

MAINE STATE LEGISLATURE

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No

March 16, 1953

To Alexander A. LaFleur, Attorney General
Re: L. D. 383, International Ferry Terminal

I have your request of March 12, 1953, stating that Senator Collins has asked two questions concerning this bill:

1. Does the act as outlined violate Section 14 of Article IX of the Constitution of Maine in that it is a lending of the credit of the State?

2. If the answer to question number 1 is in the affirmative, is there some manner in which bonds may be issued by a State agency to effect the general purpose of the act?

As written, L. D. 383 does not involve the use of credit. It makes a cash appropriation of \$1,250,000, which is made available to the Maine Port Authority to pay for plans and the construction of a terminal at Bar Harbor suitable to be the Maine terminal of an international ferry to run between Nova Scotia and Bar Harbor.

The first question raised is whether the extension of credit is the same as the advancing of cash within the meaning of Section 14, Article IX, Maine Constitution:

"The credit of the state shall not be directly or indirectly loaned in any case."

The history of the amendment, as far as the same appears of record, would indicate that the evil to be redressed was the extension of debt, rather than cash outlays. The amendment was passed in 1847 (Chapter 29 of Resolves), the debt limit then being \$300,000.

Governor Dana's Message (1847 Vol., page 61) recites the reason for its being:

"The history of the finances of Maine for a few years past will show in a striking light how soon and imperceptibly a state may change its position from one of freedom from debt to that of deep indebtedness. At the close of the year 1835, our whole debt was less than \$100,000; in five years from that time, it had increased to about \$1,700,000."

The Governor continued at some length to describe the evil of too great indebtedness.

I have referred to all the cases and court opinions respecting the constitutional language (Opinions, 53 Me. 587; 80 Me. 603; 137 Me. 340; 139 Me. 417; 60 A. 2d 903; 79 A. 2d 753.) All these references relate to the borrowing of money. None relates to the advancing of cash.

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While I cannot find any Maine citations distinguishing between the advancing of cash and incurring of indebtedness, I do find certain cases in other jurisdictions. The distinction was recognized in People v. Westchester County National Bank, 1921, 231 N. Y. 465; 132 N. E. 241; 15 A. L. R. 1344, which was paraphrased as follows in Veterans' Welfare Board v. Riley, 1922, 188 Cal. 607, 206 Pa. 631:

" . . . in the gift of the money of the state, raised by current taxation, we are expressing our own gratitude by giving our own, but when the gratitude is expressed in the issuance of bonds and the gift of the proceeds of the sale thereof, we are expressing our generosity at the expense of our posterity. When the people have so keen a sense of gratitude, or of public purpose, that they are willing to give of their substance to express that conviction, there is little danger that excessive or unreasonable burdens will be thus assumed, but when one generation can be generous at the expense of the next, there is danger that the expression may not be so reasonable or so well considered."

The state of the authorities in the State of Maine is that the court has never given an opinion, as far as I can determine, whether the prohibition against the loaning of credit of the State includes a prohibition against the lending of cash. It is my opinion, however, that there is no prohibition against the lending of cash, based on reason and on the above cited authorities.

Regardless of the constitutional limitation above quoted, there is a constitutional requirement that the legislature confine itself to

"reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States."

Section 1, Part Third, Article IV.

For convenience, we may summarize the requirement by stating that it prescribes that all legislation must have a public purpose.

The purpose of the instant bill is to appropriate \$1,250,000

"to pay for plans and other proper expenses in connection therewith and for the construction of a terminal at Bar Harbor suitable to be the Maine terminal of an International Ferry to run between Nova Scotia and Bar Harbor."

This sum is to be available to the Maine Port Authority

"after the directors of the Maine Port Authority have executed a lease with the Canadian government, or its designated agent, for the use of the Bar Harbor Terminal when constructed; . . ."

The lease is to include a provision that, over a period of 30 years, the Canadian government shall reimburse the Maine Port Authority for the cost of the terminal. It will be noted that there is no expression of any requirement that the ferry in fact be run or that, if it is not run, the facilities will be available for any public purpose of the people of Maine. The resolve further provides that after the lease payments have been made, the Maine Port Authority shall transfer to the Canadian Government or its designated agent, its right and ownership in the Bar Harbor Terminal and shall deed the property to the Canadian Government or its designated agent. The directors of the Maine Port Authority are to pay to the State of Maine

"not less than 1/30th of the amount expended hereunder, if and when received by it from the Canadian government, or its designated agent, and a like payment each year thereafter for 30 years, with interest at 2% per year on the unpaid balance, payable yearly, if and when received by it; but such interest shall be payable only if those investing the capital in the ferry and in the pier at Yarmouth, Nova Scotia, receive their pre-rata share of the interest paid from the operation of said ferry."

The resolve having stated what the Authority shall pay to the State, there is a concluding resolve in somewhat different, and perhaps contradictory language:

"Resolved: That, anything herein to the contrary notwithstanding, no part of the money hereby appropriated shall represent indebtedness of the Maine Port Authority to the State of Maine, and the Maine Port Authority shall have no obligation, either express or implied, to repay any part of said money to the State of Maine, except to transmit to the State of Maine all rentals received by it pursuant to the provisions hereof."
(Emphasis supplied.)

The language raises the question whether the Authority is to pay to the State of Maine all the rentals it receives or the stated amount of 1/30th of the cost annually for 30 years.

Respecting maintenance, the Canadian Government is to pay the cost thereof to the Directors. Presumably, the Directors are to keep the pier in repair.

It may be assumed from the above language that the public purpose involved is that there will be commerce on the ferry and the people of the State of Maine will benefit by such commercial venture. It would seem to me possible to express in the resolve some understanding that the people of the State of Maine will be able to ship their persons and property on the ferry if it operates, and it might also be possible to provide that the ferry shall be in fact operated. Thirty years is a long period of time. Suppose the ferry turns out to be unprofitable and is discontinued. Should there not be some option in the Authority whereby the pier could be used for something else?

In summary, the resolve does not state any public purpose expressly although, as a matter of common sense, it may be assumed that the ferry is intended to be profit-making, so that some good to the people ought to come from it. I would prefer that a public purpose be expressed.

In my opinion, the preamble deserves improvement. Section 16, Part Third, Article IV, requires:

"The facts constituting the emergency shall be expressed in the preamble of the act." (Underlining supplied.)

To some extent, statements in the preamble will be accepted as final by the court; to some extent the courts will consider that preambles raise questions of law. The general rule has been laid down in Morris v. Goss, 147 Me. 98, 00 of Advance Sheets:

"In examining the sufficiency of an emergency preamble the question of whether or not the Legislature has expressed (to wit, made an allegation of) a fact or facts is a question of law. Whether or not such fact or facts can constitute an emergency within the meaning of the Constitution is likewise a question of law. These questions of law may be reviewed by this court. On the other hand, whether a fact expressed as existing, does exist, is a question of fact and not of law. It is likewise a question of fact whether or not an expressed fact which can constitute an emergency, does constitute an emergency. These questions of fact are within the exclusive province of the Legislature for its determination."

Applying this language to the preamble, it is apparent that anything stated therein as a matter of fact will be accepted by the courts as factual. The question raised is, what fact stated in the preamble can constitute an emergency? This is a question of law. The facts stated in the preamble are briefly: (1) Chapter 219, P & S 1951, grants authority to the Maine Port Authority to construct a terminal

at Bar Harbor, (2) Canada has contracted for a ferry at a cost of \$4,000,000 and is to construct a pier at Yarmouth to be the Canadian terminal at a cost of not less than \$1,250,000, (3) the entire project depends upon a construction schedule that guarantees completion of the terminal facility on or before May 1, 1954. No other fact is stated. I would doubt very much that any of these facts can constitute an emergency in constitutional meaning.

To improve the preamble, it would be my suggestion that a public interest be definitely expressed and that it be found as a fact that if prompt action is not taken this public interest will be lost.

In conclusion, I call attention to a line of Massachusetts cases wherein it is made clear that a public interest may be served while nevertheless conferring private benefits.

"In such instances, the cases tend to distinguish between those results which are primary and those which are secondary or incidental and to classify the object according to its primary consequences and effects."

Opinion of the Justices, (1946)
320 Mass. 773; 67 N. E. 2d 588;
165 A. L. R. 807.

The question before the court related to public housing in which the public would benefit and the contractors would also benefit. The question is parallel in that the Canadian government should be considered the same as a private person, as respects the question whether the purpose of the bill is public or private.

It may be that Senator Collins wishes to consider the possibility of financing the project through a bond issue rather than the granting of cash. In such case, there should be a special authority given by the people, the same as we have previously had for the Fore River Bridge, specifically authorizing this very type of transaction. In this way, the people expressly authorized the lending of credit, thereby eliminating that question.

As above stated, when the facility has been completed, title is to be turned over to Canada. Mr. Austin J. Tobin, Director of the Port of New York Authority, termed this provision overly-generous. From a legal point of view, the purpose of the bill is to make a loan to the Dominion for the purpose of building a pier for the Dominion. The bill would more clearly come within the constitutional requirement that the act be "for the defense and benefit of the people of this state" if title were to remain in the Maine Authority. Furthermore, the bargaining position of the State would be considerably improved if the title remained in the State,

The following provision respecting interest seems unclear:

" . . . but such interest shall be payable only if those investing the capital in the ferry and in the pier at Yarmouth, Nova Scotia, receive their pro-rata share of the interest paid from the operation of said ferry."

Without criticism from a business point of view, which I do not understand, what is the meaning of "pro-rata share"?

We now have agreements made by the Port of New York Authority. Should it be desired to redraft L. D. 383, these agreements will be most helpful.

Boyd L. Bailey
Assistant Attorney General

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