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DOMINION-PROVINCIAL CONFERENCE

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Opinions on Constitutional Law

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No. 5. Jurisdiction as to Municipal Debt

By Vincent C. MacDonald.

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## I. PROVISIONS OF B. N. A. ACT

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91. ... it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:-

- 19. Interest.
- 21. Bankruptcy and Insolvency.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:-

- 8. Municipal Institutions in the Province.
- 13. Property and Civil Rights in the Province.
- 16. Generally all Matters of a merely local or private Nature in the Province.

## II. RECOMMENDATION OF SIROIS REPORT

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In Chapter VII of Book II the Commission deals with "Municipal Finances". Only one topic mentioned therein is covered by this Opinion, viz., legislation in relation to municipal debt. Before setting out the Commission's recommendation on this topic, it is desirable to quote a few passages which indicate the background of this topic and the Commission's general approach to it:

"Although municipalities fall within the exclusive jurisdiction of the provinces, revenue powers and expenditure responsibilities have been delegated to them by the provincial governments which make their financial position an integral part of the whole provincial picture, and consequently, to that extent, of Dominion-provincial relations. The major functions of education, public welfare, and highway construction are shared, in varying proportions, by provinces and municipalities; the whole field of revenue powers left to the provinces is divided, on the average about equally between provinces and municipalities, although the proportions as between provinces vary greatly. ... .."

The part played by municipalities in taxation (in 1937 municipalities raised 31 per cent of combined Canadian governmental revenues from all sources), and in expenditure makes it essential to consider them in any review of the Canadian public finance system. For this reason the Commission has considered jointly provincial-municipal revenues and expenditures wherever appropriate. The exclusive jurisdiction of the provincial governments over municipal affairs has, however, been recognized throughout ... ..

Nevertheless, certain aspects of municipal organization and of municipal taxation and expenditure affect the financial position of the provinces and Dominion-provincial relations, and in this chapter they are discussed from these points of view." (p. 137)

... ..

"The degree of provincial responsibility for the conduct of a municipality's affairs is variously interpreted. But it would seem clear that when the provincial government creates a subsidiary body, and delegates to it certain revenue powers and responsibilities, it should see to it not only that these powers are adequate, with efficient management, to match the responsibilities, but also that there is efficient management. This... In addition to providing for an approximate matching of revenues and responsibilities (and, as suggested in the previous sections a substantial measure of pooling of resources and averaging of expenditures to remove the wide existing differentials) the provinces should supervise adequately municipal borrowing. Supervision of borrowing would ideally include not only an examination of the purpose and immediate need for the borrowing, but also determination of the best form and terms of the borrowing, and continuing regulation of sinking funds, or repayment, provisions. Some or all of these forms of control are now exercised, although with widely varying degrees of strictness, by each province. ... .. In any case the province has a responsibility, both to creditors and prospective creditors of the municipality, and to taxpayers and recipients of services in the municipality. This responsibility can be exercised to some extent by close supervision of municipal borrowing, and of municipal budgeting, accounting, and administrative practices; perhaps even more importantly, by providing conditions under which a municipal civil service - adequately paid, professional trained, and politically independent - can develop." (p. 148)

The Commission (at p. 148) refers to municipal defaults and the necessity of legislative control by the Province of insolvent municipalities and of the debt of solvent municipalities as follows:

"Consideration of municipal defaults must include the constitutional questions of whether provinces, by virtue of their exclusive power to legislate concerning municipalities, may legislate with respect to insolvent municipalities and of whether they may deal with the bonded indebtedness of a municipality which is not insolvent. Whatever the answers, it is obvious that a province could, by valid legislation, make it difficult or impossible for the creditors of a municipality, whether solvent or insolvent, to collect their debts. Nor would it have any difficulty in turning a solvent municipality into an insolvent municipality if this were a necessary condition for securing jurisdiction over its affairs. The Commission thinks that in such matters the jurisdiction should be clear and the responsibilities precise, and it recommends that if the British North America Act is amended, provinces should be given specific power to legislate in respect to municipal debt whether or not the municipality concerned is solvent."

In short, the Commission recommends that a constitutional amendment giving the Provinces "specific power to legislate in relation to municipal debt whether or not the municipality is solvent."

### III. COMMENT ON RECOMMENDATION

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It is important to note that the recommendation is not concerned primarily with insolvency legislation as such, but rather with legislative authority to deal with the debts of municipalities in the sense of controlling the municipalities (which are the creatures of the Provinces) as to the creation of debts by borrowing and as to their discharge of those debts.

The importance of this distinction stems in part at least from the fact that the Dominion has exclusive jurisdiction in relation to "Bankruptcy and Insolvency" and it would appear that this jurisdiction would apply to an insolvent municipal corporation and the rights of creditors if it were sought formally to wind it up on the ground of insolvency. Nevertheless, as will appear below, the Provinces possess power to deal with their municipal creatures in respect of their debts even when they are insolvent in fact. Similarly they may control their municipal corporations as to the terms upon which they shall incur or satisfy debts.

#### IV. LEGAL SITUATION

##### (a) Solvent Municipalities

By head 8 of Section 92 of the B. N. A. Act, a Province has exclusive jurisdiction to legislate in relation to "Municipal Institutions in the Province." It was said long ago that this "simply gives Provincial legislatures the right to create a legal body for the management of municipal affairs." (A.C. of Ontario v. A. G. of the Dominion (1896) A. C. 348.) It follows, however, from the doctrine of the plenary nature of provincial powers <sup>enunciated</sup> ~~enumerated~~ in Hodge v. The Queen (1883) 9 App. Cas. 117 (see also Shannon v. Lower Mainland Dairy Products Board (1938) A.C. 708) that a Province may delegate to a municipal corporation any powers it possesses and that a Province possesses all powers necessary or incidental to carry on and work such corporations (LeFroy's "Constitutional Law in Canada", p. 127) including,

for example, power to delegate jurisdiction to impose taxation for municipal purposes. (Dow v. Black (1875) L.R.C.P. 272)

This primary power of creation, derived specifically from Section 92, No. 8, must not be taken to be a naked power, for it is now clear that this head has a content which may render it unnecessary to search under other heads for jurisdiction as to various aspects of municipal affairs, e.g., the amalgamation and debts of insolvent municipalities (Ladore v. Bennett (1939) A.C. 468). The general situation accordingly is that the Provinces have all power necessary to create and to provide for the working of municipal corporations, or for their dissolution, including all matters necessarily incidental to such purposes. Municipalities are statutory creations of the Province in which they lie and may be dealt with by the Province in any way permissible under the 29 heads of Section 92. The only reservation upon this exclusive and plenary power of the Provinces is that its legislation in its "pith and substance" must relate to such a head and must not constitute an invasion (colourable or otherwise) upon a Dominion head enumerated in Section 91; and that provincial legislation in relation to municipalities is subject under the "paramountcy" doctrine to be suspended by inconsistent Dominion legislation falling under a head in Section 91.

So far as concerns municipal debts, the only limiting heads of Dominion power are No. 19, "Interest", and No. 21, "Bankruptcy and Insolvency".

As to "Interest" it is reasonably clear that it is within the power of the Dominion by a general law qua interest to govern the rate of interest chargeable or payable by municipal corporations. (Cf. Lynch v. Canada N. W. Land Co. (1891) 19 S.C.R. 204, at 207, 212.) Subject to such an overriding Dominion law, however, the Provinces when legislating under Section 92, No. 8, as to municipal corporations may deal with the interest payable on municipal debts. (See Ladore v. Bennett, supra.) Apart from the case of insolvent corporations to which the Dominion power over "Bankruptcy and Insolvency" may be applicable, there seems no reason to doubt that a Province may deal effectively with the manner in which municipalities may contract debts and their responsibility for debts contracted in the exercise of provincially-conferred powers. This follows from Provincial jurisdiction over "Property and Civil Rights in the Province" (S. 92, No. 13) and over <sup>"7</sup> matters of a Local or Private Nature in the Province (S. 92, No. 16). Moreover, it is implicit in the reasoning of Ladore v. Bennett, supra, which upheld measures relating to the debts of insolvent municipalities, that a Province has the utmost power of legislation in relation to the control of municipalities and their debts and that this extends to the permissible extent and terms of borrowing. Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions.



Though this decision (set out in the Appendix hereto) relates to provincial power to provide the remedy where institutions are insolvent, it is abundantly clear that in principle it authorizes all measures necessary to prevent insolvency including the power to enquire and to decide as to the solvency of a municipal corporation. The case held, moreover, that as incident to the right to dissolve and amalgamate municipalities, a Province could deal with the terms of payment of debentures as to time and place and as to rate of interest. A fortiori a Province, as incident to its right to create and control municipal corporations, can legislate similarly as to the debts of solvent corporations.

(b) Insolvent Municipalities

The Dominion has exclusive jurisdiction over "Bankruptcy and Insolvency" (S. 91, No. 21) and it is possible that this extends to municipal as well as other corporations, although the present Act does not purport to deal with them. <sup>Bankruptcy</sup>

It is probable, however, that the Dominion will not attempt to deal with municipalities under this head so long as the Provinces discharge their responsibilities and exercise their powers in this connection. Unless they fail to do so and municipal defaults reach the proportions of a national problem, the matter of defaulting municipalities in all related aspects should be dealt with by the Provinces. That the Provinces possess adequate power in this regard is clear from

the recent decision of the Privy Council in *Ladore v. Bennett*. This case is set out fully in the Appendix hereto.

But shortly, this case raised the validity of a special Ontario statute providing for the dissolution and amalgamation of four adjoining and insolvent municipalities and of provisions in two general statutes conferring powers on the Department of Municipal Affairs and upon the Municipal Board to deal with the outstanding debts of insolvent municipal corporations, and under which there was approved a scheme for funding and refunding the debts of the corporations and for substituting debentures of the new corporation for those of the old corporations with variations as to interest.

It was held that these statutes were in substance passed in relation to Municipal Institutions in the Province and were therefore intra vires. They did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest or private rights outside the Province. The Statutes were not directed to insolvency legislation; they picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affected rights outside the Province, they only did so collaterally, as a necessary incident to their lawful powers of good government within the Province.

"But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province. ... .. Sovereign within its constitutional

powers, the Province is charged with the local government of its inhabitants by means of municipal institutions. If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the Provincial Legislature to provide the necessary remedy, so that the health of the inhabitants and the necessities of organized life in communities should be preserved. ... For this purpose, as the corporation could be created by the Province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. ... Where the former bodies are dissolved it is inevitable that the old debts disappear, to be replaced by new obligations of the new body. And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed. Efficient local government could not be provided in similar circumstances unless the Province were armed with these very powers, and if for strictly Provincial purposes debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the Province. .... That for the purpose of keeping control over municipal institutions the Legislature provided that a department of the Provincial government should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency. It is of the essence of its control over local government administered by municipalities that it should have these powers of inquiry and decision. ... The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province, they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the Province.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new

corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear."

The reasoning of the decision is clearly applicable to provincial legislation relating to the insolvency or defaults of a single municipality and dealing with its debts by way of refunding and the consequent modification of the rights of creditors. It seems, therefore, that so long as it is "directed to the effective creation and control of a municipal institution" Provincial legislation may deal with the debts of an insolvent municipality even as to such matters as interest on its debts or as to the rights of creditors outside the Province. This principle extends to the debts of one municipality or of a group of municipalities - to the reconstruction of an insolvent municipality or to the amalgamation of several.

#### V. NECESSITY OF AMENDMENT

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The Commission recommended a constitutional amendment giving the Provinces "specific power to legislate in relation to municipal debt whether or not the municipality is solvent."

It is submitted that for all practical purposes this power is already possessed by the Provinces under Section 92, No. 8, as interpreted by *Ladore v. Bennett* and that no amendment is necessary. Nor is an amendment desirable, unless for the purpose of placing

beyond the reach of judicial vacillation the power of a Province to deal with all cases of actual or apprehended default. In this view it may be desirable to include this power expressly in the Act.

The only Dominion power which need be dealt with is that relating to Bankruptcy and Insolvency and, if conceived necessary, the application of this power to the case of defaulting municipalities could be excluded expressly. (See draft amendment infra.) On the other hand this would seem unnecessary, except in the abnormal case of a Province failing to take adequate care to prevent municipal defaults or to protect creditors in the case of actual defaults. If such abnormal cases of Provincial laxity are foreseeable, it would be better to leave the Bankruptcy and Insolvency power with the Dominion intact so as to enable it to deal with such abnormal cases if they should arise.

The right to deal with municipal debts seems to be part and parcel of the right to create and control or dissolve municipal corporations and to extend to prescribing all the conditions incidental to such creation, control or dissolution, including the rights of all creditors wherever resident. If amendment there must be, it should be an amendment to No. 8 of Section 92 and by way of making explicit what already seems to be implicit in its language. An amendment in this sense is attached.

Vincent C. MacDonald.

July, 1944.

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VI. DRAFT AMENDING SECTIONS

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1. "Clause 8 of Section 92 of the British North America Act 1867

is amended to read as follows:

"8. Municipal Institutions in the Province,  
including their debts and solvency."

2. "Clause 21 of Section 91 of the British North America Act 1867

is amended to read as follows:

"21. Bankruptcy and Insolvency, except as to Municipal  
Institutions in a Province."

N. B. This amendment is not regarded by the writer as desirable  
or necessary.

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APPENDIX

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LADORE v. BENNETT

(1939) A. C.468

Headnote

"By the City of Windsor (Amalgamation) Act, 1935, of the Ontario Provincial Legislature, four adjoining municipalities which were in financial difficulties and unable to meet their debenture interest and maturing principal, part of which was payable outside the Province, were amalgamated and incorporated as the City of Windsor, and by the City of Windsor (Amalgamation) Amendment Act, 1936, the Windsor Finance Commission, constituted under the principal Act with interim powers of administering the affairs of the new city, was abolished and its duties transferred to the Department of Municipal Affairs for Ontario. By the provisions of Part III of the Department of Municipal Affairs Act, 1935, which was applied by the Amalgamation Act of 1935 to the new city and its affairs, and which reproduced the provisions, repealed in 1935, of Part VI of the Ontario Municipal Board Act, 1932, the Ontario Municipal Board, if satisfied (inter alia) that a municipality had failed to meet its debentures or interest when due owing to financial difficulties affecting the municipality, was given power (inter alia) to order terms, conditions, places and times for exchange of new debentures for outstanding debentures, and to order postponement of or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon, and variation in the rates of such interest. A scheme having been formulated pursuant to those powers, and approved by the Ontario Municipal Board, for funding and refunding the debts of the amalgamated municipalities, under which (inter alia) former creditors of the old independent municipalities received debentures of the new city of equal nominal amount to those formerly held, but with the interest scaled down in various classes of debentures:-

Held, that both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, were in pith and substance Acts passed in relation to "municipal institutions in the Province," and as such they, and the scheme formulated and approved thereunder, were intra vires of the Provincial Legislatures under s.92 (8)

of the British North America Act, 1867. The Provincial legislation in question did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. The Statutes were not directed to insolvency legislation; they picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affected rights outside the Province they only did so collaterally, as a necessary incident to their lawful powers of good government within the Province.

Judgment of the Court of Appeal for Ontario (1938) O.R.(C.A.) 324; (1938) 3 D.L.R. 212, affirmed."

Judgment by Lord Atkin (H. 480-3)

" ... .. Counsel for the plaintiffs attacked the whole of the proceedings in connection with these municipalities on three grounds. He said that the relevant statutes and the authorities which they purported to give were ultra vires the Legislature of Ontario because they invaded the field of the Dominion as to: (1) Bankruptcy and Insolvency (S.91 (21) of the British North America Act, 1867); (2) Interest (S.91(19)); and were not ~~affirmed~~ within the exclusive powers of the Province because (3) they affected private rights outside the Province.

... ..

It appears to their Lordships that the Provincial legislation cannot be attacked on the ground that it encroaches on the exclusive legislative power of the Dominion in relation to this class of subject. Their Lordships cannot agree with the opinion of Henderson J.A. that there is no evidence that these municipalities are insolvent. Insolvency



is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations. But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province: S.92 (8) of the British North America Act, 1867.

Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions. If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the Provincial Legislature to provide the necessary remedy, so that the health of the inhabitants and the necessities of organized life in communities should be preserved. If corporation A or B or C is unable to function satisfactorily it would appear to be elementary that the Legislature must have power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation could be created by the Province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. The result of dissolution is that the debts of the dissolved corporation disappear. Amalgamation of municipalities for the purpose of more effective administration,

whether for ~~any~~ financial or other reasons, is a common incident of local government. It is necessarily accompanied by an adjustment of financial relations. Where the former bodies are dissolved it is inevitable that the old debts disappear, to be replaced by new obligations of the new body. And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed. Efficient local government could not be provided in similar circumstances unless the Province were armed with these very powers, and if for strictly Provincial purposes debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the Province. They took for their debtor a corporation which at the will of the Province could lawfully be dissolved, and of its destruction they took the risk. That for the purpose of keeping control over municipal institutions the Legislature provided that a department of the Provincial government should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency. It is of the essence of its control over local government administered

by municipalities that it should have these powers of inquiry and decision. In other words, the pith and substance of both the Amalgamation Acts and the Municipal Board Act, 1935, are that the Acts are passed in relation to municipal institutions in the Province. They would also, so far as the public utility commissions are concerned, be justified as having been passed in relation to local works and undertakings under S.92 (10) of the British North America Act.

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly - namely, to facilitate repudiation by Provincial municipalities of obligations incurred outside the Province. It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care - namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that they deal with civil rights outside the Province, breaks down. The statutes are not

directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province, they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the Province.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear. Such legislation, if directed bona fide to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion Legislature over interest.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed."