

**A Comparison of New and Proposed
Municipal Acts of the Provinces:
Revenues, Financial Powers and Resources**

May 27, 2001

**Prepared for the 2001 Annual Conference
of the Federation of Canadian Municipalities
held in Banff, Alberta**

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1.0 INTRODUCTION

This is the second in a series of three comparisons of recent or proposed provincial statutes governing municipal institutions. This document compares the enactments on the basis of financial issues.

The functions, responsibilities and duties of Canadian municipalities are increasing while the diversity of fiscal resources and revenue sources is in decline. Although a number of provinces and territories have enacted new legislation governing municipal institutions, the new legislation fails to empower municipalities with the fiscal tools to meet existing or future needs.

This failure arises in part from the constitutional context. That is, although Canadian cities are the engines of our well being, they have no formal role in governance under our constitution. Local governments are the most accessible and responsive of all orders of government in Canada, yet they are not recognized as an order of government in the Canadian Constitution.

The powers and resources of municipalities derive from the 1849 *Baldwin Act* of Canada and the distribution of powers under the *Constitution Act, 1867*. Municipal functions, responsibilities and duties have changed dramatically since 1849 and 1867. There are a number of trends which are giving rise to the need for more municipal autonomy, powers and resources. These trends include federal and provincial disengagement from services (described as decentralization, downloading, and abdication of responsibility); provincial grant reductions; rapid growth rates in some urban centers; the need for infrastructure upgrades; and demands and needs for new services that were not contemplated in the mid 1800s.

Ironically, the more autonomy, powers and resources municipalities have, the more they will collide with the apprehended threats of globalization.

2.0 CONSTITUTIONAL CONTEXT

The duties and responsibilities of local authorities across Canada differ from those reflected in the 1849 *Baldwin Act*. The Act first established the role, function and structure of local authorities in what became Canada. Every provincial statute across Canada that creates and empowers local governments (with the exception of the more recent “Spheres of Jurisdiction” legislation) derives from the *Baldwin Act*.

When the *Baldwin Act* was enacted, the principal local government issues were drunkenness and profanity, the running of cattle or poultry in public places, itinerant salesmen, the repair and maintenance of local roads, and the prevention or abatement of charivaries, noises and nuisances. Today, municipalities own and operate hospitals, welfare systems, waste treatment plants, airports, public housing, hydroelectric plants, telecommunication systems, forensic laboratories, AIDS hospices, homeless shelters, hot lunch programs for school children, economic development, toxic waste remediation and fiber optic transmission.

These duties and responsibilities are evolving in the face of legislation and structures that have not varied from a model anchored to the needs of the mid-1800's.

Section 92(8) of the *Constitution Act, 1867* assigns control over "municipal institutions in the Province" to the provincial governments. The provinces have delegated some powers and resources to local governments.

The courts have held that municipal corporations are mere instrumentalities of the senior level of government for the more convenient administration of local governments [*Lynch v. Canada Northwest Land Co.* (1981) 19 S.C.R. 204 (S.C.C.)].

There is no constitutional recognition of municipal institutions as a level of government. They are creatures of provincial statute with only the powers conferred on them by the province. Municipal authority is restricted either through the withholding of powers or the imposition of limits on the exercise of the powers granted to them: *McCutcheon v. Toronto* (1983) 41 O.R. (2d) 652.

Limits on the exercise of municipal powers include centralized approvals.

The Federation of Canadian Municipalities has on a number of occasions embraced the principles of local self government articulated by the International Union of Local Authorities, as refined by the FCM and Canadian Association of Municipal Administrators' Task Force on the Future of Local Governments.

The principles of local self-government are described in the first of these three comparison papers [A Comparison of New and Proposed Municipal Acts of the Province, May 31, 1999, prepared for the 1999 annual conference of the Federation of Canadian Municipalities by Donald Lidstone, Colleen Burke and Kristen Gagnon]. In that paper, the authors concluded that none of the traditional or recently enacted provincial or territorial local government legislation has satisfied the principles of local self government.

One of the principles is "adequate financial and legal resources to provide good government and services locally. Municipalities in Canada do not have adequate financial and legal resources to provide good government and services locally, for the reasons set out in this discussion paper.

3.0 DISENGAGEMENT FROM SERVICES

Canada federal and provincial governments are, in the context of massive debts and deficits, withdrawing from areas of public policy and service. They are privatizing; downloading; and disengaging from certain functions, such as highway maintenance and social programs. In order to meet emerging local needs, the municipalities are forced, by legislation or practicality, to fill the void resulting from the federal and provincial abdication.

In a report prepared for the Union of British Columbia Municipalities on September 27, 1999, Harry Kitchen, of the Department of Economics, Trent University came to the following conclusions:

1. the federal and provincial governments have disengaged from a number of areas of spending and the municipalities have filled the vacuum in the absence of other transferees, noting that the size of the municipal sector as a percentage of gross domestic provincial product increased from 4.6 to 4.9 percent from 1988 to 1998 while federal spending declined from 23 to 19 percent and provincial spending from 21.3 to 20.6 percent;
2. the property tax has “increased noticeably in relative importance as a revenue generator”;
3. user fees fund a growing proportion of public transit and recreation;
4. provincial grants to municipalities have declined, causing municipalities to increase reliance on property taxes and other “own source revenues”;
5. in the future, property taxes and user fees will become even more important as a revenue source for municipalities;
6. nonetheless, municipalities are constrained by provincial legislation, centralized approvals, legislation and policy [Harry Kitchen, Department of Economics, Trent University, Provincial-Municipal Fiscal Trends: An Interprovincial and Intertemporal Comparison, September 27, 1999, presented at UBCM 1999 Convention].

Ontario is an interesting case study. Since 1995, the province has shifted what were previously provincial responsibilities or provincial-municipal responsibilities to the municipalities. These responsibilities include property assessment; airports; ferries; GO transit; municipal transit; child welfare; social housing; and other services and facilities.

According to Harry Kitchen, although Ontario off-loaded increased liability, the municipalities in return received negligible control over public policy or standards with respect to most of these responsibilities (especially social housing, ambulance services, highways, policing and assessment).

At the same time, grants were reduced significantly. All of this resulted in greater pressure on the property tax and user fees.

In British Columbia, the province eroded local powers and confiscated local tax revenues. For example, the province eliminated the municipal taxation on railways (averaging 7 percent of revenues for railway communities). The province also confiscated revenues from speeding ticket fines.

The federal government has also transferred services and responsibilities to municipalities, including airports and ports and harbours. In many cases, this imposition has had a devastating effect on the affected communities. In the Town of Fort Nelson, five hours from the next airport, taking on the new airport responsibility would cost the equivalent of a tax increase of 50 percent. In Port Hardy, four and a half hours from the next airport, keeping the airport open would cost the equivalent of a 24 percent tax increase.

The increased transfer of government services and the reduction or elimination of revenue sharing or transfer payments have eroded the capacity of municipal institutions to manage local public affairs.

4.0 RAPID GROWTH RATES

According to the FCM's Second Report on the Quality of Life in Canadian Communities, dated March, 2001, population growth for a number of municipalities has imposed challenges. York, Peel, Waterloo and Calgary have all grown up to four times the rate of Canadian population growth from the same period. As a result, there is significant demand for municipal services and facilities, including water and sewer systems, roads, health and social service and accommodation.

As well, the investment in transportation and other infrastructure lags population growth, and responding to the challenges of growth becomes more and more difficult as time goes on.

Various pundits from Allan Artibise to Arthur Eriksson have predicted that the Georgia Basin population will increase by anywhere from 2 to 5 million additional people over the next 20 years. Despite this, the Province of British Columbia has given municipalities no additional powers or sources of revenue to meet imminent demands.

5.0 INFRASTRUCTURE UPGRADES

According to the FCM federal budget submission to Finance Minister Paul Martin on October 12, 1999, capital for municipal infrastructure has fallen far behind needs. According to the Canadian Water and Wastewater Association, the capital investment deficit is \$16.5 billion for water facilities and \$36.8 billion for wastewater facilities. This is becoming more and more obvious as raw sewage is flushed into the sea in Greater Victoria, Greater Vancouver and other municipalities, and water quality issues have arisen in Walkerton, North Battleford and hundreds of other Canadian municipalities. As well, approximately 200 toxic pollutants are released to the environment every year according to the Sierra Legal Defence Fund.

The National Research Council has suggested there is a capital investment deficit for roads in the order of \$9 billion. The Canadian Urban Transit Association estimates an investment shortfall in public transit of more than \$8 billion.

According to the June 1999 FCM Report on Homelessness and Affordable Housing, Canadian Municipalities will need nearly half a million more rental housing units to meet estimated demand over the next 10 years.

As well, policing and firefighting costs increase as a function of labour relations, population growth and the emergence of such new issues as hazardous material fires or explosions.

While business corporations generally create reserves against future capital, repair and maintenance costs, municipalities are struggling to catch up with overwhelming existing needs for replacing, repairing and maintaining infrastructure.

6.0 MEETING FUTURE NEEDS

Future trends indicate additional powers, responsibilities, duties and costs for municipalities, without new or adequate powers or resources.

The rate of unilateral imposition by provinces of amalgamations of former municipalities is increasing dramatically. Greater Sidney, Greater Halifax, Greater Montreal, Greater Toronto, Greater Sudbury, Greater Ottawa, Greater Hamilton and others have been witnessing this phenomenon. The current mania for forced amalgamations is a direct result of disengagement and globalization. The thesis is "bigger is better". Forced amalgamations are the perfect tool for carrying out disengagement, since massive, unaccountable municipalities that have populations and budgets greater than most provinces can take over programs from which provinces withdraw (eg., housing and social programs) and pick up the pieces resulting from off-loading. Nonetheless, the provinces have failed to grant new or adequate powers or resources.

Other trends include the need for addressing new classes of services. Municipalities have become involved in providing or participating in fiber optic networking and communications convergence; Olympic and other sports infrastructure; environmental cleanups; increased health care costs arising from aging and pollution; tort and other liability for building inspection and airport crashes; increasing public sector wage costs; alternative fuel and advance transit technology; treatment for drug and related, mental, environmental and other illness; new regulations such as airport rescue; and others.

7.0 RECENT AND PROPOSED MUNICIPAL ACTS OF THE PROVINCES

Some provinces have taken steps to adjust their legislative regime to permit local self government. In 1994, Alberta enacted the *Municipal Government Act* which gives municipalities "natural person" powers and broadly enables municipalities to exercise, in their discretion, a wide range of permissive powers (as opposed to a limited number of express powers, as found in the legislation of other provinces). The problems with the Alberta approach are that it does not amount to a fundamental change of the Alberta Constitution, there is no entrenchment of the municipal

legislation (e.g., by way of an amending process), there is no commitment to consultation prior to future change, and many powers require provincial approvals.

In October 1996, Manitoba enacted the *Municipal Government Act*. The Manitoba legislation is less empowering than Alberta's. The Manitoba Act does not give municipal governments "natural person" powers. Although the Manitoba legislation broadly enables municipalities to exercise their discretion by a wide range of permissive powers, the range is narrower in scope than is the case in Alberta.

Amendments to Nova Scotia's *Municipal Government Act* through Bill 47, which passed 3rd reading on December 3, 1998 followed a review of a "Working Paper in Legislative Form" proposed in 1997. The stated purpose of the new Act is to "give broad authority to councils" respecting bylaw making and to enhance their ability to respond to present and future issues. It does not give municipal governments "natural person" powers, or broad spheres of jurisdiction, but rather continues to authorize a limited number of specified and express powers.

British Columbia executed a "Recognition Protocol" in 1996 with the Union of British Columbia Municipalities (UBCM) that recognized local government as an "independent, responsible and accountable order of government". During the same years, however, the province unilaterally eliminated municipal grant guarantees, reduced grants, transferred major highway responsibilities and closed local courthouses without meaningful prior consultation with municipalities. The wording of the Protocol was incorporated into the *Municipal Act* through amendments which came into force in September, 1998. Its stated purpose is to provide a legal framework for local governments to gain power, and flexibility to represent and respond to the various and changing needs of their communities. The resulting *Local Government Act* failed to provide any new financial powers or resources to address the erosion of resources caused by previous provincial policies.

On March 10, 1997 Ontario released a discussion paper outlining a new *Municipal Act* and in 1998 the province released a draft *Municipal Act*. The proposed legislation would give municipalities "natural person" powers and broadly enabling spheres of jurisdiction (e.g., public utilities). Within those spheres, municipal governments could act or exercise powers from a comprehensive "tool kit" (e.g. expropriate). Ontario has scrapped the draft *Municipal Act* and is proposing to release a new draft which is more responsive to the needs and expectations of residents and municipalities.

In 1997, the Newfoundland Minister of Municipal and Provincial Affairs asked the cities to propose new legislation to be considered by the province for enactment in the fall of 1998 respecting cities. Any city could opt into the new legislation once enacted. The province has indicated it will introduce the legislation in the fall 2001 session of the legislature. The proposed legislation gives municipalities nature person powers, spheres of jurisdiction and more autonomy.

Yukon Territory assented to Bill 69 in December, 1998. The new *Municipal Act* states in its preamble its goals of establishing "partnership, mutual respect and trust between the Government of the Yukon and the Association of Yukon Communities." The former is stated as wishing to

"empower municipal governments with the authority necessary to effectively govern in the new millennium". In Section 2 of the Act, the purpose is worded somewhat more modestly: it is to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, to represent and respond with flexibility to the various interests, needs, and changing circumstances of their communities.

8.0 COMPARISON

A comparison of the provincial and territorial legislation across Canada that empowers municipalities indicates that Canadian municipalities do not have adequate financial powers or resources in comparison with their counterparts in the United States and Europe. Municipalities in Canada rely principally on the real property tax, user fees, and a number of other tools that raise comparatively small amounts compared to the property tax and user fees.

According to Harry Kitchen, (Provincial-Municipal Fiscal Trends, September 27, 1999), municipal "own source revenue" increased significantly between 1988 and 1998, from 77 percent to 85 percent. At the same time, provinces gave municipalities no new sources of revenues. Accordingly, according to Harry Kitchen, property taxation increased from 48.6 percent of all municipal revenues to 56.7 percent between 1988 and 1998. In Nova Scotia, property taxes in 1998 accounted for 70.4 percent of all municipal revenues.

User fees, according to Harry Kitchen, grew from 20 percent of all municipal revenues in 1988 to 20.7 by 1997. Grants, on the other hand, declined significantly between 1988 and 1998. Grants amounted to 23 percent of municipal revenues in 1988 and just over 15 percent in 1998. Since 1998 the provinces have further reduced grants.

In 2001 the federal infrastructure program was initiated. Infrastructure Canada agreements are in place with the provinces and territories to administer the program and recommend projects for funding. The program will not, however, enable municipalities in a major way to catch up with the infrastructure capital deficits, to displace property taxation or user fees, or to afford a new opportunity for expanding revenues.

8.1 Newfoundland *Cities Act*

The *Cities Act* contains authority for real property tax; sewer and water tax; business tax; home based business tax; specified service areas (to raise monies for any municipal service by way of any form of tax fee, levy or charge); poll tax; and user fees. There is a vast array of collection mechanisms. The legislation also includes innovative approaches to service delivery. Although the legislation eliminates many of the paternalistic, centralized controls under the current legislation, the greater autonomy, flexibility and powers are combined with increased requirements for accountability, transparency and public participation.

8.2 Nova Scotia *Municipal Act*

The Nova Scotia *Municipal Act* sets out express, limited authority for expenditures on the model of the *Baldwin Act*. The Act provides authority for property tax; charges for services; a rate for a water system; charges for waste water or storm water system; water system capital costs; highway and transportation infrastructure, and future expenditure; and sewage system supercharges for “over users”.

8.3 Ontario *Municipal Act*

Under the existing *Municipal Act*, a council of a local municipality may by bylaw levy an annual tax. There is authority for a special rate on farm ratepayers. A local government may establish a reserve fund and money may be raised for the fund. According to the FCM analysis of the proposed Ontario legislation, there was no new authority to impose fees and charges; no power to incorporate or acquire an interest in security of a corporation; restrictions affecting the operations of municipal services; and provincial cabinet limitations on municipal powers to engage in commercial activities resulting in competition with private commercial activities [Federation of Canadian Municipalities “Early Warning: Will Canadian Cities Compete?”, May 2000, prepared for the National Round Table on the Environment and the Economy].

8.4 Alberta *Municipal Government Act*

Under the Alberta *Municipal Government Act* enacted in 1994, municipalities may exercise power within spheres of jurisdiction. The legislation also grants “natural person” powers. Such powers give the municipality the capacity, rights and powers of a natural person. This enables the courts to construe municipal powers on the basis of court precedents respecting natural person powers. The courts have held that natural person powers include the powers to purchase, own and use property, sue and be sued, enter into contracts and enter into contracts of indemnity. Business corporations have natural person powers. Benefits include entering into public-private partnerships, providing incentives to businesses, incorporating subsidiaries and enhancing existing powers.

The Alberta legislation also expands local government powers by setting out spheres of provincial jurisdiction within which the municipalities may exercise power for municipal purposes. Nonetheless, the legislation does not expressly give municipalities any greater financial resources.

8.5 British Columbia *Local Government Act*

The *Local Government Act*, the result of three years of amendments further to the Recognition Protocol entered into between the Union of British Columbia Municipalities and the Province, contains a number of financial tools: entering into public private partnerships; affording more flexible revenue-raising authority; clearer authority for user fees, parcel taxes and specified areas; and an increase in the scope of development cost charges.

The Community Charter for British Columbia, proposed by the new government of British Columbia, will reportedly provide all municipalities in British Columbia with the full autonomy and flexibility to exercise the residual powers of the Province in the manner of “home rule” municipalities in the United States and Europe. In particular, the government has proposed a large number of new revenue sources and financial tools, including full taxation of provincial, crown corporation and provincial agency property and services; a return to the municipalities of 75 percent of revenues from moving violations; and new taxes, fees, levies and charges that will be announced in June, 2001.

9.0 OPTIONS FOR THE FUTURE

There is an excellent summary of additional and alternative financial powers and resources municipalities should have in the FCM paper entitled “Early Warning: Will Canadian Cities Compete?”, prepared in May 2001 for the National Round Table on the Environment and the Economy. These include:

- “• legal authority for local self government, available to US municipal governments through home rule charters;
- fiscal authority to engage in public private partnerships through such mechanisms as municipal permission to hold a mortgage;
- access to growth, such as a sales tax, which underpins much of the locally-generated revenue in New York City; or local income taxes, as imposed in Europe and in the U.S.;
- opportunities to leverage private sector investment, through direct tax incentives (tax-exempt municipal bonds in the U.S.) or through national fiscal policy (France’s Transport Contribution Tax);
- access to permanent lending programs for infrastructure, such as state-run infrastructure banks for transportation, and clean water/drinking water revolving funds widely available in the U.S.” (page 23)

10.0 CONCLUSION

A comparison of the provincial and territorial legislation across Canada that empowers municipalities indicates that Canadian municipalities do not have adequate financial powers or resources in comparison with their counterparts in the United States and Europe. Municipalities

in Canada rely principally on the real property tax, user fees, and a number of other tolls that raise comparatively small amounts compared to the property tax and user fees. This situation has not changed for decades, despite the recently adopted municipal governance legislation in Nova Scotia, Manitoba, Alberta, British Columbia and Yukon Territory.

The FCM and the provincial municipal associations have been lobbying the federal and provincial governments for additional municipal financial tools and resources consistent with the principles of local self government articulated by the International Union of Local Authorities, the Federation of Canadian Municipalities, the Union of British Columbia Municipalities and others. To date, none of the provinces or territories have responded, although the new government of British Columbia has promised new legislation to provide municipalities with full autonomy and flexibility to exercise the residual powers of the Province in the manner of “home rule” municipalities, along with a broad range of new financial powers and revenue sources.

Ironically, the pressing municipal demand for increased autonomy and additional powers and resources collides with the growing trend toward globalization. International trade agreements will have a significant impact in municipal governance and the exercise of municipal powers.

The GATS (the General Agreement on Trade in Services) agreement expressly applies to services provided by or on behalf of municipalities, and requires the federal government to ensure that local authorities fulfill the obligations and commitments made by the federal government. The GATS also applies to all services “except those provided in the exercise of governmental authority”. The exception is defined as any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. In other words, both tests must be satisfied. Although this would seem to preserve strictly municipal public services, such as a water treatment, it would appear that public private partnerships, contracting out, design build agreements or privatization would be subject to the GATS agreement. The question also arises whether charging a fee for service by a municipality could mean that the service is being delivered on a commercial basis and therefore subject to the agreement.

A number of municipal services could be subject to the GATS, including sewer, water, solid waste and drainage; building inspection and planning regulations; regulation of retail and commercial business operations; regulation of signage; and transit and transportation infrastructure. Under the language of the GATS, the prohibition or restriction of “big box” stores could be considered a restriction of trade. The GATS raises questions about the extent to which a municipal council must balance the expectations of its community with internal business interests without contravening the GATS agreement.

GATS negotiators have also commenced a review of a proposed “transparency” objective. This would require notification of new measures affecting services, time to respond (taking control of the legislative timetable away from municipalities), consideration of the missions of foreign governments, and justification of measures in relation to a world trade organization menu of “illegitimate objectives”. The transparency objective contradicts the municipal purposes set out

in the provincial and territorial municipal acts. Instead of being accountable to the ratepayers and residents, municipal councils would be subject to the WTO transparency objectives.

In Canada, the federal and provincial governments have not resolved what would happen if a local government acts contrary to the GATS agreement. What is known is that trade agreements trump other powers. Under the international agreements, the federal governments pay, despite local transgressions. In the *Salmon* case, although the tribunal said that the World Trade Organization authority supercedes local autonomy, Tasmania refused to reimburse Australia for the compensation Australia had to pay under the international trade agreement.

In the May 2, 2001 decision of the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corporation* (an appeal from the North American Free Trade Agreement tribunal), the court did not alter the tribunal's extremely broad definition of expropriation. The tribunal had held that expropriation under the NAFTA includes incidental interference with the use of property which has the effect of depriving the owner, in whole or in part, of the use or reasonably to be expected economic benefit of property. Accordingly to Mr. Justice Tysoe of the British Columbia Supreme Court, "This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority". In the end, the court found in favour of Metalclad, with Metalclad being awarded \$16 million (U.S.) and 75 percent of the costs of the proceeding.

Metalclad is a wakeup call for municipalities throughout North America. The enactment of regulatory bylaws that could have the effect of interfering incidentally with the use of property so as to deprive the owner of the use or economic benefit of the property could result in compensation for expropriation under Chapter 11 of the NAFTA and the analogous provision in the proposed FTAA.

The FCM is at this annual meeting considering a proposed resolution (A14) from the Union of British Columbia Municipalities, which is attached as Appendix A.