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From Telecoms to Pipelines: Good News from the Supreme Court of Canada for Pipeline Builders

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Case Commented On: *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 (CanLII)

In this decision the Supreme Court of Canada (unanimous in the result) concluded that the actions of the City of Châteauguay in creating a reserve as to certain real property were directed at frustrating Rogers' efforts to install an antenna system on property located within the City and were therefore unconstitutional as a measure dealing with the siting of telecommunications infrastructure. The majority found that Châteauguay's notice of reserve was *ultra vires* (but also went on to offer an analysis that would have rendered the reserve inapplicable on the basis of the doctrine of interjurisdictional immunity (IJI)). The minority (Justice Gascon) preferred to find for Rogers solely on the basis of IJI.

While this is no doubt an important decision for the telecommunications industry it will almost certainly prove to be more important for the more tightly networked elements of the energy sector and in particular oil and gas pipelines given the highly contentious nature of current proposals to construct new pipelines or expand existing pipelines. For earlier posts on this issue see here (Northern Gateway) and here (Kinder Morgan's expansion project).

The Facts

Rogers is a federally regulated telecoms provider. It holds a spectrum licence from the federal government which authorizes it to provide services in specified frequency ranges. The licence also obliges Rogers to provide adequate network coverage and to do that it must install and maintain radio stations and antenna systems. Under the federal scheme (*Radiocommunication Act*, RSC 1985, c R-2) Rogers must enter into an agreement with the relevant property owner for the use of a particular site and secure the federal Minister's approval for the use of that site. In order to get that approval, a licensee such as Rogers must engage in a consultation process prescribed by Industry Canada which requires the licensee to consult both the public and the relevant land use authority (LUA), in this case Châteauguay. While the goal of the consultation with the LUA is to reach an understanding or agreement, the Minister retains the right to make a final decision in the event of an impasse. A licensee has no right of expropriation. The evidence showed (at para 66) that while telecoms technology did not require the use of any particular site for an antenna "a deviation of 100 or 200 metres from a clearly specified location can prevent the antenna system from effectively meeting the network's identified needs."

Rogers secured the right to use what it believed to be a suitable site (the 411 site) but Châteauguay objected on a number of grounds, including a contravention of a by-law and aesthetic and health and safety reasons, and suggested that Rogers consider another site, the 50 site. Further discussions ensued and proposals were exchanged over a two-year period

culminating in Châteauguay establishing a reserve over the 410 property and justifying it by reference (at para 22) to concerns related to the interests and well-being of its residents and the development of its territory (at para 22). The reserve served to prohibit all construction for a two-year period and was subsequently renewed for a further two-year period. (at para 2)

Rogers contested the validity of the reserve on both constitutional and municipal/administrative law grounds.

The Majority Decision

The majority (per Wagner and Côté, McLachlin, Abella, Cromwell, Karakatsanis and Brown concurring) concluded (at para 46) that the pith and substance of the impugned measure (the notice of reserve and not the provincial legislation underpinning the reserve) was not the protection of the health and well-being of the residents or the development of the territory but rather the choice of location of radiocommunication infrastructure. The majority felt able to reach this conclusion on the basis of its assessment of the evidence which demonstrated the close connection between the municipality's actions and Rogers' proposals. In effect, the majority concluded (but without using the term, see *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297) that the notice of reserve and the reasons given in support of the notice were colourable. The majority expressly rejected the suggestion that the notice of reserve had a double aspect. There was no double aspect here, only a notice of reserve dealing with the location of telecommunications infrastructure (at para 51) and any "finding that the siting of radiocommunication infrastructure has a double aspect would imply that both the federal and provincial governments can legislate in this regard, which would contradict the precedent established by the Privy Council in *In re Regulation and Control of Radio Communication in Canada* [1932] AC 304 to the effect that the federal jurisdiction over the siting of such infrastructure is exclusive." (at para 52)

That was enough to dispose of the case since the notice of reserve was simply (at para 53) *ultra vires*. But, unusually, the majority still provided its analysis of the application of Rogers' alternative argument based on interjurisdictional immunity (IJI). The premise of such an argument is of course that the provincial measure in question is valid (*intra vires*).

The majority acknowledged, following *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 SCR 3, that IJI should be applied with restraint and in situations already covered by precedent. The majority was of the view that *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] AC 52 was authority for the application of IJI since that case suggests (at para 63) that "the siting of telecommunications infrastructure is at the core of the federal power" and (at para 65) that the Court of Appeal erred in this case "in interpreting *Bell* as meaning that municipalities have a certain degree of control over the determination of the exact location of telecommunications poles." The majority continued as follows (at paras 66 and 69):

> [66] Moreover, the evidence in the record favours a finding that the siting of radiocommunication antenna systems is at the core of the federal power over radiocommunication. It is the appropriate and specific siting of radiocommunication antenna systems that ensures the orderly development and efficient operation of radiocommunication in Canada…
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> [69] We conclude that the siting of antenna systems is part of the core of the federal power over radiocommunication and that any other conclusion would

> make it impossible for Parliament to achieve the purpose for which this power was conferred on it. The question therefore becomes whether, in the instant case, the effect of the notice of a reserve served by Châteauguay on the core of this federal power is sufficiently significant for the doctrine of interjurisdictional immunity to apply.

The majority concluded that the notice of reserve "seriously and significantly impaired the core of the federal power over radiocommunication and that this notice served on Rogers was therefore inapplicable by reason of the doctrine of interjurisdictional immunity." (at para 72) The evidence in support of this was as follows:

> [71] In the case at bar, the service of the notice of a reserve prevented Rogers from constructing its antenna system on the property at 411 Boulevard Saint-Francis for two successive two-year periods, and there was no alternative solution to which it could have turned on short notice. Once the resolution authorizing the service of the notice of a reserve had been adopted, Châteauguay's offer meant that Rogers would have to wait either until the end of the expropriation proceedings with regard to the property at 50 Boulevard Industriel or for a period of approximately seven months before it would be able to construct its installation on the property at 411 Boulevard Saint-Francis. In these circumstances, Rogers was unable to meet its obligation to serve the geographic area in question as required by its spectrum licence. In this sense, the notice of a reserve compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada.

The passage is worth quoting in its entirety, since it confirms that the IJI test is not "sterilizing" or "paralyzing" and that the more qualified test of impairment may be met by measures which serve to delay, as well as measures that completely frustrate, the attainment of the goal or objective sanctioned by the federal power.

Justice Gascon (Concurring in the Result)

Justice Gascon considered that the appeal should have been resolved on the basis of the doctrine of interjurisdictional immunity rather than on the basis of the pith and substance doctrine. In effect, it seems that Justice Gascon was prepared to take at face value Châteauguay's representations that it was enacting the reserve (at para 109) "to ensure the harmonious development of the territory of Châteauguay, to allay its residents' concerns and to protect their health and well-being ...".

In the name of "a flexible approach tailored to the modern conception of federalism, which allows for some overlapping and favours a spirit of co-operation" (at para 93) and an approach that is consistent with the presumption of validity, Justice Gascon clearly favoured a more deferential and "delicate" approach to the assessment of pith and substance than did the majority. Justice Gascon put the point this way at para 106:

> [106] In my view, this more nuanced understanding of the effects of the notice of a reserve is in line with a more flexible conception of the pith and substance doctrine that is more consistent with the guiding principles discussed above. I think it would be prudent to approach the application of this doctrine in this way. An overly narrow understanding

> of the consequences of the measure that is limited to an examination of just one of its effects could lead to the premature conclusion that the measure applies only to the matter so affected, that is, to the siting of radiocommunication towers. By contrast, undertaking the analysis by way of an approach that takes into account the various effects of the notice on Châteauguay's ability to manage its territory in accordance with its citizens' expectations favours a more accurate understanding of the matter to which this notice actually applies.

Once again the entire text merits quotation, because implicitly, if not explicitly (see the comments of the majority above on double aspect), the majority must be taken to have rejected this approach. For the majority it is clearly not enough that a provincially authorized entity might have relied on a legitimate provincial objective if it was in fact motivated to frustrate a legitimate federal purpose.

Justice Gascon largely agreed with the majority on the formulation and application of the IJI doctrine but his concluding comments with respect to the question of when the impairment occurred are worth noting (at para 121):

> The measure's intrusion on the core of the power is significant and amounts to an impairment. My colleagues base the impairment on the time during which the notice of a reserve was to be in effect, that is, two consecutive two-year periods. In my opinion, the impairment existed as of the time when the effect of the notice is found to have prevented Rogers from installing its radiocommunication tower on the available site that had been formally approved by the Minister of Industry, given that the federal legislation and the *Circular* both give the Minister the last word as regards the siting of radiocommunication systems in Canada. Such an obstacle has undesirable and extremely harmful consequences on the orderly development and efficient operation of radiocommunication insofar as Rogers' activities are concerned.

The Principle of Co-operative Federalism

The decision features an interesting discussion of the idea or principle of co-operative federalism. This was a central plank of Justice Gascon's judgement. He noted (at para 85) that:

> ... any application of the constitutional doctrines must take into account the principle of co-operative federalism to which the Court has referred in a number of cases (*CWB*, at para. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, at para. 162; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 (CanLII), [2005] 2 S.C.R. 669, at para. 10). This principle favours, where possible, the operation of statutes enacted by governments at both levels (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 (CanLII), [2013] 3 S.C.R. 53, at para. 50, citing *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641; *CWB*, at para. 37). The Court's adoption of an approach involving concurrent federal and provincial powers, as opposed to applying the outdated concept of "watertight compartments" to establish exclusive

> jurisdictions, is consistent with this (*CWB*; *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, 2001 SCC 67 (CanLII), [2001] 3 S.C.R. 113; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2).

The majority acknowledged the importance of the principle, recognizing (at para 38) "that when the courts apply the various constitutional doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels …". But there are limits to the principle which the majority acknowledged at paras 39 and 47:

> [39] …. although co-operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority…. Nor can it support a finding that an otherwise unconstitutional law is valid.
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> [47] We agree completely with the flexible and generous approach our colleague advocates ... However, flexibility has its limits, and this approach cannot be used to distort a measure's pith and substance at the risk of restricting significantly an exclusive power granted to Parliament. A finding that a measure such as the one adopted in this case relates in pith and substance to a provincial head of power could encourage municipalities to systematically exercise the federal power to choose where to locate radiocommunication infrastructure while alleging local interests in support of their doing so.

I think that we might anticipate that paragraph 47 will feature prominently in facta filed by counsel acting for federally regulated pipelines. While the Government of Alberta did not intervene in this litigation in support of the federal position, and neither did any pipeline interests, both Edmonton and the likes of TransCanada, Enbridge, and Kinder Morgan should be celebrating this decision. The City of Burnaby may not be so enthusiastic.

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