City of Montreal); the City of Winnipeg is continued under the City of Winnipeg Act and the City of Vancouver is established under the Vancouver Enabling Act, 1949.

ix) For example, the natural person powers could only be used in areas in which the Ontario municipality already had the authority to act. Therefore, the powers would be implementation powers, rather than substantive ones.

x) The proposed Act would give the Provincial Cabinet or the Minister of Municipal Affairs & Housing the discretion to "claw back," retroactively if desired, any power given the municipalities not only by the proposed Act but by other statute.

xi) A recent Ontario case arose out of a municipality charging campground operators for each site on their campgrounds. The Court found that the charge was an indirect tax because it would likely be passed on to the campground users. *Carson's Camp Limited v. Township of Amabel*, [1998] O.J. 1760 (General Division).

xii) See, for example, *Ontario Private Camp Grounds Association v. The Corporation of the Township of Harvey* (1997), 33. O.R. (3d) 57