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Planes, Trains and Postboxes? The Federal Enclave at the end of the block

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Planes, Trains and Postboxes? The Federal Enclave at the End of the Block

The current dispute between Canada Post and a number of local governments in Quebec and Ontario has implications that reach across the country, and engage fundamental issues and questions about the division of powers and property in Canada. *Canada Post Corp v. Hamilton (City)*,[1] is the first court decision in the volley of litigation that has sprung up on this issue, but undoubtedly will not be the last.

In that case, Canada Post successfully challenged a bylaw of the City of Hamilton that modified the City's pre-existing street and traffic bylaw to specifically impose a moratorium on the processing of all street and traffic permits related to community mail boxes for 4 months until the City could develop standards and policies for considering them.

The Ontario Superior Court found that the bylaw amendments were invalid and inapplicable to Canada Post on a number of bases. Some of the Court's reasons are confined to Hamilton's bylaw, such as the finding of vagueness (the delegation of an approval authority to the Director of Engineering Services without standards to guide the Director's discretion), and the implicit finding that the City's purpose in enacting the bylaw was to thwart a Canada Post policy to remove door-to-door delivery, rather than a primary concern for the use and function of City streets.

However, some of the Court's reasons for the finding of invalidity or inapplicability can be expected to have much greater implications, particularly the Court's findings that the *Mail Receptacles Regulations* authorize Canada Post to place superboxes on any public property, including property vested in the Province and its municipalities; that the bylaw "impaired" and "frustrated" the core of the federal interest in the postal service; that Canada Post was immune from all enactments, including bylaws, as an agent of the federal Crown; and even that the street and traffic bylaw amendments were not within the jurisdiction of the City.

[1] 2015 ONSC 3615

The City of Hamilton is appealing the decision. In this paper we entertain some of the constitutional issues the decision raises for the whole country, and suggest a different perspective than that reflected in the Ontario Court's decision.

To our knowledge, the *Hamilton* decision goes further than any other in negating the province's constitutionally vested rights to own and control property, and therefore the rights granted by most provinces to municipalities. Indeed, the case does not appear to consider the constitutional dimensions of this federal assertion over provincial and municipal property rights under sections 92(5), 92(13), 108, 109 and 117 of the *Constitution Act 1867*.

Section 92(13) of the *Constitution* confers upon the provincial legislatures the exclusive authority to make laws in relation to property and civil rights in the province and encompasses the creation of property rights, their transfer and their general characteristics. This would certainly appear to include jurisdiction over the right to place structures on land without the land owners consent (in our province--a trespass and public nuisance regulated by legislation, and local bylaws).

Perhaps more significantly, the *Constitution Act 1867* distributes public property as between the provinces and the federal government. With respect to Quebec, Ontario, New Brunswick and Nova Scotia it does so by way of s. 108, 109 and 117, granting to the federal government a specific schedule of lands including canals, harbours, railways, post offices and other public buildings, and reserving all other lands to the provinces. In British Columbia, this was accomplished at the time BC joined confederation.

In addition, Section 92(5) of the *Constitution Act 1867* confers the power to make laws in relation to the management of public lands in the provinces.

In many provinces, British Columbia and Ontario included, the province has vested public lands such as roads and parks, in local government.

The *Constitution* therefore preserves the proprietary rights of public land in the provinces to the provinces, as well as granting them legislative authority over private and public property rights more generally.

These powers have been relied upon by the courts (and Privy Council) to find federal laws invalid for impermissibly regulating proprietary rights.[2]

[2] See eg. *AG Can v AG Ont (Fisheries)*, [1898] AC 700

Granted, the federal government has powers of expropriation over provincial land where the exercise of those powers is essential to the dominion undertaking.[3] Proper process, and often compensation, is required. However, the *Canada Post Act* and *Regulations* fall far short of authorizing an expropriation of public roads and streets vested in the provinces and their local governments. Furthermore, expropriation would not be necessary where local governments have a licensing scheme to authorize structures and obstructions in roads and parks.

Even the CRTC decision in *Ledcor v. Vancouver*[4] confirmed that local government consent is required for the use of public roads for federal utilities, and that permits, processing fees, and "causal costs" could be recovered for the use of municipal roads under the federal *Telecommunications Act*. The *Canada Post Act* provides no similar rights to erect structures on lands vested in the Crown in the right of the Provinces, and in our view the Ontario Court's interpretation that the *Mail Receptacles Regulations* as constitutionally capable of doing so warrants significant further consideration.

We would suggest that a reading of the *Canada Post Act* and the *Mail Receptacles Regulations* as a whole, and in light of the constitutional vesting of proprietary and regulatory rights over property in the provinces, does not clearly authorize Canada Post to erect structures on municipally owned public property without the consent of the landowner. While it is possible that the federal government might enact laws that would grant Canada Post this power, any such exercise of power would generally require clear language, establish that the land was absolutely necessary for the federal purpose, and go through due process. The validity and effect of the *Mail Receptacles Regulations* in light of the core areas of the provincial ownership of public lands in the province (except those lands expressly reserved to the federal government pursuant to s. 91(1A) and 108), and the jurisdiction to manage property rights and public lands in the province, is certainly worthy of further consideration and argument.

Furthermore, it would appear from the *Hamilton* case that neither the federal government nor Canada Post have passed any enactments or regulations *requiring* Canada Post to place community mail boxes on public property or in any specific location. The *Hamilton* case simply refers to a *policy* of doing so in order to attain the economic goals of the corporation, and a regulation made by Canada Post authorizing the corporation to place receptacles on public roads, among other places. However, nothing in that regulation appears to bind or require the property owners affected to permit permanent structures on their land. In this instance, it is arguable that there is not even a conflict between federal laws and provincial laws sufficient to

[3] See Eg, *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004

engage the constitutional analysis of the paramountcy of federal law. Certainly, Canada Post can apply for permits or obtain contractual permission to use municipal roads and parks within the scope of its regulatory authority and no enactment requires or mandates that it do otherwise.

An analysis of Canada Post's authority to erect structures on provincial and municipal land that it does not own or control is wholly lacking in the *Hamilton* case, and indeed there is no indication that the provincial or federal governments participated or were involved by way of constitutional notice.

There are other obstacles to the City of Hamilton's success in this case, including weaknesses in its bylaw, and the finding of improper purpose made against it. In BC the legislation is more favorable to the assertion of local government control of the roads and parks at issue, with a clearer vesting of proprietary rights over roads under s. 35 of the *Community Charter*, and no legislative restrictions similar to s. 14 of the Ontario *Municipal Act*, which appears to go beyond what constitutional jurisprudence requires, and makes municipal bylaws ineffective "to the extent of any conflict with a provincial or federal act or regulation… or an instrument of a legislative nature, including an order, license or approval made or issued under a provincial or federal act or regulation."

It is also possible that Canada Post might accept the limitations of its authority to install superboxes on property it does not own without permission, but then simply refuse to deliver mail in the absence of such a permission (as they do in apartment buildings), leaving municipalities that do not issue permits in a quandary.

There is no doubt that mail receptacles are an integral part of the postal network, that the national postal service is within the jurisdiction of Parliament, and that Canada Post faces significant financial pressure to find efficiencies. The comment of the court in the *Hamilton* case that "I have the distinct impression that the practical effects of city council's opposition to [community mail boxes] were thrust upon the beleaguered city employees" may well be equally applicable to Canada Post's current administration and staff.

Overall, however, the assumption that Canada Post has the lawful right to use property that it does not own without permission or compensation--property that is constitutionally vested in the provinces and municipalities--requires more scrutiny by the courts than has been accomplished so far in the *Hamilton* case.

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[4] CRTC 2001-23 (affirmed [2003] 3 FC 379),