INTERJURISDICTIONAL IMMUNITY AND FEDERAL PARAMOUNTCY: RECENT SUPREME COURT OF CANADA DECISIONS AND THEIR IMPACT ON MUNICIPALITIES

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Introduction

The City of Toronto had to deal with a challenge based on the principle of inter-jurisdictional immunity in the recent case of *Telus Communications Co. v. Toronto*[1]. This case represents the City's latest dispute of a more than century long tussle between municipalities and federally regulated works, undertakings and entities.[2] The dispute in the *Telus* case involved whether the City of Toronto's site-plan controls could apply to the installation, design and construction of telecommunications towers. *Telus* successfully relied upon the constitutional law doctrine of inter-jurisdictional immunity, arguing that site-plan control by-laws issued pursuant to the *Planning Act*[3] could not validly regulate the placement of its telecommunications towers because to do so would impair a vital part of a federally-regulated undertaking.

Several months after the *Telus* case was decided, the Supreme Court of Canada issued two decisions, *British Columbia (Attorney General) v. LaFarge Inc.*[4] and *Canadian Western Bank v. Alberta*,[5] which alter the landscape with respect to the scope of the inter-jurisdictional immunity doctrine. These cases call for a substantial narrowing

* The views expressed in this paper are the authors' own and do not represent the position of the City of Toronto.
[1] (City) (2007), 279 D.L.R. (4th) 111 (Sup. Ct. J.).
[2] See for example Mary Ellen Bench, "How Municipalities Deal with Federal Agencies Located Within Their Boundary" Canadian Bar Association, August, 2007.
[3] R.S.O. 1990, c. P.13
[4] 2007 SCC 23; (2007), 281 D.L.R. (4th) 54 (S.C.C.)
[5] 2007 SCC 22; (2007), 281 D.L.R. (4th) 125 (S.C.C.)

of federal immunity in the face of otherwise valid provincial laws of general application and as such, should give municipalities more power when dealing with federally regulated entities in the future.

For those not familiar with the concept of inter-jurisdictional immunity, it is somewhat similar to the more conventional division of powers constitutional challenge that a law is in "pith and substance" beyond the power of the level of government which has enacted it. Constitutional scholar Peter Hogg defines an attack on a law based on inter-jurisdictional immunity as to:

> …acknowledge that the law is valid in most of its application, but to argue that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. If this argument succeeds, the law is not held to be invalid, but simply inapplicable to the extra-jurisdictional matter.[6]

For American readers, the debate about inter-jurisdictional immunity has some resonance in the American federal "necessary and proper" ancillary power, as well as paramountcy. However, the Canadian doctrine of inter-jurisdictional immunity has no precise equivalent in American, or for that matter Australian constitutional law. In those countries, legislative power is concurrent between the federal and state governments, except that the federal powers are limited to what is enumerated in the constitution and federal laws are paramount over conflicting state laws.[7]

By contrast, in Canada, both federal and provincial levels of government are limited to their enumerated lists of powers, and legislative power is, at least in theory, assigned exclusively to one or the other levels of government.[8] Inter-jurisdictional immunity arises when a law of general application, which is otherwise valid and

[6] Peter W. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1997)at 15-28
[7] Hogg, at 15-39
[8] Hogg, at 15-38

supported by an enumerated power of the respective level of government, has *such an effect* on an enumerated power of the other level of government that it must be "read down" so as not to invade the powers of the other level of government. Defining what level of intrusion into the powers of the other level of government is sufficient to enable a claimant to rely upon the doctrine has been the subject of almost fifty years of at times complex and conflicting legal decisions.

Emergence of Inter-jurisdictional Immunity

"Sterilize the Function"

One of the first references to the inter-jurisdictional immunity doctrine arose in another dispute between the City of Toronto and a telephone company. The case of *Toronto (City) v. Bell Telephone Co.*[9] involved a dispute about the placement of telephone wires on municipal streets. In an attempt to resolve the dispute, the Ontario legislature passed an Act which required telephone companies to obtain the consent of municipalities before they installed telephone poles. Bell succeeded in this case, with the Privy Council concluding that "no provincial legislature was or is competent to interfere with [Bell's] operations, as authorized by the Parliament of Canada."[10] This case is illustrative of future conflicts between municipalities and the federal government, and

[9] [1905] A.C. 52 (P.C.).

[10] This case was decided early in the development of Canada's constitutional law. This case does not state explicitly whether the law was struck because of the concept of inter-jurisdictional immunity or because the 'pith and substance' was outside provincial power, as Bell Telephone was directly named in the Act. Consequently, the fact the Act was directed at Bell Canada may not have been viewed as a law of general application. Therefore, a declaration that the Act was *ultra vires* may be the remedy granted even if the case was decided today.

uses the language of "interference with the operation" of a federal undertaking which is so common in later inter-jurisdictional immunity cases.

A further clear reference to the doctrine later to be called "inter-jurisdictional immunity" is found in the case of *John Deere Plow Co. v. Wharton.*[11] The appellant brought a challenge against a provincial law which prohibited federally incorporated companies from operating in the province of British Columbia unless the company first obtained a licence, which was not forthcoming in this case. The Privy Council found the provincial law to be inoperative, writing:

> It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers… What it does mean is that *the status and powers of a Dominion company as such cannot be destroyed by provincial legislation*. [emphasis added]
> It follows from these premises that these provisions of the companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice.

Two important principles emerge from this case. First, the provincial legislation was held inoperative because it "destroyed" the status and powers of a federal corporation. The use of the word "destroyed" indicates that a very high level of impairment was required before the provincial law was held inoperative. Second, this case contrasted provincial laws which will be rendered inoperative because they "destroy" a federal corporation with "laws affecting the general public," which would not be held inoperative under this doctrine.

The requirement that a very serious intrusion, such as the "destruction" of a creature of the other level of government, is necessary before invoking inter-jurisdictional

[11] (1914), 18 D.L.R. 353 (P.C.).

immunity was a common element in decisions for years afterwards. A decision in 1954 rendered inoperative a provincial law which prohibited an inter-provincial bus company from picking up or dropping off passengers in the province because the result of the law was that a federally regulated company was "sterilized in all its functions and activities or its status and essential capacities [were] impaired in a substantial way."[12] Another 1954 decision protected an interprovincial pipline from provincial mechanics lien legislation on the grounds that to do so could authorize a "mutiliation" of a federal work because it could lead to "physical appropriation [of portions of the pipeline]… that would completely nullify the object of the legislation of Parliament."[13]

These above cases all required an extreme degree of intervention into the jurisidiction of another level of government; the applicable provincial acts "destroyed," "sterilized," "mutilated" or "nullified" federally regulated entities. Consequently, this approach left significant scope for provincial, and therefore municipal legislation, to validly apply notwithstanding some incidental effect on federal undertakings.

The High Water Mark of Inter-Jurisidictional Immunity

"Affects a Vital Part"

However, the level of intrusion necessary to invoke inter-jurisdictional immunity changed in the 1966 decision of *Quebec v. Bell Telephone Co*. The dispute in this case was the applicability of minimum wage legislation to a federally regulated undertaking. The Supreme Court mused that "all matters which are a *vital part of the operation* of an

[12] *Attorney-General for Ontario v. Winner*, [1954] 4 D.L.R. 657 (P.C.).
[13] *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd*., [1954] S.C.R. 207.

interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament…"[14]

The case noted that provincial workers' compensation legislation still applied to federally regulated undertakings, but that minimum wage legislation could not so apply because such legislation related to the "subject matter of a contract between employer and employee" which "affects a vital part of the management and operation of the undertaking." However, worker's compensation legislation affects the subject matter of civil rights between an employer and employee by prohibiting civil actions arising out of workplace injuries. It is difficult to see any relevant distinction between minimum wage legislation and worker's compensation in this regard; both are enacted pursuant to provincial jurisdiction over property and civil rights and both can affect a vital part of the management and operation of the undertaking.

The 1988 decision of *Bell Canada v. Quebec*,[15] the lead case in a trilogy, reinforced this change in approach and was the first case in which the term "inter-jurisidictional immunity" was used to describe the doctrine. The allegedly intruding provincial law in the 1988 *Bell Canada* decision was Quebec's occupational health and safety legislation. The decision states that inter-jurisidictional immunity will apply to provincial legislation that affects the "essential part of the very management and operation of [federal] undertakings," "bears upon those subjects in what makes them specifically of federal jurisdiction"[16] and "affects a vital or essential part" of the undertaking. According to this decision, the federal heads of power must have a "basic, minimum and unassailable content" that cannot be interfered with by provincial laws of

[14] *Quebec (Commission du Salaire Minimum) v. Bell Telephone Co.*, [1966] S.C.R. 767.
[15] *(Commission de Sante et de la securite du travail du Quebec),* [1988] 1 S.C.R. 749.
[16] At para.19 and 304.

general application.[17] For further certainty, the 1988 *Bell Canada* case stated that this change of wording was intended to reflect and broaden the scope of the inter-jurisdictional immunity doctrine:

> I am of the view that the test for impairment is insufficient and is not conclusive in cases where, without going so far as to impair or paralyze federal undertakings, such application affects a vital part of those undertakings.

On the basis of this conclusion, Bell was spared from the application of Quebec's occupational health and safety legislation, as was Canadian National Railway and an inter-provincial trucking company Alltrans Express from British Columbia's occupational health and safety legislation in the two other companion cases in the trilogy.[18]

Revisting the Expansion of Inter-Jurisidictional Immunity

Doubts about the broadened, "affects a vital part" approach to inter-jurisdictional immunity arose almost immediately, both from academic commentary and from dissenting and obiter statements in other cases.[19] In the case of *O.P.S.E.U. v. Ontario,*[20] the appellant union argued that provincial public sector legislation, which limited the ability of public servants to participate in elections, should be inoperative by reason of its intrusion into federal elections. Chief Justice Dickson questioned the expansion of the doctrine, writing:

> The doctrine [of interjurisdictional immunuty] had its origins in the so-called "company law cases" where it was held that provincial laws could not sterilize or impair the status or essential powers of a federally incorporated company…

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[17] At para. 250.
[18] *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, *Alltrans Express Ltd. v. British Columbia (Workers'/Workmens' Compensation Board)*, [1988] 1 S.C.R. 897.
[19] See Hogg, at 15-30.
[20] *(Attorney General)*, [1987] 2 S.C.R. 2.

> …The doctrine came to stand for the proposition that a provincial law could not affect a vital part of the management and operation of a federal undertaking…
> …even though the doctrine of interjurisdictional immunity has arguably expanded since its company law origins, it is, in my opinion, not a particularly compelling doctrine…[21]

The Chief Justice cited criticisms from Hogg, who noted that the doctrine is both inconsistent with division of powers analysis, because it invalidates a law despite the fact that it only has an incidental effect on another level of government, and unecessary, because the federal govenrment could pass legislation to protect its undertakings that would prevail over provincial laws of general application because of paramountcy. The Chief Justice concluded:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[22]

Following *O.P.S.E.U.*, and the year after the 1988 *Bell Canada* trilogy, the Supreme Court found it necessary to restrain the broadened immunity doctrine in the case of *Irwin Toy Ltd. v. Quebec*.[23] The issue in *Irwin Toy* was provincial legislation which prohibited commercial advertising directed at children. An intervenor in the case noted, that by prohibiting television advertising to children, the law reduced advertising revenue to commercial broadcasters, a "vital part" of their undertaking. The Supreme Court 'clarified' the inter-jurisdictional immunity doctrine, stating for the first time that where a provincial law "directly affects" a federal undertaking, it is inoperative if it affects a vital

[21] At para. 19-21.
[22] At para. 22
[23] *(Attorney General),* [1989] 1 S.C.R. 927

part, but if it "indirectly affects" a federal undertaking, it is not inoperative unless it "impairs its operations."[24] Elaborating on the meaning of "impairs its operations," *Irwin Toy* implies this will occur if "the undertaking was 'sterilized in all its functions and activities.'"[25]

Hogg criticizes this case, writing that if the theory underlying a broadened inter-jurisidictional immunity doctrine is based on the federal heads of power operating 'defensively' against intrusions from provincial laws that affect their "unassailable, exclusive core," it ought to make no difference whether the intrusion to that unassailable core is direct or indirect.[26] Indeed, the whole premise behind the inter-jurisdictional immunity is to prevent provincial governments from doing indirectly -- regulating federal matters via laws of general application -- what they cannot do directly -- which is to legislate respecting federal matters. Consequently, creating a new distinction between direct and indirect effects in the application of the inter-jurisdictional immunity doctrine, as was done in the *Irwin Toy* decision, seemed to make little sense. A better approach would be to revisit the doctrine as a whole, as the Supreme Court ultimately did this year.

2007 Supreme Court Decisions

These simmering tensions and doubts with the new broadened inter-jurisdictional immunity doctrine set the stage for the *Canadian Western Bank* and *LaFarge* decisions,

[24] At para. 25.
[25] At para. 27.
[26] At para. 15-32.

which scale back the inter-jurisidictional immunity doctrine.[27] In *Canadian Western Bank*, Binnie and Lebel JJ. writing for all justices except Bastarache J. commented that:

> We believe that the law as it stood prior to *Bell Canada* (1988) better reflected our federal scheme. In our opinion, it is not enough for the provincial legislation simply to "affect" that which makes a federal subject or object … specifically of federal jurisdiction.[28]

Of the two decisions, the *Canadian Western Bank* decision addressed the inter-jurisdictional immunity most. The appellant banks in *Canadian Western Bank* argued that provincial regulation of insurance affected their ability to use insurance as collateral for loans and therefore affected a "vital part" of the federal power of banking. On this basis, banks argued that they ought to be immune from such regulation. The Court found against the Banks.

While the Supreme Court in *Canadian Western Bank* found as a fact that provincial insurance regulation did not go to the "core" of federal banking power,[29] the case went much further:

> The "dominant tide" [of constitutional law] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest….
> In our view, the sweeping immunity argued for by the banks in this appeal is not acceptable in the Canadian federal structure. The argument exposes the dangers of allowing the doctrine of interjurisdictional immunity to exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine.[30]

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[27] In both cases, Justice Bastarache wrote his own reasons that supported the other justices' decision on the result but not on the principle of inter-jurisdictional immunity. Justice Bastarache said that the other justices approach to the doctrine severely restricts it and that was unwarranted. For example, in Canadian Western Bank, see para. 111.
[28] At para. 48.
[29] At para. 91-96.
[30] At para. 36-37.

In addition to dissonance with division of powers analysis, the Court noted that a broad definition of inter-jurisidictional immunity requires determining what constitutes the "vital and essential core" of each federal power, an inquiry which is inherently uncertain, and by providing immunity to federal undertakings in the absence of a conflicting federal law, leads to undesirable "legal vacuums."[31]

In addition to doubting the correctness of the 1988 *Bell Canada* decision, *Canada Western Bank* also sought to limit its impact by carefully narrowing the wording in *Bell Canada*. While having earlier rejected the *Bell Canada's* approach that "affecting" rather than "impairing" was sufficient for immunity, *Canada Western Bank* clarifies the test further, indicating what is meant by the words "vital or essential":

> [Bell Canada] intended to use "vital" in its ordinary grammatical sense of '[e]ssential; to the existence of something; absolutely indispensable or necessary; extremely important, crucial." The word "essential" has a similar meaning, e.g. "[a]bsolutely indispensable or necessary." … What is 'vital' or 'essential' is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation …there is no general interjurisidictional immunity, provided that 'the application of [the] provincial laws does not bear upon those [federal] subjects in what makes them specifically of federal jurisdiction.[32]

The *LaFarge* decision arose from a dispute between a municipality (Vancouver) and a federal port authority about land-use planning, in which the port authority argued that they were immune from provincial land use controls because such controls affected the "essential core" of the federal navigation and shipping power.[33] The dispute was being advanced by a ratepayers group rather than the municipality.

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[31] At para. 43-45.
[32] At para. 51.
[33] The *LaFarge* decision was decided according to the doctrine of federal paramountcy, because there were land use planning policies and procedures who's purpose would have been frustrated if both federal and provincial laws were to be applied. However, it supported *Canadian Western Bank's* approach to narrowing interjurisidictional immunity and would not have granted immunity had there been no conflicting federal law.

The *LaFarge* case affirmed the approach taken in *Canada Western Bank.* Binnie and Lebel JJ. writing for the other justices except Bastarache J., commented that:

> …the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land-use planning controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.[34]

These two cases suggest that the doctrine of inter-jurisdictional immunity should generally not be applied where the legislative subject matter presents a double aspect and both federal and provincial authorities have a compelling interest. The matter at issue in the *Lafarge* case – the development of waterfront lands – presented a double aspect as it could potentially fall under either provincial or federal jurisdiction, depending on ownership of the lands and/or the use to which the lands were to be put.

Rather than rendering inoperative provincial land use controls on account of inter-jurisdictional immunity, the Supreme Court adopted a more conventional constitutional analysis and found the provincial controls to be inoperative on account of federal paramountcy. In order for the doctrine of federal paramountcy to prevent the application of valid provincial/municipal law, the Court must find the existence of valid and applicable federal and provincial laws and the impossibility of their simultaneous application by reason of operational conflict, or because such application would frustrate the purpose of the federal law.

In the *Lafarge* case, the Court found that the City Zoning and Development By-law governing land-use development was a valid expression of provincially authorized legislative power as it was a law of general application that was not aimed at navigation

[34] At para. 4

and shipping. In terms of federal regulation, the Vancouver Port Authority ("VPA") had developed a detailed land-use plan pursuant to s. 48 of the *Canada Marine Act*. The Court therefore found that both the Parliament of Canada and the legislature of British Columbia had validly exercised their legislative powers and there was, at least in principle, a valid double aspect to the matter of waterfront re-development.

However, on the facts the Court found the test for operational conflict had been met. The Lafarge project complied with both the VPA's land use plan but not the City's by-law which contained a 30-foot height restriction. However, the Court found that to subject LaFarge to both regimes would be contrary to the purpose of the federal act to grant the VPA the authority to make decisions about this type of land use in the harbour, and would therefore frustrate the purpose of the federal act.[35]

Given the operational conflict between the federal and provincial laws, and the provincial law's impact on the achievement of the federal purpose, the pre-conditions for federal paramountcy were met and the Court held that the City of Vancouver's Zoning and Development By-law was constitutionally inapplicable to the proposed Lafarge development on the VPA Lands. Importantly however, the Court went on to comment that there will be other cases where both levels of government are vitally interested in a project and the port authority must comply with municipal procedures. [36]

It is useful to examine the areas where there have been conflicts between municipal powers and federal undertakings. There are a number of cases dealing with the subject areas of airports; harbours; building permits and site plan; municipal licensing and heritage protection. It remains to be seen how recent Supreme Court cases may

[35] At para. 84.
[36] An example the Court commented on was a hypothetical automotive assembly plant where the shipping aspect is severable from the manufacturing operation.

expand a municipalities ability to regulate federal undertakings in these and other subject areas.

Municipal Regulation of Federal Undertakings

Airports

Perhaps the most frequent conflict between municipalities and federal powers has arisen in the context of the regulation of airports, where municipal concerns respecting land use, zoning and noise regulation often conflicts with the federal power over aeronautics and airports. One of the leading cases highlighting municipal/federal conflict in respect of airports is *Johannesson v. West. St. Paul*,[37] a case in which the Supreme Court struck down a provision in Manitoba's municipal act that permitted municipalities to regulate or prohibit the construction of airports. The municipal by-law and provision of the municipal act in *Johannesson* were *ultra vires* because the provincial act attempted to authorize municipalities to directly regulate or prohibit airports, and as such, the law was not of general application and the case was decided according to traditional division of powers analysis.

Subsequent cases, however, typically rendered municipal by-laws inoperative even if they were of general application. In the 1976 decision of *Orangeville Airport Ltd. and Town of Caledon*, a municipal by-law was rendered inoperative because it attempted to zone a particular area agricultural, and limited development to "public parking, race

[37] *(Rural Municipality)*, [1952] 1 S.C.R. 292.

tracks, motels, …[and] recreational establishment." [38] For this reason, the municipality refused to grant the airport building permits necessary for a planned expansion.

The Attorney General intervened in the case to support the Town, arguing that the zoning by-laws were passed under valid provincial legislation of general application. To reconcile the ability to prohibit airports under provincial land use planning legislation with the federal aeronautics power, the provincial Attorney General proposed that federal power should prevail only for public airports built on land the federal government had expropriated or otherwise obtained. The court rejected this submission, stating that "if this argument were sound it could effectively sterilize the greater part of the aeronautics power." Finding that the proposed new hangars were "a necessary and integral part of airports," the court declared that the by-could have no application to airport lands.

A similar case is the 1992 decision of *Venchiarutti v. Longhurst and Longhurst* which involved a similar by-law in the Township of Muskoka Lakes. The by-law in *Venchiarutti* prohibited the construction of any structure on the land. The Township, no doubt aware of the *Johannesson* and *Orangeville Airport* decisions, told the respondent that building an airstrip was not contrary to the municipal by-law. However, a neighbour brought an application for an injunction, alleging that the airstrip would be noisy, lower property values and could be dangerous. The Court of Appeal disposed of the neighbour's application, citing *Johannesson* and *Orangeville Airport* for the proposition that "the municipal by-law, albeit *intra vires*, was inapplicable and ineffective to control the respondent's aerodrome."[39]

[38] 66 D.L.R. (3d) 610 (Ont. C.A.).

[39] The decision did not formally invoke inter-jurisdictional immunity, but rather the "canon of construction" of 'reading down' the by-law. While this may be correct as a legal doctrine, reading down is also the remedy granted when inter-jurisdictional immunity is found, see Hogg at 15-28. Deciding this case

The almost identical situation arose in, *Comox Strathcona (Regional District), v. Hansen*.[40] The Regional District in *Hansen* removed "airports" from a list of permitted uses in a certain area. At some point afterwards, the defendants attempted to establish a landing strip. Like the other cases, the by-law was rendered inoperative for reasons of inter-jurisdictional immunity, the court writing "the doctrine of inter-jurisdictional immunity takes precedence over the double aspect doctrine where the impugned provincial legislation affects a vital or essential part of a federal undertaking."[41]

Another significant case is *Greater Toronto Airports Authority v. Mississauga (City)*. [42] The Court of Appeal relied upon the "affects a vital part" test in concluding that the City's building permit and development charges fees did not apply to the expansion at Pearson Airport. Interestingly, in the *Canadian Western Bank* case, the Supreme Court seems to prop up these airport cases as correct even if they were decided on a test that has now been overruled. The Supreme Court commented on the *Mississauga* in *Canadian Western Bank*, saying:

> …The appellants rely on *Greater Toronto Airports Authority v. Mississauga (City)*, … in which it was held that a neighbouring municipality could not impose its land-use development controls (and charges) on the planned expansion of terminal facilities at Toronto's Pearson Airport. Of course inter-provincial and international carriers have a vital and essential interest being able to land at an airport or having access to a safe harbour. Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation. See *Johanneson v. Rural Municipality of West St. Paul*, [1952] S.C.R. 292, *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.), *and Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.). [43]

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on the basis of reading down, rather than inter-jurisdictional immunity, is likely a distinction without a difference.

[40] 2005 BCSC 220.

[41] At para. 45.

[42] [2000] O.J. No. 4086 (C.A.) This case is discussed below under the Building Permits and Site Plan Section.

[43] At para. 54

Reflecting the debate in the jurisprudence as to whether "impairs or sterilizes" or "affects a vital element" is necessary to invoke inter-jurisdiction immunity, the decision of *British Columbia v. Van Gool*[44] diverged from the other airport cases and upheld a municipal by-law restricting the operation of a private airstrip. Two aspects distinguish this case from the above airport cases, one factual, the other legal.

First, unlike *Johannesson, Orangeville Airport, Hansen* and *Mississauga,*[45] the defendant in *Van Gool* had no license or permit from any federal agency authorizing the use of the property for aeronautics. The decisions in *Orangeville Airport* and *Johannesson*, cited the issuance of a permit by the federal government as additional support to invalidate the municipal by-law.[46] To enforce the municipal by-law in the face of a federal permit would frustrate the purpose of the federal licensing scheme and would constitute conflict, rendering the by-law inoperative. By contrast, the *Van Gool* decision placed considerable emphasis on the lapse or 'hiatus' in regulation that would occur if the municipal by-law was invalidated, given the apparent lack of federal control over the defendant's airstrip.

Second, the *Van Gool* decision preceded the 1988 *Bell Canada* trilogy by one year. Notwithstanding the 1966 *Bell Canada* case which suggested the broader approach to immunity, *Van Gool* decided to follow Hogg's approach to the application of the

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[44] [1987] B.C.J. No. 714 (C.A.).

[45] In *Venchiarutti*, the appellant was apparently advised by the federal Department of Transportation that no permit was needed to operate his private airstrip. By contrast, the clear implication in *Van Gool* is that such a permit was required, but was not obtained by the defendant. Further, the case found that the Department of Transportation was taking no enforcement action despite the failure to obtain a permit. There is no obvious explanation for the difference between the two cases. It may be that the Aeronautics Act was changed in the intervening time between these two cases. Another point of distinction may have been that in *Van Gool*, the defendant was renting out the airstrip to other users, while in *Venchiarutti*, the airstrip was truly private.

[46] Both these cases found that the federal government had 'occupied the field' therefore the applicable municipal by-law that had some effect on aeronautics was in conflict. This approach to conflict is likely no longer correct, see *Spraytech v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 38.

immunity doctrine and declined to grant immunity unless the municipal by-law "sterilized or mutilated" the federal undertaking. While *Van Gool* was doubted and not followed in both *Venchiarutti* and *Hansen* in large part because of the 1988 *Bell Canada* trilogy, with the reasoning behind the decisions in the trilogy effectively overturned, the *Van Gool* case may yet emerge as a helpful decision for municipalities.

In light of *Canadian Western Bank* and *LaFarge,* it will be interesting to see whether some limited space may have been opened to allow municipalities to affect airports. The comments in *Mississauga* that airports do not lend themselves to "overlapping regulation" suggest a municipality's impact, if any, over airports will likely still be severely limited. Clearly, an outright prohibition on airports, or the enactment of by-laws prohibiting an airport after land had already been purchased for the purpose of building an airport would certainly 'impair a vital or essential element' of the federal aeronautics power and would therefore not be permitted.

In any future cases dealing with airports, one will need to examine the facts to see whether there is scope for the provincial (municipal) laws of general application to apply. The ownership of the lands will be an important factor.[47] Where dual compliance[48] with both federal aeronautics legislation and municipal by-laws would be possible, there may be a reasonable argument the provincial (municipal) laws should apply.

Harbours

[47] If the Federal Crown or a Crown agent owns the lands, there may be little scope for provincial (municipal) laws to apply.

[48] The new test for conflict between federal legislation, and municipal by-laws derived from provincial legislation, is whether there is direct operational conflict, or whether the municipal by-law frustrates the purpose of the federal act, see *Spraytech*, above, at para. 38.

It is fitting that one of the two recent Supreme Court cases, involved a dispute between a municipality and a port authority in respect of land use planning. Like airports, land use planning, particularly around ports, has been yet another point of tension between municipalities and the federal government.[49]

An earlier case illustrating this type of dispute is the case of *Hamilton Harbour Commissioners v. Hamilton (City),*[50] involving a dispute between the municipality and the port authority regarding the zoning of lands both within and adjacent to port authority lands. The Harbour Commissioners sought a declaration that various land use by-laws of the City, in particular, by-laws which zoned certain port land as agricultural, open space and "in transition", were beyond the constitutional power of the municipality, and further, that the Harbour Commission had exclusive jurisdiction to regulate port land. Distinguishing this case from many of the airport cases reviewed above, the municipal land-use by-law stated in two places that the by-law would not be applied in a manner "as to conflict with shipping or harbour operations."

This case declined to follow the out-dated "water-tight compartments" approach to federalism and acknowledged that significant overlap and interplay between federal powers and provincially derived powers was a practical necessity. The Court acknowledged that the Harbour Commission had jurisdiction to pass by-laws to regulate land not only in the harbour, but also of land adjacent to the harbour to prevent such private land use from interfering with navigation and shipping. As well, the decision recognized that the Harbour was not a "federal enclave" and that the City could pass zoning by-laws affecting land use in the harbour as long as such by-laws did not prohibit

[49] *LaFarge* at para. 37 – 38.
[50] (1978), 21 O.R. (2d) 459 (H. Ct. J.), aff'd C.A.

or regulate navigation and shipping. *Hamilton Harbour* was cited with approval in *LaFarge*[51] in recognition of the case's "flexible" and "overlapping" approach to federalism.[52]

The *LaFarge* case is broadly similar to *Hamilton Harbour* and involved a proposed manufacturing development on port lands which a resident's group submitted exceeded the City's height restrictions, among other objections. The Court acknowledged the "double aspect" of the proposed development:

> The potential for conflict in mixed land-use development along urban waterfronts is considerable… The development of waterfront land could potentially fall under either provincial or federal jurisdiction, depending on the ownership and the use to which the land is proposed to be put. Waterfront lands do not cease to be "within the province" by reason of their potential use for federally regulated activities … but of course federal authority will be paramount to the provincial authority in cases of overlapping jurisdiction where there is a valid federal law and a valid provincial law applicable to different aspects of the proposed use and the two laws come into operational conflict. [53]

While LaFarge argued that it was exempt from provincial land-use planning because the proposed development was to occur in a federally regulated harbour, the Court rejected this submission:

> The question before us, therefore, is whether it can be said that federal jurisdiction over all development on [port authority] lands within the port area of Vancouver, even non-Crown lands *not* used for shipping and navigation purposes, is "absolutely indispensable or necessary" to the discharge by the [port authority] of its responsibilities in relation to federal "public property" or "shipping and navigation". We concluded in *Canadian Western Bank* that interjurisdictional immunity is not essential to make these federal powers effective for the purposes for which they were conferred and therefore, this appeal should be decided on the basis of federal paramountcy, not interjurisdictional immunity.[54]

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[51] At para. 38-39.
[52] *Canadian Western Bank,* at para. 42.
[53] *LaFarge,* at para. 38 and 37.
[54] At para. 43.

LaFarge's claim for immunity from provincial land-use planning was rejected, although the application for the development was ultimately successful by virtue of the operation of federal paramountcy. As noted above, the Supreme Court found that both the provincial (municipal) and federal regimes had validly exercised their legislative powers. While the project complied with the VPA's land use plan but not the City's by-law, as discussed above, the decision found an operational conflict on the facts.

There is one case that has arisen in the context of municipal legislation respecting harbours that has been decided after the 2007 Supreme Court cases. *Salt Spring Island Local Trust Committee v. B&B Ganges Marina Ltd*. [55] involved the application of municipal land-use by-laws to a floating barge in a marina. The barge in *Salt Spring* was being used as temporary office space, but was very old, had sunk several times, was unsightly and contravened the applicable municipal by-law respecting the maximum height and size of buildings. After a temporary permit to allow the barge expired, the municipality sought to have it removed. In response, the barge owners submitted that the barge was registered under the *Canada Shipping Act*[56] and that they ought to be immune from municipal land use controls.

Unlike *LaFarge*, the decision found no applicable federal land use controls governing the marina, so paramountcy was not engaged. Relying heavily on *LaFarge*, the court declined to grant the barge owners immunity, writing:

> …it is my opinion that land-use control in Ganges Harbour by the federal government is not "absolutely indispensable or necessary" to its jurisdiction over shipping and navigation. Although the Land Use Bylaw incidentally affects the federal power over navigation and shipping by regulating the size and height of buildings and structures in Ganges Harbour, *it does not impair or paralyze the core of the power of the federal government over navigation and shipping*. As a

[55] 2007 BCSC 892.
[56] 2001, S.C. 2001, c. 26.

> result, the doctrine of interjurisdictional immunity is not engaged, and the Land Use Bylaw does apply to the Floating Structure. [emphasis added]
> The Supreme Court of Canada decided in *Lafarge* that commercial ports are not federal enclaves and that the doctrine of interjurisdictional immunity does not prevent provinces and municipalities from exercising land-use control with respect to ports….[57]

Like *LaFarge* and *Hamilton Harbour*, *Salt Springs* found that land-use was a subject in which there is a 'double aspect' such that municipal land-use by-laws may validly apply. On a broader level, *Salt Springs* is helpful because it re-introduces the language of "paralyze" along with the word "impair," seemly to imply that they may be synonymous. This case puts into application the new approach that a provincial law that "affects" the federal undertaking is no longer sufficient to conclude it does not apply to the undertaking.

Building Permits and Site Plan Approval

A further area of conflict between municipal governments and federal undertakings have involved the regulation of construction, both as it relates to construction on federally owned land and land owned by federally regulated entities. In the case of *City of Ottawa v. Shore & Horwitz Construction Co. Ltd.*,[58] the City of Ottawa attempted to prosecute a sub-contractor which had constructed buildings for an airport which was owned by the federal government. The court stated that:

> The barracks built by the accused firm and the land on which they were located were owned by the Crown in the Right of Canada and formed part of the Public Debt and Property over which s. 91(1A) of the B.N.A. Act *excludes the Province from any legislative authority* and over which the Government of Canada has the exclusive right to legislate. [emphasis added]

[57] At para. 88 and 89.
[58] (1960), 22 D.L.R. 2d 247 (Ont. H. Ct.)

After finding that the provincial building act could not apply on federal land, the defendant was acquitted.

However, the *Shore & Horwitz* decision cited no authority for the proposition that federal land excludes the province from "*any* legislative authority" on federal land. In any event, even if that aspect of the decision was correct at the time, it is no longer correct. The constitutional authority for provinces in respect of property and civil rights, which is the source of the regulation of buildings, is limited in the constitution by the words of limitation "in the province." Lands owned by the federal government remain "in the province"; the federal power over property does not operate as a territorial limitation over the provincial power creating a "federal enclave" in which provincial laws do not apply.[59] The legal principles governing the application of provincial laws on federal land are the same as the principles governing the application of other provincial laws that have some effect on the regulation of federal undertakings and entities.[60]

More recent disputes between municipalities and federally regulated entities regarding building permits were not decided in such a categorical manner as was *Shore & Horwitz.* The case of *Greater Toronto Airports Authority v. Mississauga (City)*[61] was about the applicability of municipal building permits and development fees to a proposed expansion at Pearson airport. The decision relied heavily on the 1988 *Bell Canada* trilogy, finding that the applicable test for inter-jurisdictional immunity is not whether the municipal by-law:

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[59] *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754. This case dealt with whether a construction company doing work on Mirabel Airport had to comply with Provincial Minimum Wage laws. The SCC found that it did.
[60] Same, see also *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695 and 703.
[61] [2000] O.J. No. 4086 (C.A.).

> … 'impairs' or 'interferes' or 'paralyzes' or 'sterilizes'… If a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply…[62]

Citing previous decisions that the design, dimensions and materials used in building airport buildings have a 'direct effect' on the airport, the Ontario Court of Appeal found Pearson airport to be immune from Mississauga's building permit and development charges scheme.[63]

The decision of *Winnipeg (City) v. Canadian Pacific Railway Co.*[64] is similar to the *Mississauga* case except that it involved municipal building permits as they related to a train station. In *Winnipeg*, the Canadian Pacific Railway demolished an existing building and built a new structure, largely to accommodate its office employees. The structure included employee personal space, conference rooms and a lunchroom. The court canvassed the applicable authorities, and concluded that the structure:

> Though not vital or essential to the C.P.R. undertaking of running trains, is significantly supportive of that undertaking…
> The question is not whether C.P.R. required this particular reconstruction to facilitate directly, the running of the trains themselves. The question, rather, is whether the construction is within a facility of the C.P.R. that significantly supports its core function, the operation of trains.[65]

The court found the defendant to be immune from the provincial law, and therefore not guilty of the offence of demolishing and constructing a building without a permit.

In light of the new approach to inter-jurisdictional immunity, one needs to consider whether these building permit cases are still correct. None of these cases made the factual finding that obtaining a building permit or complying with the *Building*

[62] At para. 41.
[63] At para. 48 and 49.
[64] [2003] M.J. No. 303 (Prov. Ct.).
[65] At para. 20-22.

Code[66] in any way impaired the operation of the relevant undertaking.[67] The municipal building permit by-laws were not enforced in *Mississauga* and *Winnipeg* because to do so would have "affected a vital part" of the airport or "affect some related aspect of the operation" of the railway, respectively. As clearly indicated in *Canadian Western Bank*, this approach is no longer sufficient for immunity. However, as noted above, the Supreme Court seemed to prop up these and other cases as correctly decided notwithstanding the new approach to immunity, so an opinion cannot be expressed on the correctness of these cases with certainty.

The *Telus* case was also decided before the 2007 Supreme Court decisions.[68] Telus argued that the City's site plan by-law approval process did not apply to its telecommunication facilities. In Toronto, these facilities are often erected on existing buildings owned by third parties. The City argued, based on the *Irwin Toy* case, that the Court should apply the "impairment test" as the by-laws only indirectly affected Telus. The Court concluded on the facts that to the "extent site plan control enables the City to control the placement or siting of wireless towers, or to refuse or significantly delay permission to establish wireless towers, it allows the City to substantially impair Telus essential activities". As a result, the Court found site plan did not apply to Telus' telecommunication facilities.[69]

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[66] O. Reg 350/06, *Building Code Act*, S.O. 1992, c. 23.

[67] Although a factual finding of impairment was not made that may have been because the test for immunity used in the cases did not require such a finding. In particular, the Mississauga case involved building permits for air-traffic control towers and aircraft hangars. In light of the highly specialized nature of these buildings, it may be that they could not have been built in compliance with the *Building Code* without significant impairment. It is unlikely that the same could be said about an office building for clerical staff in the *Winnipeg* case.

[68] (2007), 279 D.L.R. (4th) 111 (Ont. S.C.J.)

[69] This is despite the fact the Court noted that there was really no evidence of actual impairment in this case. See para. 6.

In summary, municipal building and other officials will need to carefully consider all of the facts when dealing with federally regulated entities in terms of building permits and site plan approval. While it is likely that building permits can be required for federal undertakings as a general principle, a situation may arise in which a highly specialized and unique structure is necessary for the federally regulated undertaking, and to refuse its construction would genuinely impair the undertaking. One need only think of such unique structures which are necessary for airports, ports, railways and telecommunications to illustrate how requiring a building permit could inadvertently impair or paralyze a federal undertaking. In addition, municipalities still need to consider to what extent the federal government already regulates the proposed building or structure, and therefore whether insisting on compliance with the *Building Code* would produce an operational conflict.

Municipal Licensing

The issue of inter-jurisdictional immunity arose in the context of municipal licensing in the case of *Commission de transport de la communaute urbaine de Quebec v. Canada (National Battlefields Commission)*[70]. The appellant in *National Battlefields* was a transit body for the regional municipality which was given statutory authority to regulate bus services in the area. The federal Commission, however, contracted with bus companies to provide sight-seeing tours which did not possess a permit from the transit authority. The case was decided in the federal Commission's favour because the plain meaning of the statute did not require the Commission to contract only with companies

[70] [1990] 2 S.C.R. 838.

which had a permit if the sight-seeing bus ride was offered to the public without charge. Still, the case went on to discuss the constitutional issue of inter-jurisdictional immunity using the broad *Bell Canada* (1988) test, writing that it would have granted immunity because by interfering with sight-seeing tours of the site, the "provincial statute *touches* on a vital or essential aspect of [the federal undertaking's] establishment, management, or operation…"[71]

While the reasoning in the *National Battlefield*'s case is likely no longer correct, the case will still be of general interest to municipalities, and not just those in which large federal parks are situated. Municipal licensing of matters such as food and transportation in respect of federal undertakings could arise in a number of contexts, such as airports and ports as discussed above. *National Battlefields* also provides insight into what makes municipal licensing vis-à-vis federal undertakings more or less objectionable for the purpose of constitutional law. The decision found that the applicable statute left the federal Commission "at the mercy of the largely discretionary decisions" of the licensing body, and went on to illustrate the many ways in which the statute was discretionary, vague and over-broad.[72] Accordingly, irrespective of paramountcy and inter-jurisdictional immunity issues, municipal licensing by-laws need to be limited to matters logically relevant to the purpose of the licence with discretionary powers circumscribed by guidelines, factors and considerations to the extent possible. The *Canadian Western Bank* case gives support to the possibility of provincial and municipal licensing regimes applying to federal undertakings depending again on the facts of the case. As noted

[71] At para. 33.
[72] At para. 40-44.

above, in that case a provincial licensing regime dealing with insurance was held to validly apply to the banks.

Heritage

Municipalities in Ontario are empowered by section 29 and 39 the *Ontario Heritage Act*[73] to designate property or districts within the municipality as historic and thus grant the property or area various protections from demolition or alteration. In a somewhat unconventional situation, inter-jurisdictional immunity arose in the context of the preservation of historical property in the case of *Kitkatla Band v. British Columbia.*[74] This decision concerned a permit issued by the provincial government which permitted the logging of trees in an area that contained aboriginal artefacts, and expressly permitted the alteration and removal of a certain number of such artefacts. The appellant band argued that the provincial Act and associated permit authorized the removal, alteration and destruction of aboriginal artefacts, and that such artefacts went to the core of aboriginal identity. On this basis, they argued that the artefacts were immune from the provincial permit authorizing their destruction and removal. The appellant's claim for immunity was rejected on the basis of a factual finding that the effect of the legislation did not go to the "core" of the aboriginal identity and therefore the federal power over Indians.[75]

This case could have broader application because, as suggested by the intervening Attorney General for Canada, cultural property could fall under the jurisdiction, or have

[73] R.S.O. 1990, c. O.18.
[74] *(Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.
[75] At para. 77

an effect, on some other federal "head of power."[76] One could imagine that a municipality could seek to designate a property or an area that included, for example, a post office, port, bank, penitentiary or other federally regulated entity. In such a situation, it may be that the property would be immune from the restrictions on alteration or demolition only to the extent that the restrictions "impaired a vital or essential element" of the purpose for which the property was built or is used or if the provincial (municipal) regime conflicted with federal laws that applied to the property.

Still, a municipality which attempts to designate a building, owned by a federally regulated entity, as historical would be wise to proceed with caution. First, given the extensive restrictions that govern the alteration of historically designated buildings, heritage restrictions could easily be found to "impair the essential or vital elements" of the federal undertaking. Second, the federal government has enacted statutes, by-laws and regulations which govern the use of certain property such as buildings.[77] Consequently, a heritage designation of such federally regulated entity or property could easily 'frustrate the purpose' of the federal act, leading to a successful federal paramountcy argument.[78]

Conclusion:

The *Lafarge* case and the companion *Canadian Western Bank* case are helpful to municipalities because they suggest a restriction in the application of inter-jurisdictional immunity. The Supreme Court is suggesting that these types of disputes should primarily be dealt with under the paramountcy rules. Consequently, the particular facts of future

[76] At para. 31.
[77] See for example section 10 and 11 of the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, section 44 and 46 of the *Canada Marine Act*, S.C. 1998, c. 10, the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50
[78] Recall the test for federal paramountcy in the case of conflict, for example, *Spraytech*, above, at 35.

cases will be important as the municipal regime will only not apply where there is an operational conflict with federal laws, or the application of municipal laws frustrates the purpose of the federal law. This will tend to leave more room for municipalities in which to legislate, as municipal legislation will be rendered inoperative only when it truly conflicts or frustrates the purpose of federal legislation, rather than simply "affecting" the ill-defined "core" of a federal power. Still, in light of the wording in *LaFarge* and *Canadian Western Bank* that "propped-up" and continued to support cases which were decided under the old approach to inter-jurisdictional immunity, it remains to be seen how courts will apply their stated new approach in future fact situations.