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Federal Jurisdiction in Municipal Matters: What Happens When the Provinces or Municipalities Step on Federal Toes?

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I. INTRODUCTION:

The key to success for any ballroom dancing partnership is to understand and respect your role in the partnership, but, most importantly, you must avoid stepping on each other's toes. Failing to follow this sage and seemingly simple advice ultimately results in a loss of balance and a potential breakdown of the partnership. Perhaps the drafters of the *Constitution Act, 1867* (the ***"Constitution"***) had this sound and reasonable advice in mind when drafting Part VI of the *Constitution*, being the distribution of legislative powers.[1]

Section 91 of the *Constitution* establishes the legislative authority of the Parliament of Canada to make laws for the peace, order and good government of Canada ("**POGG**") in relation to all matters not assigned exclusively to the legislatures of the provinces. Section 91 then sets out the specific powers assigned to the federal government with the caution that it is being provided for greater certainty but "not so as to restrict the generality" of the federal government's powers.[2]

Section 92 of the *Constitution* states that in each province the legislature may exclusively make laws in relation to those matters coming within the class of subjects enumerated. Section 92.8 allows provincial legislatures to pass laws to establish municipal institutions within its province. As municipal governments are a product of provincial statutes they are limited to those powers granted to them through legislation enacted by the province and, therefore, remain creatures of provincial legislation.

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[1] *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[2] *Ibid* s 91.

Municipalities are not empowered with residuary general powers, which would allow them to exercise dormant provincial or federal powers.[3] To act, a municipality must be able to establish a grant of authority within an enabling provincial statute. The Supreme Court of Canada in *Nanaimo (City) v. Rascal Trucking Ltd.*, ruled that a municipality's grant of power must be construed reasonably and generously, however, it cannot receive a power unless it already exists.[4]

In theory, the separation of powers between the three levels of government is well defined and each exists within its individual silo. However, the lines often blur and appear to overlap and, before you know it, one level of government ends up stepping on the toes of the other.

Perhaps the reason for the overlap is that the rules are not as clear as originally envisioned. For example, regulation of the environment has been found to come under the federal government's jurisdiction pursuant to POGG, however, federal legislation in this area would appear to conflict with the provinces' power to regulate property and civil rights under section 92.13 of the *Constitution*. Similarly, pursuant to POGG under section 91 of the *Constitution*, the federal government has exclusive jurisdiction over the regulation of aerodromes, yet the province has jurisdiction over property and civil rights (s. 92.13).[5] The federal government has exclusive jurisdiction over the regulation of telecommunications and yet the courts have confirmed the provinces' powers to regulate advertising and cable installation.[6] The federal government has exclusive jurisdiction over postal services under section 91 of the

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[3] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v Hudson (Ville)*, 2001 SCC 40 at para 49, [2001] 2 SCR 241 [*114957 Canada*].

[4] *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 19, [2000] 1 SCR 342.

[5] *Constitution Act, 1982, supra* note 1 at s 92.13.

[6] See *Attorney General of Quebec v. Kellogg's Co of Canada*, [1978] 2 SCR 211, [1978] 1 ACWS 211; *The Corporation of the City of Toronto v The Bell Telephone Company of Canada* [1904] UKPC 71 (PC), aff'g (1903), 6 OLR 335 (Ont CA), rev'g (1902), 3 OLR 465 (Ont HC); Industry Canada, *Canadian Municipalities and the Regulation of Radio Antennae and their Support Structures* (Ottawa: Industry Canada, 1987).

Constitution, while the province has jurisdiction over both local works and undertakings (s.92.10)[7] and property and civil rights (s. 92.13).[8]

The aforementioned are but a few examples of overlaps that have arisen within the municipal context. The determination of which level of government has jurisdiction when such overlaps occur has often resulted in protracted and lengthy litigation that has consumed a great deal of the courts' time. This paper will focus on examples of cases where overlap has occurred primarily regarding the interpretation of municipal by-laws and the federal government's jurisdiction in the areas of telecommunication, the environment, postal service and aerodromes.

II. CONSTITUTIONAL INTERPRETATION PRINCIPLES:

Prior to embarking on a review of specific cases it is important to first provide an overview of key principles of constitutional law to assist in the analysis. The following is a brief overview of the principles applied by the Courts in assessing the validity of provincial legislation, federal legislation and municipal by-laws.

The Principle of Cooperative Federalism[9]

Cooperative federalism envisions the principle that the two levels of Canadian government (federal and provincial) should no longer operate as "watertight compartments,"[10] but should instead consult, communicate, and work together.[11] It is "a system of relationships between various political actors that allow for the continuous reallocation of responsibilities and resources" without the need to resort to the courts or the amending process.[12]

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[7] *Constitution Act, 1982, supra* note 1 at s 92.10.

[8] *Ibid* s 92.13.

[9] For additional cases providing a more detailed discussion of the principle, see *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37, [2007] 2 SCR 3 [*Canadian Western Bank*]; *PHS Community Services Society v Canada (Attorney General)* 2011 SCC 44 at para 63, [2011] 3 SCR 134 [*PHS Community Services*].

[10] *Rogers Communications Inc v Chateauguay (Ville)*, 2016 SCC 23 at para 85, [2016] 1 SCR 467 [*Rogers*].

[11] WR Lederman, "Some Forms and Limitations of Co-Operative Federalism" in WR Lederman, ed, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) at 315.

[12] Peter W Hogg, *Constitutional Law of Canada: 2012 Student Edition*, 5th ed (Toronto: Carswell, 2012) at 5-45 to 5-46.

Pith and Substance Doctrine[13]

The "pith and substance" of a law or provision refers to its "dominant characteristic" or "matter". This doctrine is necessary for characterizing and classifying the law or provision under a head of power. There is no single test for determining pith and substance, as the approach must be flexible,[14] but during this exercise the courts will consider a provision or a law's statutory context, purpose, and effects. A law or provision will be *intra vires* if its pith and substance falls within the jurisdiction of the enacting legislature. This is true even if it has incidental effects on a matter under the power of another jurisdiction.

Double Aspect Doctrine[15]

Legislation may have a double aspect when it falls under a federal power for one purpose and aspect, and yet for another aspect and purpose, also falls under the provincial powers.[16] The double aspect doctrine is an important principle to consider when determining a matter's pith and substance. This doctrine recognizes that both levels of government "can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered."[17] If there is no direct conflict between the heads of power, then the provincial law can remain operable; otherwise, the doctrine of federal paramountcy will apply.[18]

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[13] For additional cases providing a more detailed discussion of the principle, see *Canadian Western Bank, supra* note 9; *Reference re Firearms Act (Canada)*, 2000 SCC 31 at para 16, [2000] 1 SCR 783.

[14] *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537; *R v Kirk*, 2014 ABQB 517, [2014] 11 WWR 86 aff'g [2013] 11 WWR 381, 82 Alta LR (5th) 394.

[15] For additional cases providing a more detailed discussion of the principle, see *Québec (Commission de la santé & de la sécurité du travail) v Bell Canada*, [1988] 1 SCR 749 at 765, 51 DLR (4th) 161; *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

[16] *Hodge v The Queen* (1883) 9 AC 117 (PC); *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 ("Laws raising a double aspect come within the jurisdiction of their enacting body, but intrude on the jurisdiction of the other level of government because of the overlap" at para 38) [*Lacombe*].

[17] *Canadian Western Bank, supra* note 9 at para 30.

[18] See *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1 (that mere duplication does not amount to conflict) [*Multiple Access*].

The Concurrency Doctrine[19]

Concurrency is the ability for both the federal and provincial governments to legislate the same matters under the same head of power. Similar to the double aspect doctrine, concurrency is an important principle to consider when determining a matter's pith and substance. It is also important not to confuse concurrency with the double aspect doctrine, which deals with both levels of government legislating a specific matter, but under different heads of power under sections 91 and 92 of the *Constitution*.

The Doctrine of Federal Paramountcy[20]

Federal paramountcy protects federal powers from provincial intrusion. While both the provincial and the federal governments may legislate on a common matter, the federal legislation will prevail in the event of a conflict. [21] There are two types of potential conflict, the first is where "it is impossible to comply with both laws" and the second occurs where "to apply the provincial law would frustrate the purpose of the federal law."[22] Courts have found federal paramountcy preferable over the application of the interjurisdictional immunity doctrine as it will only limit the provincial legislation to the extent that it conflicts with federal jurisdiction and no further.[23]

The Doctrine of Interjurisdictional Immunity[24]

This doctrine is similar to the principle of federal paramountcy, however, the doctrine of interjurisdictional immunity protects the powers of one level of government from intrusion by the other. This doctrine recognizes that the *Constitution* is based on exclusive powers allocated

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[19] For additional cases providing a more detailed discussion of the principle, see *Lacombe*, supra note 16.

[20] For additional cases providing a more detailed discussion of the principle, see *Citizens Insurance Co v Parsons* [1881] UKPC 49, rev'g in part [1880] 4 SCR 215, 1880 CarswellOnt 221; *Multiple Access* supra note 18; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188.

[21] *Canadian Western Bank, supra* note 9 at para 74.

[22] *Ibid* at para 75.

[23] *PHS Community Service, supra* note 9.

[24] For additional cases providing a more detailed discussion of the principle, see *Rogers, supra* note 10 at para 63 (applying the doctrine of interjurisdictional immunity).

to both levels of government, but that these powers are bound to interact. Unlike the doctrine of federal paramountcy, the issue is not whether a provincial and federal law conflict, but whether "a valid provincial law of general application should be deemed to apply to federal things."[25] The court asks whether the provision "trenches on the protected 'core' of a federal competence," and if it does, "whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine."[26] As noted above, the preferred approach to conflict is to apply the federal paramountcy doctrine. The interjurisdictional immunity analysis should only be used for situations where the courts have established a precedent for its application.[27]

Ancillary Powers Doctrine / Necessarily Incidental[28]

The ancillary powers doctrine provides a means of saving an otherwise *ultra vires* provision of a piece of legislation. It is available to both federal and provincial legislatures,[29] allowing "one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme."[30] For example, if a provision in a federal act is in pith and substance related to a provincial matter, the provision may still be saved if it is sufficiently integrated into a federal scheme such that it is considered necessary but incidental to the main legislation.[31] However, it cannot be the central part of the act or scheme that "spills over" into

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[25] Peter C Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court" in David A. Wright and Adam M. Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) at 167-200 [Oliver, "Busy Harbours"]; see also *Rogers, supra* note 10 at para 119 (although at one point it was said not to apply to matters which had a double aspect, this is no longer the case).

[26] *Quebec (AG) v COPA*, 2010 SCC 39 at paras 27, 42–43, [2010] 2 SCR 546.

[27] See *Canadian Western Bank*, *supra* note 9 (terminal facilities of interprovincial and international carriers); *Lacombe*, *supra* note 18 (includes the design and operation of airports, but not the construction; it extends to construction standards like those in building codes; also extends to location of airports); *Rogers*, *supra* note 10 (telecommunication infrastructure); *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 SCR 635.

[28] For additional cases providing a more detailed discussion of the principle, see *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21 at para 45, [2000] 1 SCR 494 [*Global Securities Corp*]; *General Motors of Canada v City National Leasing*, [1989] 1 SCR 641, [1989] SCJ No 28.

[29] *Lacombe*, *supra* note 16 at para 34.

[30] *Ibid* at para 35.

[31] Oliver, *supra* note 25 at 167–200.

the other jurisdiction (hence, ancillary). Where the subject *ultra vires* provision is central to the act or scheme, the entire act will be found to be *ultra vires*.

The Incidental Effects Rule

The incidental effects rule is different from the ancillary powers doctrine. It applies where "a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government," and "it holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body."[32] The ancillary powers doctrine is not invoked simply because there is an incidental or subsidiary effect of a law with a valid core matter – there must be a true "spill-over" into the powers of the other jurisdiction.

III. JUDICIAL INTERPRETATION OF A BY-LAW'S VALIDITY:

In the event of a dispute regarding the jurisdictional validity of a law or provision, such as a by-law enacted by a municipality, the courts will apply a test that includes application of the constitutional interpretation principles detailed above. As discussed below, we have divided this analysis into two steps with respect to the legal validity of a municipal by-law. The initial focus or first step is whether the municipality had the statutory authority to enact the by-law. Should the initial question be answered in the affirmative the courts will then determine whether the by-law is rendered inoperative because of a conflict between federal and provincial powers. As stated in the Supreme Court of Canada decision in *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, "as a statutory body a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation".[33]

Step 1: Characterization and Classification

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[32] *Lacombe, supra* note 16 at para 36.

[33] *114957 Canada, supra* note 3 at para 18 , citing *R v Sharma*, [1993] 1 SCR 650 at para 668, 100 DLR (4th) 167.

In order to address the first question the court must begin by identifying the heads of power engaged by the by-law. To do so the court will examine the true purpose of the by-law by identifying the "pith and substance", "matter" or "dominant characteristic" of the by-law or impugned provision of the by-law.[34] Next, the court will identify all the heads of power under sections 91 and 92 of the *Constitution* that are engaged by the by-law or the impugned provision.[35] A by-law or provision may validly come under both a provincial and federal enumeration. If a municipal by-law or provision is classified as solely falling under one of the provincial heads of power, then the by-law is *intra vires*.[36] If the municipal by-law engages, to any extent, a federal head of power, however, the court must then proceed to apply one or all of the doctrines of federal paramountcy, interjurisdictional immunity and ancillary powers. [37]

Step 2: Conflict Analysis

In applying the doctrines of federal paramountcy, interjurisdictional immunity and ancillary powers to consider conflicts between a federal head of power and municipal by-law or provision, the courts will consider the following issues:

(a) Federal Paramountcy

When applying the doctrine of federal paramountcy the court will consider:

(i) Whether or not it is impossible to comply with both the municipal by-law (or the impugned provision) and any overlapping federal laws;

(ii) Whether or not the municipal by-law (or the impugned provision) frustrates the purpose of any overlapping federal laws; and

(iii) Where either type of conflict exists, the federal law will govern and the municipal by-law or the impugned provision will be *ultra vires* to the extent of the conflict.

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[34] *R v Swain*, [1991] 1 SCR 933 at para 998; 47 OAC 81; see also *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture*), 2002 SCC 31 at para 52, [2002] SCR 146.

[35] *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at para 450, 68 DLR (3d) 452.

[36] Note that for the purposes of this analysis it has been assumed that the municipal by-law was validly and properly enacted pursuant to a valid provincial statute.

[37] *Global Securities Corp, supra* note 28.

(b) Interjurisdictional Immunity

(i) If federal paramountcy does not apply, it must determine whether or not the courts have stated that interjurisdictional immunity applies to the engaged heads of power.

(ii) When applying the principle of interjurisdictional immunity the courts will determine if the municipal by-law or the impugned provision goes to the "heart" or "core" of the engaged federal power.

(iii) Where a by-law or an impugned provision goes to the core of a federal competency, then the by-law or impugned provision will be *ultra vires*. Where only a provision of a by-law is found to go to the core of a federal competency, the court will then move to a consideration of the ancillary powers doctrine to determine whether the impugned provision of the by-law can be saved. Where a by-law, in its entirety, is found to go to the core of a federal competency, the by-law will be *ultra vires* and the ancillary powers doctrine will not be applied.

(c) Ancillary Powers

In order to determine whether an impugned provision of a by-law can be saved, the courts will ask the following questions:

(i) Is the impugned provision intruding on federal powers? If yes, to what extent?

(ii) Is the by-law that includes the impugned provision validly enacted? If not valid, that is the end of the analysis and both the by-law and provision will be considered *ultra vires.*

(iii) If the by-law is valid, is the impugned provision of the by-law sufficiently integrated or functionally related so that it can be upheld by virtue of its relationship to the by-law as a whole?[38] This analysis will include consideration of questions such as:

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[38] See also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 (suggesting a reverse order to the above test, starting with confirming the validity of the whole scheme, then considering its provisions); *Lacombe, supra* note 16 (slightly rewords the test saying that the impugned provisions, to be salvaged, should not just supplement the scheme, but must complement and actively further it (the "functional test"). Arguably, the order does not matter, but it may be more convincing to start with one or the other – e.g., if you wish the provision to be saved, it may be more convincing to start by validating the whole scheme, as it then presumes there is a rational connection with the impugned provision.)

- Is the connection stated in the legislative text, or is it implied?
- Is it a stand-alone provision?
- Does it fill a gap in the scheme, enhance the scheme or resolve an inconsistency or uncertainty in the scheme?
- If the impugned provision is marginally encroaching, then a functional relationship with its scheme is sufficient for it to be *intra vires*.
- If the impugned provision is seriously encroaching, then it is a stricter test: the impugned provision must be necessary to its scheme to be *intra vires*.
- If the impugned provision is not functionally related or necessarily incidental, is it severable from the by-law?
- If the impugned provision is not sufficiently integrated/functionally related/necessarily incidental, is it severable from the by-law?
- If the impugned provision intrudes on federal powers and is not sufficiently integrated or functionally related to the by-law, then it must be severed. If the impugned provision cannot be severed from the by-law, then the by-law as a whole will be *ultra vires* as the impugned provision clearly goes to the heart of the by-law itself.

IV. CASE LAW REVIEW:

The constitutional principles described above are complex and at times the nuances subtle. It is important to remember that the application of the constitutional interpretation principles are very specific to the context of the legislation the courts are being asked to interpret. It is also clear from reviewing the case law that the principles set out above are not always consistently applied. The following is a summary of cases involving consideration of how the key principles were applied and the principles that emerged regarding the scope of municipal jurisdiction.

Pesticides (Regulation of the Environment)

a) *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40

In this case, a by-law imposing restrictions on the use of pesticides within the Town of Hudson's boundaries, to specified locations and only for enumerated activities, was challenged by several landscaping and lawn care companies. The Supreme Court of Canada (**"Supreme Court**") considered whether the Town of Hudson had the authority to pass By-law 270, and if so, whether the by-law conflicted with federal or provincial legislation.

In answering these questions, the Supreme Court discussed how the municipality may act only by virtue of the powers given to it by the province. Included within the provincial enabling statute is the authority to pass by-laws for the "general welfare" of its citizens, including public health and safety. The Supreme Court found that the by-law was within these powers and was intended to protect the health of the town's citizens.

The Supreme Court did not proceed through a traditional federalism analysis, rather, it characterized the matter of pesticide use as a matter dealing with the environment, which it acknowledged is "a diffuse subject that cuts across many different areas of constitutional responsibility."[39] In what appears to be an application of the federal paramountcy test, the Supreme Court compared By-law 270 with the federal acts regulating pesticides and found no operational conflict, nor any frustration of a federal legislative purpose.[40] The Supreme Court then considered the test for whether there was a conflict between the by-law and provincial legislation (i.e. whether there is "impossibility of dual compliance"). The Supreme Court stated that, "[a]s a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter."[41] The Supreme Court found no conflict with the either the provincial or federal legislation. Rather it found that the federal *Pest Control Products Act* is permissive, rather than exhaustive, and there was no

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[39] *114957 Canada*, *supra* note 3 at para 33.

[40] *Ibid* at para 35.

[41] *Ibid* at para 39.

operational conflict with By-Law 270.[42] The Supreme Court held that the provincial and federal legislation could "co-exist with stricter municipal by-laws of the type at issue."[43] By-Law 270 was therefore found to be *intra vires*.

Telecommunications

a) *Rogers Communications Inc. v. Châteauguay (City)* 2016 SCC 23

In this case, the municipality of Châteauguay attempted to prevent Rogers from installing a cellphone tower by imposing a "notice of reserve" on the proposed site for the tower. In order to proceed with its installation, Rogers challenged the validity of the City's notice of reserve.

The Supreme Court began its analysis by highlighting Parliament's exclusive jurisdiction over radiocommunication under POGG, which power includes "the power to choose the location of radiocommunication infrastructure."[44] It then determined the pith and substance of the notice by considering its purpose and effect. The Supreme Court held that the pith and substance of the notice was not the protection of the health and well-being of residents or the development of the territory (as argued by the City) but, rather, the choice of the location of radiocommunication infrastructure.[45] In this way, the Supreme Court concluded that the stated objective of the notice differed from its real purpose and effect.[46] The Supreme Court, therefore, found the notice to be *ultra vires*. Of note, the Supreme Court commented that: "a municipal measure is not *intra vires* simply because it has a positive effect on the exercise of the federal power over radiocommunication, just as it is not necessarily *ultra vires* because it has a negative effect on the exercise of that power."[47]

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[42] *Pest Control Products Act,* SC 2002, c 28.

[43] *114957 Canada*, *supra* note 3 at para 42.

[44] *Rogers*, *supra* note 10 at para 42.

[45] *Ibid* at para 46.

[46] *Ibid* at para 49.

[47] *Ibid* at para 45.

Having found the notice to be *ultra vires*, the Supreme Court then proceeded through an interjurisdictional immunity analysis, citing precedent cases for radiocommunications which established that this principle should be applied.[48] Through this analysis the Supreme Court concluded 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."[49] The Supreme Court found that the notice as a whole constituted a serious and significant impairment of the federal power over telecommunications, and consequently, the municipality's notice was inapplicable in its entirety.[50]

Postal Services

a) *Canada Post Corporation v. Hamilton (City)*, 2016 ONCA 767

In response to a decision by Canada Post to restructure its delivery services to increase installation of the use of community mailboxes, the City of Hamilton passed a by-law to control the installation of equipment on municipal roads, including community mailboxes.

The Ontario Court of Appeal (the "**Appeal Court**") began with an overview of the applicable legislation, including the *Canada Post Corporation Act* (the "**CPCA**") and the Mail Receptacles Regulations (the "**Regulation**") enacted thereunder which provide Canada Post with the power to install community mailboxes in any public place, including a public roadway. Considering the legal and practical effect of the City of Hamilton's by-law in its characterization analysis, the Appeal Court concluded that the pith and substance of the by-law was to "protect against risks of harm to property and harm to persons using municipal roadways".[51] The Appeal Court noted that "an intention on the part of one level of government to prevent another from realizing a policy objective it disagrees with does not, on its own, lead to the conclusion that

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[48] *Ibid* at para 62.

[49] *Ibid* at para 69.

[50] *Ibid* at para 71.

[51] *Canada Post Corp v Hamilton (City of)*, 2016 ONCA 757 at paras 58, 65, 403 DLR (4th) 695 aff'g (2015), 126 OR (3d) 501, 386 DLR (4th) 519.

there is an encroachment on the other level of government's sphere of exclusive jurisdiction".[52] Thus, the motives of the City of Hamilton in enacting the by-law were to be distinguished from the law's practical and legal effect when determining the pith and substance.

Based on the characterization of the by-law as relating to protection from harm to property and persons, the Appeal Court determined that the by-law comes within the provincial jurisdiction under sections 92.10 (local works and undertakings) and 92.13 (property and civil rights) of the *Constitution*. However, the Appeal Court also concluded that the by-law impacts the federal head of power over postal service as set out in section 91.5 of the *Constitution*.

As the City of Hamilton's by-law was found to engage a federal head of power, the Appeal Court moved to a consideration of the doctrine of federal paramountcy. Through this analysis a conflict between the by-law and the CPCA and the Regulation was identified. The Appeal Court concluded that the by-law gave final authority over the location of mail receptacles to the City of Hamilton while the federal purpose of the Regulation and CPCA (taken together) grants sole decision-making power over the location of mail receptacles to Canada Post. As a harmonious reading of the by-law and the Regulation was found not to be possible, the Appeal Court applied the doctrine of federal paramountcy and, consequently found the by-law to be *ultra vires* to the extent that it applies to Canada Post.

Aerodromes

a) *City of Burlington v. Burlington Airpark Inc.*, 2016 ONSC 4375

This case involved a site alteration by-law passed by the City of Burlington to regulate the use of fill within the municipality. Fill was used by Burlington Airpark at its aerodrome to facilitate the construction and expansion of various airport facilities. Prior to construction the City requested that Burlington Airpark apply and receive a site alteration permit in compliance with the by-law. The Burlington Airpark challenged the jurisdiction of the municipality to require compliance with the by-law.

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[52] *Ibid* at para 51, citing *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693 at paras 35–38.

The Superior Court confirmed and adopted the decision of Murray J. in *City of Burlington v. Burlington Airpark Inc.*, finding that there was "little doubt…that the pith and substance of the by-law…is a valid exercise of property and civil rights under section 92.13."[53] In particular, the Superior Court drew the following conclusion:

> "The By-Law is designed to regulate the quality of fill to prevent the use of toxic or contaminated fill in the municipality. It is not an attempt by the municipality to regulate slopes or surface of runways or taxiways, or their shoulders. It does not purport to regulate the design, construction, or operation of runways, taxiways, aprons, terminals, hangars, other airport buildings or facilities, or purport to control aeronautical operations. Its purpose, either directly or indirectly, is not to manage an undertaking that is federally regulated." [54]

The Superior Court adopted the conclusions reached by Murray J. through application of the doctrine of interjurisdictional immunity. More specifically, the Superior Court agreed that the by-law neither impaired, nor created an operational conflict with the federal aeronautics power.[55] In *City of Burlington v. Burlington Airpark Inc.*, Murray J. stated his reasons for this finding as follow:

> "While regulating the quality of fill may have an impact on the manner of carrying out a decision to build airport facilities in accordance with federal specifications, such regulation will not have any direct effect upon the operational qualities or suitability of the finished product which will be used for purposes of aeronautics."[56]

Additionally, the Superior Court found that the Burlington Airpark had been "conducting a commercial landfill business on airport land and that not all of the fill it accepted was required for the purpose of modifications to the property to advance improvements related to aeronautical

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[53] *Burlington (City of) v Burlington Airpark Inc*, 2016 ONSC 4375 at para 106 [*Burlington Airpark 2016*].

[54] *Ibid* at para 109.

[55] *Ibid* at para 106.

[56] *Burlington (City of) v Burlington Airpark Inc*, 2013 ONSC 6990 at para 19.

operations". [57] The Superior Court confirmed the decision of Murray J. in *City of Burlington v. Burlington Airpark Inc.*, ruling that the by-law was *intra vires* and applied to the fill activities undertaken by Burlington Airpark at its aerodrome.

It is also interesting to note that the applicable federal law is silent on the use or quality of fill at aerodromes for grading or constructing runways. This silence prevented any operational conflict between the federal and municipal regimes during the courts' consideration of federal paramountcy. Even if the federal law had regulated fill quality, however, given the Supreme Court's findings in *Spraytech* (discussed above), it appears likely that a court would find that the province or municipality may further restrict fill quality to protect its citizens. In contrast, had the applicable federal legislation spoken specifically about a need, for example, for there to be flexibility in fill quality, then the by-law may have been found to be in conflict with the purpose of the federal legislation and thus *ultra vires*.

b) Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39

This case involved a provision of Quebec land use legislation that prohibited the construction of airports on land zoned agricultural. In considering the purpose and effect of the legislation, the Supreme Court found that the purpose was to regulate the use of land and that, while the impugned section supported this purpose, it had a potential incidental affect on aeronautics.[58] On this basis the Supreme Court concluded that the legislation was, in pith and substance, about land use planning and agriculture that fell under section 92.13, 92.16, or 95 of the *Constitution*, and that it was consequently valid provincial law.[59] This was notwithstanding its incidental effects on aeronautics.

Aeronautics falls clearly within federal jurisdiction under POGG, however, the Supreme Court considered whether the doctrines of interjurisdictional immunity or federal paramountcy would apply. Interjurisdictional immunity was held to apply, although the Supreme Court also

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[57] *Ibid* at para 107.

[58] *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 20, 324 DLR (4th) 692; [*Canadian Owners and Pilots Association*].

[59] *Ibid* at para 21–23.

noted that in application of the doctrine of federal paramountcy there was no operational conflict or frustration of purpose. [60]

Proceeding on the basis of interjurisdictional immunity, the Supreme Court considered whether the impugned section impacted the federal power over aeronautics.[61] More specifically, it first considered whether the provincial law trenched on the protected 'core' of federal competence. Next the Supreme Court considered whether the law's effect on the exercise of the federal power was sufficiently serious to invoke interjurisdictional immunity. The Supreme Court, relying on precedent, concluded that "the location of aerodromes lies within the core of the federal aeronautics power."[62] The Supreme Court then determined that the impugned provision impaired the federal power to decide when and where aerodromes should be built:

> "If s. 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do."[63]

As a result, the Supreme Court held that while valid, by virtue of the doctrine of interjurisdictional immunity, the legislation is inapplicable to the extent that it impacts the federal power over aeronautics.

Interestingly, the Supreme Court acknowledged the difficulty that this may pose on provincial and municipal governments:

> "To be sure, this result limits the ability of provincial and municipal authorities to unilaterally address the challenges that aviation poses to agricultural land use regulation. However, as Binnie and LeBel JJ. noted in *Canadian Western Bank*, at para. 54,

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[60] *Ibid* at paras 65, 74.

[61] *Ibid* at para 25.

[62] *Canadian Owners and Pilots Association, supra* note 58 at para 37.

[63] *Ibid* at para 60.

> Parliament's exclusive power to decide the location of aircraft landing facilities is vital to the viability of aviation in Canada." [64]

c) *Quebec (Attorney General) v. Lacombe,* 2010 SCC 38

This case involved a challenge to a by-law which prohibited water aerodromes or aeronautics on the part of a lake where Lacombe was operating a small air excursions business. Lacombe challenged the validity of the by-law.

The Supreme Court first considered the provincial scheme, finding that the municipality was granted authority by the province to enact a "zoning by-law for its whole territory," which authority resulted in By-law No. 210.[65] The by-law was initially silent on the matter of aerodromes, but was amended by By-law No. 260 to effectively prohibit aerodromes.[66] Considering the federal scheme, the Supreme Court noted that Lacombe had registered his aerodrome with the Minister of Transport and was therefore subject to federal regulation and safety standards.

Examining both the intrinsic and extrinsic evidence of the purpose and effect, the Supreme Court found that the pith and substance of By-Law 260 was the regulation of aeronautics,[67] which it classified under the federal jurisdiction of POGG.[68] The Supreme Court found that "the amendments brought by by-law No. 260 [did] not fall under any provincial heads of power."[69]

The Supreme Court then considered whether the amendments could be saved under the ancillary powers doctrine. The Supreme Court first determined that the provision at issue did "not constitute a serious intrusion on federal jurisdiction" [70] Thus, where there is only a marginal

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[64] *Ibid* at para 61.

[65] *Lacombe*, *supra* note 16 at paras 10–12

[66] *Ibid* at para 14.

[67] *Ibid* at paras 21–23.

[68] *Ibid* at paras 24–26.

[69] *Ibid* at paras 30.

[70] *Ibid* at para 44.

intrusion on federal power, a functional relationship with the overall legislative scheme (in this case, the scheme of the zoning by-law No. 210) would be sufficient to deem the impugned provision *intra vires*. In this case, however, the Supreme Court found that the amending By-law 260 did not further the scheme of zoning by-law No. 210, which purpose was to regulate land use. This was because By-law 260 banned "aerodromes *throughout the municipality*, which spans a variety of land uses."[71] The Supreme Court concluded that the amendments in by-law No. 260 did not have a rational functional connection to zoning by-law No. 210, and as a result, was *ultra vires*.[72]

d) *Walker v Ontario (Ministry of Housing)*, [1983] 41 OR (2d) 9, 144 DLR (3d) 86[73]

In this case, an Ontario municipality and the Minister of Transport agreed to acquire lands to make improvements to a federally-licenced airport which the municipality operated and wished to expand. Mr. Walker owned land at the end of the runway and refused to sell his land to the municipality. Mr. Walker erected a silo and other buildings which obstructed the obstacle limitation surface ("**OLS**") of aircraft at the federally-licensed airport. The municipality applied to the Minister of Transport to impose Zoning Regulations pursuant to the *Aeronautics Act* (the ***"Aeronautics Act"***).[74]

Pursuant to section 5.4 of the *Aeronautics Act*, the Governor General in Council may make regulations for airports for the purpose of preventing lands adjacent to or in the vicinity of an airport or airport site from being used or developed in a manner that is incompatible with the safe operation of an airport or aircraft.[75] The Minister of Transport declined to make a Zoning Regulation hoping the parties would resolve their differences amicably. The Minister of Housing for Ontario then imposed a provincial zoning order under the *Planning Act*[76] which imposed

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[71] *Ibid* at paras 50-53.

[72] *Ibid* at paras 58, 68.

[73] See also *Mullaney v Red Deer (County No 23)*, 1999 ABQB 434, [2000] 9 WWR 740.

[74] *Walker v Ontario (Ministry of Housing)*, [1983] 41 OR (2d) 9, 144 DLR (3d) 86 at 9 [*Walker*].

[75] *Aeronautics Act*, RSC1985, c A-2 at s 5.4.

[76] *Planning Act*, RSO 1990, c P.13.

height restrictions on buildings around the airport[77]. Mr. Walker and others challenged the provincial zoning order at the Superior Court.

The Superior Court found that the provincial zoning orders controlled the OLS to and from the airport[78]. The Attorney General and the Ministry of Housing argued that "double aspect" applied, suggesting that the orders also dealt with land use control for safeguarding persons and property, but the Superior Court did not agree, saying there was "not a hint of land-use control".[79] The Superior Court confirmed that aeronautics is under the exclusive control of Parliament, and concluded that the "whole and sole purpose of the orders in question is to affect or regulate the use of the airspace or flight paths adjacent to the airport for aerial navigation".[80] Rejecting the applicability of the double aspect doctrine, the Superior Court concluded that the zoning orders were *ultra vires*, and there was no need to proceed through a paramountcy analysis. On these grounds, the Superior Court allowed Walker's appeal.

V. CASE STUDY – PROTECTION OF HOSPITAL HELICOPTER FLIGHT PATHS

As illustrated by the cases summarized above, the extent to which municipal governance may validly overlap with federal jurisdiction is often unclear. In particular, where there is an absence of federal regulation, provincial and municipal governments may seek to take action pursuant to provincial heads of power in order to address resultant issues. This can give rise to the exercise of provincial and municipal power of questionable validity.

Legislation Relating to Heliport Obstacle Limitation Surfaces

Both the Hospital for Sick Children ("**SickKids**") and St. Michael's Hospital ("**St. Michael's"**) have heliports that are used by air ambulances to transport patients to and from

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[77] *Walker, supra* note 74 at 4.

[78] "Flight path" is not a defined term under the *Aeronautics Act* or related legislation and guidelines. Consequently, as the OLS relates to the protection of areas needed for the safe operation/flight of aircraft to and from aerodromes, it is assumed that the term "flight path" is equivalent to the term OLS which is defined under the *Aeronautics Act*.

[79] *Walker, supra* note 74 at 13.

[80] *Walker, supra,* note 74 at 13.

the hospitals. Both heliports are certified aerodromes under the Canadian Aviation Regulations (the "**CARs**") passed pursuant to the federal *Aeronautics Act*.

Pursuant to the CARs, the operator of a heliport is required to create a heliport operations manual and to establish OLS. Therefore, the heliports for both SickKids and St. Michael's must each have a heliport operations manual that records the heliport's OLS.

An OLS is defined in section 101.01(1) of the CARs as a surface that establishes the limit to which objects may project into an aerodrome's airspace, so that aircraft or helicopter operations, for which the aerodrome is intended, may be conducted safely. The OLS will be different for each aerodrome.

Pursuant to section 5.4 of the *Aeronautics Act*, the Governor in Council may make regulations for airports (including heliports) for the purposes of:

(a) Preventing lands adjacent to or in the vicinity of a federal airport or an airport site from being used or developed in a manner that is, in the opinion of the Minister, incompatible with the operation of an airport;

(b) Preventing lands adjacent to or in the vicinity of an airport or airport site from being used or developed in a manner that is, in the opinion of the Minister, incompatible with the safe operation of an airport or aircraft; and,

(c) Preventing lands adjacent to or in the vicinity of facilities used to provide services relating to aeronautics from being used or developed in a manner that would, in the opinion of the Minister, cause interference with signals or communications to and from aircraft or to and from those facilities.

Regulations enacted pursuant to section 5.4 of the *Aeronautics Act* are known as "Zoning Regulations". Both the Pearson International Airport and the Billy Bishop (Island) Airport are subject to federal Zoning Regulations. Surprisingly, however, neither the SickKids heliport nor the St. Michael's heliport appear to be the subject of any federal Zoning Regulations passed pursuant to section 5.4 of the *Aeronautics Act*. As a result, there is no federal legislation preventing the construction of buildings within the OLS established in the operation manuals for either the SickKids or St. Michael's heliports.

Both the City and province, in recent years, became increasingly concerned regarding the ever growing height of buildings in close proximity to the two hospitals. Both the province and the City have attempted to fill this legislative gap and protect the operations of these important heliports. First, in 1993, pursuant to Section 34 of the *Planning Act*, the City enacted exception provision 12(2)256 under Zoning By-law No. 438-86 (the "**SickKids By-law**").[81] The SickKids By-law purported to prevent the erection of buildings or structures within identified "flight approach areas".

On May 3, 2016, pursuant to section 47(1)(a) of the *Planning Act*, the Minister of Municipal Affairs and Housing passed Ontario Regulation 114/16 – Zoning Order – Protection of Public Health and Safety – Toronto Hospital Heliports (the "Zoning Order"). Similar to the SickKids By-law, the Zoning Order prohibits the erection of buildings or structures where any portion of such structures would penetrate the OLS for the SickKids and St. Michael's heliports.

Analysis

The following analysis is a consideration of how the courts may approach a challenge to the validity of the SickKids By-law and the provincial Zoning Order through application of the constitutional interpretation doctrines discussed in this paper.

Does the municipality have the statutory authority to pass the Sick Kids By-law and does the province have the jurisdiction to control the height of buildings to protect the OLS of the hospitals' heliports?

To characterize the SickKids By-law and the Zoning Order, the courts would consider both their purposes and statutory authority. The title of the provincial Zoning Order states that it is for the protection of public health and safety and section 2 states that the purpose "is to protect public health and safety by ensuring the safe operation of air ambulance services provided in relation to St. Michael's Hospital and The Hospital for Sick Children".

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[81] City of Toronto, By-law No 438-86, *Zoning By-law* (1993), s 12(2) 256.

The purpose and practical effect of both the SickKids By-law and the Zoning Order, however, appear to be the protection of the OLS or by preventing the erection of buildings or structures within the OLS thus falling within the exclusive jurisdiction of the federal government.[82] The practical effect of the SickKids By-law and provincial Zoning Order, however, could also be considered as regulation of land use (such as the height and location of buildings), as it impacts a person's ability to obtain permissions for land use, such as zoning by-law amendments or building permits.

However as discussed in *Walker*, the Ontario Court of Appeal characterized the provincial Zoning Order at issue as relating to the protection of the OLS. Given the similarities between the *Walker* and the SickKids By-law and the provincial Zoning Order, a similar characterization by the courts appears likely. As discussed below, this characterization would necessarily lead to a finding that the SickKids By-law and Zoning Order are *ultra vires*. Therefore, to allow our analysis to progress into a consideration of the other constitutional interpretation principles, for the purpose of this analysis it has been assumed that the courts would characterize the SickKids by-law and the provincial Zoning Order as regulating land use.

Assuming for the purposes of this analysis, however, that the courts characterize the SickKids By-law and the provincial Zoning Order as regulating land use, the SickKids By-law and Zoning Order would likely be classified by the courts as engaging the property and civil rights head of power under 92.13 of the *Constitution*.[83] Under such a circumstance, it is anticipated that the SickKids By-law and Zoning Order would also be found to relate to the protection of OLS for aerodromes, engaging the power of the federal government over aeronautics under POGG.

If we assume, for the purposes of this analysis it is assumed that the classification of the SickKids By-law and provincial Zoning Order validly fall within the exercise of a provincial

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[82] It is noted that the term "flight path" is not defined under the Act or the CARs.

[83] See *Constitution Act, 1982*, *supra* note 1 at s 92.7 (it is noted that characterization of the SickKids By-law and Zoning Order as relating to the management of hospitals could cause the courts to also turn their attention to a province's power to establish, maintain and manage hospitals).

head of power, but engage a federal head of power, our analysis must move to a consideration of federal paramountcy.[84]

Federal Paramountcy

As no federal Zoning Regulation is in place to protect the OLS for the SickKids or St. Michael's heliports, there is no conflict preventing compliance with the federal regime, the Zoning Order and the SickKids By-law.

Regardless, as detailed above in the case law summaries, in the case of aerodromes the courts have established that the principle of interjurisdictional immunity applies. Therefore, our analysis must move forward on this basis.

Interjurisdictional Immunity

OLS are critical to the safe operation of aerodromes as it protects the areas needed for safe approaches and landings by airplanes or helicopters. The importance of OLS to the regulation of aerodromes is exhibited by the legislative scheme created by the federal government for regulation of aerodromes. Under the CARs, airport and heliport operators are obligated to establish an OLS in their operation manuals. The *Aeronautics Act* itself includes the power to establish Zoning Regulations for their protection. Additionally, standards and recommended practices for OLS are established by Transport Canada, the federal regulator, in their publications, including "TP 1247 – Aviation – Land Use in the Vicinity of Aerodromes".[85]

Therefore, a strong argument can be made that the establishment and protection of OLS goes to the core and heart of the federal power over aeronautics. In particular, the SickKids By-law and the provincial Zoning Order effectively constitute Zoning Regulations which are regulations that can only be validly enacted by the federal government under the *Aeronautics Act*. Therefore, it is likely that the SickKids By-law and the Zoning Order would be considered *ultra vires*.

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[84] As opposed to the more likely classification of the SickKids By-law and Zoning Order falling under a federal head of power and engaging a provincial head of power, which classification would render both instruments *ultra vires*.

[85] Transport Canada, "Aviation – Land Use in the Vicinity of Aerodromes" TP 1247, (Ottawa: Transport Canada, 2013).

Ancillary Powers

The SickKids By-law and Zoning Order in their entirety relate to the protection of OLS. Consequently, if this purpose is found to go to the core of the federal power over aeronautics, no part of these instruments could be removed in order to save the remaining part. For this reason, the ancillary powers doctrine would not apply and our analysis would end upon a consideration of interjurisdictional immunity.

Consequently, for the reasons described above, it appears likely that while well intentioned, both the SickKids By-law and the provincial Zoning Order are *ultra vires*. First, while enacted pursuant to the *Planning Act*, the purpose and effect of the zoning order is to protect the OLS, which is a power exclusively reserved for the federal government under the *Constitution*. Additionally, even if the SickKids By-law and Zoning Order were considered to be an exercise of provincial power over property and civil rights, the application of the principles of interjurisdictional immunity indicate the likely conclusion that the SickKids By-law and Zoning Order intrude upon the heart and core of the federal power over aeronautics.

As acknowledged by the Supreme Court of Canada in *Quebec v. Canadian Owners and Pilots Association*, this result limits the ability of provincial and municipal authorities to unilaterally address certain challenges, in this case challenges encountered in the relationship between land development and aviation. Nevertheless, the protection of OLS appears to rest exclusively with the federal government. Therefore, it would be wise for both SickKids and St. Michael's to formally request the federal government to exercise its powers to enact Zoning Regulations for protection of the hospitals' OLS, which all can agree are essential for the safe operation of the hospitals' heliports.

VI. CONCLUSIONS

Under the *Constitution* the Parliament of Canada has been granted the authority to make laws for the peace, order and good government of Canada in relation to all matters not assigned exclusively to the legislatures of the provinces. Section 92 of the *Constitution* exclusively grants the provinces the right to make laws concerning those class of subjects specifically enumerated. Municipalities have not been granted any powers under the *Constitution*, rather a municipality's

powers are granted to them through legislation enacted by the province and therefore municipalities remain creatures of their provincial legislation.

In theory, the separation of powers between the three levels of government would appear well defined, however, the lines often blur and overlap resulting in one level of government stepping on the jurisdictional toes of another. When overlaps occur, the determination of which level of government has jurisdiction has often resulted in protracted and lengthy litigation that has and continues to consume a great deal of the Canadian courts' time.

In order to tackle the jurisdictional issues that so often arise, the courts have adopted and applied several different interpretation principles including the doctrine of cooperative federalism, the pith and substance doctrine, the double aspect doctrine, the doctrine of federal paramountcy, the ancillary powers doctrine or the incidental effects rule, to name a few. The constitutional interpretation principles are complex and at times the nuances between the various principles subtle. A review of the case law also makes it clear that the principles are not always consistently applied. The main reason for what might appear to be inconsistent application of the principles is that the application of the interpretation principles, in each case, is specific to the unique context of the legislation that the courts are being asked to interpret.

With respect to determining whether a municipal by-law is validly enacted, the Court will always review the by-law to determine whether the municipality had the statutory authority to enact the by-law. In doing so it will determine the true purpose of the by-law by reviewing the pith and substance or dominant characteristic of the by-law. The next step will be to identify the heads of powers under section 91 and 92 of the *Constitution.* If the municipal by-law engages to any extent a federal head of power the court must then proceed to apply one or all of the doctrines of federal paramountcy, interjurisdictional immunity and ancillary powers to determine if the by-law can be saved.

A by-law is most often upheld as being within a municipality's jurisdiction where a determination has been made that there is no operational conflict and both the federal and municipal legislation can co-exist. However, a municipal by-law will ordinarily be found *ultra vires* if it is determined that it is an attempt to regulate a matter wholly within a federal power

although it was enacted under the guise of being land use planning. Therefore, each case will always be determined under the specific unique context of the legislation or by-law being interpreted.