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BY E-MAIL

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Re: Opinion re Proposed Amendments to the *Telecommunications Act*

Dear Sirs/Madams,

I am pleased to provide you with the opinion you requested. I have divided the presentation in five parts to facilitate later discussions:

1. OVERVIEW AND SUMMARY OF CONCLUSIONS

Background

The provision of telecommunications services requires the presence of vast infrastructure networks capable of connecting homes, businesses and communities. The wires, cables and fibre of these networks rely on a wide array of supporting structures such as poles and underground ducts so that they can physically reach their destinations. As much of the necessary infrastructure already exists in the form of electricity distribution systems and landline telephone networks, it would be economically inefficient and wasteful—and in some cases prohibitively expensive—to require all telecommunications undertakings (hereinafter referred to as "Carriers") to build out their own network of support structures. Instead, it is preferable that Carriers be permitted to use the existing support structures on terms that fairly compensate the owner of the support structure. This policy and practice eliminates the duplication of infrastructure, reduces disruption from construction in municipal streets, and ultimately results in greater competition and lower costs to consumers.

Another source of existing yet relatively untapped support structures are municipal street furniture (e.g., streetlights, transit shelters) and municipal buildings. These structures can be used to attach smaller pieces of wireless telecommunications equipment designed to carry 5G services.

Parliament has seen fit to grant the CRTC powers under section 43 of the *Telecommunications Act*[1] (the "Act" or the "Telecom Act") to regulate access to those support structures owned by the incumbent telephone companies. It has also granted the CRTC the power to regulate access to municipal streets and public places. However, as telecommunications technology has evolved, these powers have proven to be too limited to support many of the statutory objectives of the Canadian telecommunications industry, including, in particular, the objective to provide services to the more remote and sparsely-populated regions of Canada. This means that, when negotiating to use the support structures of municipalities or electricity utilities, Carriers are largely faced with a patchwork of "market prices" set by municipalities and prohibitive access rates set by provincial energy boards asserting their jurisdiction over the federally-regulated Carriers.

This gap in access rights can only be corrected through legislative change. In this context, you have proposed numerous amendments to sections 43 and 44 of the Telecom Act that have the following purposes:

- Extend the statutory access rights granted to wireline facilities to wireless equipment;

[1] SC 1993, c 38.

- Provide telecommunications undertakings with the right to access and use support structures owned by electrical utilities;
- Provide telecommunications undertakings with the right to access and use support structures owned by municipalities; and
- Grant the CRTC with jurisdiction in determining the terms of access and use of such rights and the rates applicable thereto.

You have now asked me to review your proposed amendments and provide my opinion as to their constitutionality, including whether any provincial measures to regulate the same areas covered by the proposed amendments would trump the federal powers.

Discussion

With regard to the constitutionality of the proposed amendments, there are three ways by which a law may be attacked on jurisdictional grounds: one may impugn: (a) its validity, (b) its operability or (c) its applicability. Invalidity results from the law being "in pith and substance" *ultra vires* (or outside the jurisdiction) of the enacting legislature. Inapplicability results when a law that is otherwise *intra vires* is held not to apply to a given entity or in a particular situation, even though there is no question of inconsistency with federal legislation. Inoperability results from the application of the doctrine of paramountcy. When a provincial law is inconsistent or in conflict with a federal law, the latter alone will apply.

After considering the above doctrines in detail, this opinion comes to the following three conclusions:

i) The proposed amendments are *intra vires* because of Parliament's legislative power over telecommunications.

ii) Should the legislative amendments be adopted, any provincial measures that address the same subject matter would be inoperative pursuant to the federal paramountcy doctrine.

iii) These provincial measures would also be inapplicable pursuant to the doctrine of "interjurisdictional immunity".

Validity of the Proposed Amendments

When assessing the constitutionality of a measure under the federal division of powers, there are two steps to the analysis: a) identifying the "pith and substance" of the impugned measure; and b) determining whether it relates to an enumerated head of power granted to the enacting legislative body.

In order to establish the pith and substance of a challenged provision, one must identify the "dominant" or "most important" characteristic of the parent legislation, regulation or provision.

It is well established that Parliament has exclusive jurisdiction in the sphere of radiocommunications (*i.e.*, radio frequency spectrum and radio apparatus) and telecommunications. Federal jurisdiction over telecommunications is derived from subsection 91(29) and paragraph 92(10)(a) of the *Constitution Act, 1867*, which gives the federal government power over transportation and communication works - undertakings that traverse provincial or national borders. Exclusive federal jurisdiction over these undertakings avoids subjecting single integrated transportation and communications networks to multiple and overlapping systems of regulation, the effect of which is to confuse jurisdictional lines and make any coherent regulation of such undertakings enormously difficult.

This exclusive federal jurisdiction includes the power to choose the location of radiocommunication infrastructure. It has also been held that Parliament clearly has a broader jurisdiction over telecommunications undertakings where such undertakings operate outside the limits of a province.

I addressed the issue of jurisdiction over the siting of telecom infrastructure in relation to support structure access in dissenting reasons in a 2003 decision of the Supreme Court of Canada called *Barrie Public Utilities v. Canadian Cable Television Association*. The majority was silent on this issue and it has not come specifically before the courts since. I concluded that the power at issue was one relating to the regulation of telecommunications infrastructure, not local transportation or electricity infrastructure—which are (generally) areas of provincial jurisdiction—despite the fact that it may have incidental effects on the latter. Having characterized the pith and substance of the measure in this way, it was clear that the provision at issue related to federal jurisdiction over telecommunications.

The line of cases that I relied upon in my reasons was recently reaffirmed by the Supreme Court of Canada in *Rogers Communications Inc. v Châteauguay (City)*. There, a majority of the court held that the federal jurisdiction over interprovincial communications undertakings included the power "to choose the location of radiocommunication infrastructure" and therefore the municipal order which purported to block or dictate the placement of the antennae was unconstitutional because it related in pith and substance to an exclusive federal power.

The dominant purpose of the proposed amendments to the Telecom Act similarly relates to the siting of telecommunications infrastructure. Accordingly, I am of the view that *Châteauguay* would clearly apply so as to confirm that the proposed measure is *intra vires* pursuant to Parliament's jurisdiction over telecommunications.

Provincial Measures Addressing the Same Subject Matter Would be Inoperative

In recent cases, the Supreme Court indicated that it did not want to apply the doctrine of interjurisdictional immunity when a conflict can be resolved by applying the paramountcy doctrine. Without discarding the possible application of interjurisdictional immunity, one could invoke paramountcy. In my view, if the federal government were to enact the proposed amendments, existing provincial measures would likely be held to be inoperative pursuant to the doctrine of "paramountcy".

Paramountcy provides that an otherwise valid provincial law, regulation or authorization must not directly (i) conflict with or (ii) frustrate the purpose of a federal law, regulation or authorization. In those cases, the federal law will supersede the provincial measure.

Whether or not the proposed amendments would directly conflict with the various provincial and municipal by-laws currently in place largely depends on the specific provisions of those laws. That said, any provincial regime that purported to set the terms for access to support structures would likely be held to give rise to a direct conflict, because one would have to satisfy a provincial rule in order to obtain the full benefit of the federal permit. Ending up with different terms or rates is evidence of a direct conflict.

While in theory the Carrier could comply with both legislative schemes by simply paying the higher rate, thus avoiding an operational conflict in the strict or orthodox sense, my view is that complying with the provincial regulation would create an operational conflict and would, in any event, directly undermine the purpose of the federal provision which is to allow for a specific action to be taken.

In particular, the rationale behind assigning the constitutional authority over interprovincial communications undertakings exclusively to the federal government was to avoid the risk of having large-scale undertakings "hobbled by local interests". The current situation in relation to utility pole access is indeed an example of a telecommunications undertaking that is "hobbled by local interests."

In the Alternative, Provincial Measures Addressing the Same Subject Matter Would be Inapplicable

In the event that a court did not find provincial measures in relation to telecommunications facilities to be inoperative, it is also my view that these measures would be held to be inapplicable to Carriers pursuant to the doctrine of interjurisdictional immunity. That doctrine provides that a province cannot encroach upon a "core" aspect of federal jurisdiction, even if it does so pursuant to a generally applicable law that is constitutionally sound in most of its applications.

In *Châteauguay*, the Supreme Court therefore held that the municipal regulation relating to the location of the antennae system was barred by the doctrine of interjurisdictional immunity; the provincial restriction on the construction of the antennae "compromised

the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada."

The same comment could be said to apply in the present case. Based on the facts as we understand them, the varying conditions applied to pole attachment is indeed compromising the orderly and efficient development and operation of telecommunications. Accordingly, the provincial measures in question would be inapplicable pursuant to the doctrine of interjurisdictional immunity, in the event it can be shown that such measures are compromising the orderly development and efficient operation of telecommunications.

2. TEXT OF THE PROPOSED AMENDMENTS

You have provided us with text for the proposed amendments that are the subject of this opinion.

For ease of reference, we have prepared the following table, which sets out both the current and proposed versions of sections 43 and 44 and indicates all proposed changes. Deletions from the existing text are indicated in the left-hand column, while proposed additions to the text are indicated in the right-hand one:

Current version of s. 43 & 44 (Deletions - strikethrough)	**Proposed version of s. 43 & 44 (Additions underlined)**
Definition 43 (1) In this section and section 44, ~~"distribution undertaking" has the same meaning as~~ in subsection 2(1) of the Broadcasting Act.	**Definition** 43 (1) In this section and section 44, Canadian carrier includes a distribution undertaking as that term is defined in subsection 2(1) of the Broadcasting Act. (1.1) In this section, "electrical utility undertaking" means an undertaking engaged in the distribution or transport of electricity. (1.2) In this section, a supporting structure includes: (a) poles, strands or ducts owned by Canadian carriers; (b) poles, strands or ducts owned by electrical utility undertakings, regardless of whether they are otherwise regulated at the provincial level of government; and (c) poles, strands or ducts, as well as any public property that is capable of being used as a support for telecommunications facilities, including but not limited to, street light standards, traffic lights, transit shelters or the exterior of buildings, that are owned by a municipality or other public authority.
Entry on public property	**Entry on public property**

Current version of s. 43 & 44 (Deletions - strikethrough)	Proposed version of s. 43 & 44 (Additions underlined)
(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier ~~or distribution undertaking~~ may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its ~~transmission lines~~ and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.	(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its telecommunications facilities and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place. (2.1) Subject to subsections (3) and (4) and section 44, a Canadian carrier may enter on any highway, transit corridor or other public place for the purpose of attaching its telecommunications facilities to any supporting structure, but shall not unduly interfere with the public use and enjoyment of the highway, transit corridor or other public place. (2.2) Subject to subsections (3) and (4) and section 44, a Canadian carrier may use any supporting structures owned by a municipality or public authority for the purpose of constructing, maintaining or operating its telecommunications facilities, and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the municipality's or public authority's use of those supporting structures or the safety of the public.
Consent of municipality (3) No Canadian carrier ~~or distribution undertaking~~ shall construct a ~~transmission line~~ on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.	**Consent of municipality** (3) No Canadian carrier shall construct a telecommunications facility on, over, under or along a highway or other public place, or attach its telecommunications facilities to any supporting structures owned by a municipality or public authority, without the consent of the municipality or other public authority having jurisdiction over the highway, other public place or supporting structures.
Application by carrier (4) Where a Canadian carrier ~~or distribution undertaking~~ cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct ~~a transmission line~~, the carrier ~~or distribution undertaking~~ may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the	**Application by carrier** (4) Where a Canadian carrier cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct, maintain or operate a telecommunications facility or attach its telecommunications facilities to any supporting structure, the Canadian carrier may apply to the Commission for permission to construct it or attach it, as the case may be, and the Commission may, having due regard to the use and enjoyment of the highway, other public place or supporting structure by others, including the municipality or public authority, grant the permission subject to any conditions that the Commission determines, including, but not limited

Current version of s. 43 & 44 (Deletions - strikethrough)	Proposed version of s. 43 & 44 (Additions underlined)
permission subject to any conditions that the Commission determines.	to, the terms of access and the applicable rate, if any, payable.
Access by others (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure ~~of a transmission line~~ constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of ~~providing such~~ services and the Commission may grant the permission subject to any conditions that the Commission determines.	**Access by others** (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to a supporting structure of a Canadian carrier or an electrical utility undertaking constructed on a highway or other public place, or on an easement or real property whether owned by or licensed to the owner of the supporting structure, that person may apply to the Commission for a right of access to the supporting structure for the purpose of attaching its telecommunications facilities in order to provide its services, and the Commission may grant the permission subject to any conditions that the Commission determines including, but not limited to, the terms of access and the applicable rate, if any, payable to the owner of the supporting structure.
44 On application by a municipality or other public authority, the Commission may (a) order a Canadian carrier, subject to any conditions that the Commission determines, to bury or alter the route of any ~~transmission line~~ situated or proposed to be situated within the jurisdiction of the municipality or public authority; or (b) prohibit the construction, maintenance or operation by a Canadian carrier of any such ~~transmission line~~ except as directed by the Commission.	**44** On application by a municipality or other public authority, the Commission may (a) order a Canadian carrier, subject to any conditions that the Commission determines, to bury or alter the route of any telecommunications facility situated or proposed to be situated within the jurisdiction of the municipality or public authority; or (b) prohibit the construction, maintenance or operation by a Canadian carrier of any such telecommunications facility except as directed by the Commission.

3. CONTEXT AND PURPOSE OF THE PROPOSED AMENDMENTS

(a) Overview

The provision of telecommunications services requires the presence of vast infrastructure networks capable of connecting homes, businesses and communities. However, much of the necessary infrastructure already exists, at least in part, in the form of electricity distribution systems and landline telephone networks, whose owners have constructed the necessary support structures. It would be economically inefficient and wasteful—and in some cases prohibitively expensive—for all telecommunications undertakings (hereinafter

referred to as "Carriers") to build out their own network of support structures, rather than taking advantage of existing structures, whether they are owned by other Carriers or other entities. It is preferable by far that Carriers be granted access to existing support structures in exchange for a reasonable contribution to their cost, as this results in a lower cost to consumers, greater competition, and greater accessibility.

Recognizing this, Parliament has already granted the CRTC some power to regulate access to some support structures under section 43 of the Telecom Act. However, the powers granted by section 43, especially as interpreted by the Supreme Court of Canada, are too limited to achieve the aims of the telecommunications system as a whole.

The need for the proposed amendment in relation to poles stems from the decision of the Supreme Court of Canada in *Barrie Public Utilities v Canadian Cable Television Assn.*[2] . This case arose from an application for judicial review of a decision of the CRTC based on subsection 43(5). Following a dispute between the Canadian Cable Television Association and various provincially-regulated utilities over rates for access to power poles for the purpose of installing cable television lines, the CRTC ruled that subsection 43(5) of the Act granted it the power to order that access be granted and to determine the rate of any applicable charges. On appeal, however, the Supreme Court of Canada determined that the Act does not presently confer such jurisdiction on the CRTC. As a result, Carriers were forced to negotiate with provincially-regulated utilities and other third parties that own utility infrastructure on an individual basis.

The *status quo* presents a number of practical and financial challenges (discussed in more detail below). The purpose of the proposed amendment is to address these by allowing the CRTC to set rates and resolve disputes between Carrier, on the one hand, and electrical utility undertakings and municipalities (hereinafter referred to collectively as "Utilities"), on the other, in a manner that best serves the national public interest. Unfortunately, the majority reasons in *Barrie* did not address the constitutionality of a federal legislative enactment that would have the effect that the CRTC decision attributed to subsection 43(5) of the Act. As a result, that specific question remains unanswered at law and has led to the request for this opinion.

The underlying policy challenge

A 2006 report of a federal telecommunications policy review panel convened by Industry Canada (now Innovation, Science and Economic Development) provided the following overview of the basic underlying problem presented by the *status quo*:

> Support Structures

[2] [2003] 1 SCR 476 [*Barrie*].

In Canada, poles and ducts are used extensively to support telecommunications transmission lines. Telephone companies and electricity distribution companies own most of the poles that are used for these purposes. Historically, they have shared these resources, granting each other reciprocal rights to use these poles. Regulations are in place governing the height of poles and the portion of the poles that are dedicated to electricity distribution and telecommunications functions. In urban centers, telecommunications service providers also make extensive use of ducts. These are owned by carriers, municipalities, public utilities and other entities.

When support structures are owned by telecommunications carriers, the CRTC has clear jurisdiction to order access by third party carriers for telecommunications purposes on terms and conditions it considers reasonable. However, when support structures are owned by third parties who are not also telecommunications carriers, the courts have ruled that, under the existing legislative framework, the CRTC lacks jurisdiction to order use by telecommunications carriers.

A 2003 decision of the Supreme Court of Canada held that the words "transmission line" in ss. 43(5) of the Telecommunications Act could not be interpreted to extend to electrical distribution lines. Nor could ss. 43(5) be interpreted to extend to private property, including private easements where some of the electrical poles were located. The effect of this decision was to place resolution of disputes over access to support structures owned by electrical utilities outside the CRTC's jurisdiction and to prevent it from regulating access to such poles pursuant to ss. 43(5) of the Act.

Some provincial regulators, such as those in Alberta, Nova Scotia and Ontario, have exercised jurisdiction over the rates and terms and conditions of access to support structures owned by electricity distribution undertakings. The Public Utilities Commission in New Brunswick has also recently asserted jurisdiction to review the power company's support structure rates in that province. However, it is not clear that all provincial regulators will assume this jurisdiction or that they will adequately fulfil this regulatory role in all provinces and territories. Furthermore, their jurisdiction is limited to the companies they regulate, and does not extend to other entities. An equally important consideration is the fact that they are not regulating access pursuant to the policy objectives embodied in the *Telecommunications Act*, and they do not have a mandate to ensure fulfilment of these policy objectives. In addition, even in those jurisdictions in which provincial

> public utility boards have acted, there is a significant variance in both the methodology used to set rates and in the magnitude of the charges for third party access to support structures.

In the absence of federal legislation dealing with the issue, some provincial energy boards have asserted jurisdiction to set rates for utility pole attachments by federally-regulated telecom companies.[3] In my view, this is inconsistent with the division of powers and could be contested. That said, the focus of this opinion will be on the proposed amendment.

(b) The structure and purpose of the proposed scheme

The proposed legislative amendments are analogous to, and in fact an extension of the scheme set out in the existing version of section 43 of the Telecom Act. Subsection 43(2) currently provides that Carriers have a right to "enter on and break up any highway or other public place" for the purpose of building and maintaining their telecommunications infrastructure, subject to the duty not to interfere unduly with public use and enjoyment. Subsection 43(3) however stipulates that a Carrier must obtain the "consent" of any municipality or other public authority with jurisdiction over the space in question. Subsection 43(4) provides that, if this proves impossible on terms acceptable to the Carrier, it may apply to the CRTC for permission to proceed with the desired work, which the latter can grant subject to whatever conditions it deems reasonable.

Currently, this scheme applies only to "highways" and "other public places". It does not confer a right to Carriers to access and use support structures found in such places (such as power poles or streetlights) for the purpose of building their telecommunications infrastructure, nor does it grant such a right in relation to support structures located on private land, even if said structures are owned by a public entity. Subsection 43(5) does address the question of support structures in a limited way, but it was interpreted by the SCC in *Barrie* as regulating access to support structures owned by Carriers and not those owned by third parties.

Based on the materials you have provided us, the proposed changes to sections 43 and 44 have three primary goals, as described below.

(1) Extend the statutory access rights granted to wireline facilities to wireless equipment

Currently, under section 43 of the Telecom Act, Carriers have a statutory right to construct *transmission lines* on *highways and other public property*. In association with that right, the CRTC has established a number of principles designed to protect the

[3] See for example: Ontario Energy Board Decision and Order on CCTA Application (RP-2003-0249), March 2005.

wireline networks of Carriers (*e.g.*, no requirement to pay rent). However, the undefined term *transmission lines* has only been applied to wireline facilities (cable, fibre) and not wireless equipment (antennas, etc.). Therefore, the amendment seeks to expand this right to wireless equipment by replacing *transmission lines* with the term *telecommunications facility*, which is already defined in the Act and broad enough to capture wireless equipment.[4]

(2) Provide Carriers with reasonable (i.e., regulated) access to support structures owned by electrical utilities.

Currently, Carriers have access to supporting structures (poles, strand[5] and ducts) owned by other telecoms, all of which are regulated by the CRTC[6]. However, the CRTC has no authority over poles and ducts owned by electrical utilities, and Carriers have been faced with punitive attachment rates, whether regulated by provincial energy boards (poles) or based on market rates (ducts). The proposed amendments seek to give the CRTC jurisdiction over the rates telecoms pay to attach their facilities to these supporting structures, regardless of whether the supporting structure is located on public or private property. Electrical utilities would still own their poles and still have a direct say on terms of access to them by third parties, but the CRTC could establish enforceable rates applicable to Carriers. This would have a significant impact on cost predictability, provide regulatory consistency and enhance the ROI case for investing in rural and remote areas.

(3) Provide Carriers with reasonable (i.e., regulated) access to support structures owned by municipalities.

Currently, Carriers have a right to access municipal rights-of-way and certain kinds of public property. However, this right does not extend to any supporting structures that are owned by a municipality. This could include poles, strand and duct (many municipalities use underground duct for other services), "street furniture" (streetlights, traffic lights and transit shelters) and the sides or rooftops of municipally-owned buildings. The proposed amendments would extend the right to any municipality-owned structure that can support telecom facilities.

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4 "Any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility".

5 Strand is a steel cable strung between poles used to support the fibre cables. Typically, there will be 3 to 4 fibre cables spun around the strand. The parties that are not the owner of the strand will pay the owner for the privilege of wrapping their fibre around the strand.

6 Because poles, strand and duct are viewed as essential services typically owned by the incumbent telephone companies (Bell and Telus), access to them by others (including the attachment rates) is regulated set by the CRTC. The CRTC, of course, has direct jurisdiction over the telephone companies and ensures that competitors have reasonable access to these supporting structures.

4. VALIDITY OF THE PROPOSED AMENDMENT

When assessing the constitutionality of a measure under the federal division of powers, there are two steps to the analysis: a) identifying the "pith and substance" of the impugned measure; and b) determining whether it relates to an enumerated head of power granted to the enacting legislative body.

(a) Pith and Substance Doctrine

In order to establish the pith and substance of a challenged provision, one must identify the "dominant" or "most important" characteristic of the parent legislation, regulation or provision.[7] This will be based on an assessment of both the intended purpose and the legal effect of the challenged law,[8] which are assessed in order to ascertain the "true purpose", rather than the "stated or apparent purpose".[9]

Once the pith and substance of the measure has been identified, it must then be brought within a federal or provincial head or heads of power, most which are listed in sections 91 and 92 of the *Constitution Act, 1867*, respectively.

The pith and substance doctrine is to be understood within the context of the "dominant tide" in recent years, which is to adopt a "more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation".[10]

As such, the Supreme Court of Canada has indicated that it is reluctant to rely on the pith and substance doctrine to strike down a law that has a plausible connection to a head or heads of power of the enacting body; it has also recognized that incidental effects on matters outside the enacting bodies' jurisdiction will not always doom a law at the pith and substance stage of the analysis.[11]

(b) Federal Jurisdiction over Telecommunications

It is well established that Parliament has exclusive jurisdiction in the sphere of radio and telecommunications. Federal jurisdiction over telecommunications is derived from subsection 91(29) and paragraph 92(10)(a), which gives the federal government power

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7 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR at pp 362-63, 88 DLR (4th) 1.

8 See generally *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 27-31, [2007] 2 SCR 3 [*Canadian Western Bank*].

9 *Canadian Western Bank* at para 27.

10 *Reference re Securities Act*, 2011 SCC 66 at para 57, [2011] 3 SCR 837, [*Securities Reference*].

11 *Canadian Western Bank* at para 28.

over transportation and communication works and undertakings that traverse provincial or national borders.

This exclusive federal jurisdiction includes the power to choose the location of radiocommunication infrastructure.[12] It has also been held that Parliament clearly has a broader jurisdiction over telecommunications undertakings where such undertakings operate outside the limits of a province.[13]

In this regard, it is worth noting that the rationale for federal jurisdiction over such undertakings is to avoid jeopardizing the viability of links between the provinces through divided and uncertain jurisdiction. That is, while each province could conceivably have its own laws in relation to banking or even criminal law (as in the United States) without imposing direct harm on the other provinces, divided jurisdiction over the transportation and communication *links* between the provinces places each at the mercy of the other.

The importance of having a single regulator for interprovincial and international transportation works and undertakings has been repeatedly emphasized in the jurisprudence, as captured by Justice Binnie's pithy phrasing that the "*transportation needs of the country cannot be allowed to be hobbled by local interests*".[14]

Moreover, unlike other heads of power where jurisdiction over works and undertakings is derivative of some broader "matter",[15] subsection 92 (10) is exclusively directed to the regulation of certain types of undertakings as undertakings.

In this respect, the case for exclusivity over the regulation of those undertakings and their operations is clear. As Professor Hogg has stated:

> The *Bell Telephone* and *Winner* cases established an important rule, which has been consistently reaffirmed in later cases, that a

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12 In *re Regulation and Control of Radio Communication in Canada*, 1932 CanLII 354 (UK JCPC), [1932] AC 304 (PC); *Capital Cities Communications Inc v Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 SCR 141.

13 *Toronto Corporation v Bell Telephone Co of Canada*, [1905] AC 52, [1904] JCJ No 2 (QL); *Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission)*, 1989 CanLII 78 (SCC), [1989] 2 S.C.R. 225; *Téléphone Guèvremont Inc v Quebec (Régie des télécommunications)*, 1994 CanLII 130 (SCC), [1994] 1 SCR 878.

14 *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23, at para 64, [2007] 2 SCR 86 [*Lafarge*]; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 33-37, [2009] 3 SCR 407, [*Consolidated Fastfrate*].

15 Some federal undertakings are considered federal undertakings in a derivative sense. For instance, it is common to speak of "banks" as federal undertakings, but the real power allocated to the federal government is to pass legislation in relation to "Banking, Incorporation of Banks, and the Issue of Paper Money". Similarly, the federal government's authority in relation to ports, which are also considered federal undertakings, derives from the navigation and shipping power; there is no express federal authority to regulate "ports", as such.

> transportation or communication undertaking is subject to the regulation of only one level of government. Once an undertaking is classified as interprovincial, all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction...As Dickson C.J. commented in the *AGT* case, the question of jurisdiction is an "all or nothing" affair.[16]

Exclusive federal jurisdiction over undertakings avoids subjecting single integrated transportation and communications undertakings to multiple and overlapping systems of regulation, the effect of which is to confuse jurisdictional lines and make coherent regulation of such undertakings enormously difficult. The Courts are not blind to such practical realities. As noted in *Quebec (Attorney General) v Canadian Owners and Pilots Association*, they will be leery of overlapping laws in contexts that:

> …result in rival systems of regulation, which would be a "source of uncertainty and endless disputes" (*Bell Canada*, at p 843, *per* Beetz J.) and a "jurisdictional nightmare" (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para 140, *per* Bastarache J.).[17]

This pragmatic rationale is particularly compelling in relation to interprovincial transportation undertakings because otherwise significantly different regulatory requirements could be imposed in relation to the core aspects of the same undertaking.

(c) Support Structure Access Specifically

In relation to support structure access specifically, while the majority in *Barrie* did not address the constitutional issue (having decided the appeal on administrative law grounds), I discussed it at some length in my dissenting reasons. I found that the construction of subsection 43(5) adopted by the CRTC was valid in light of the constitutional division of powers (para 103). My analysis at the time is therefore the logical starting point for any opinion on the matter.

Following the "pith and substance" analysis, I found that the dominant characteristic of the construction placed by the CRTC on subsection 43(5) of the Act is that the latter "empowers the CRTC to aid federal undertakings by granting them access to the

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16 Hogg, *supra*, at §22.5, citing e.g. an interprovincial pipeline case: *Saskatchewan Power Corporation et al v TransCanada Pipelines Ltd*, [1979] 1 SCR 297, 88 DLR (3d) 289. See also Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 7th ed (Toronto: Irwin Law, 2017) at 379 ("The Courts have held that jurisdiction over a work or undertaking must be allocated to a single level of government. The courts have consistently rejected the idea of dividing jurisdiction between the federal and provincial governments over a single undertaking.")

17 *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 53, [2010] 2 SCR 536 [*COPA*].

infrastructure of provincially-regulated utilities when they have otherwise failed to obtain access on acceptable terms" (para 106). I specifically rejected the argument that the pith and substance of the proposed construction of subsection 43(5) would instead be to empower the CRTC "to minimize disruption of roadways or to regulate hydro-electricity within a province". In other words, the power at issue was one relating to the regulation of telecommunications infrastructure, not local transportation or electricity infrastructure—which are (generally) areas of provincial jurisdiction—despite the fact that it may have incidental effects on the latter.

Having characterized the pith and substance of the measure in this way, I then ruled that it related to federal jurisdiction over telecommunications, and was thus *intra vires* (para 107). I rested this conclusion in part on earlier cases dealing with federal jurisdiction in relation to telephone and railway lines. It is worth reviewing the relevant cases here.

In *Toronto Corporation v Bell Telephone Co of Canada*,[18] the Privy Council considered the validity of an application for an injunction against the Bell Telephone Company of Canada by the City of Toronto. The case dealt with the power of Bell, a company that had been incorporated under a special act of Parliament, to lay cables under and erect poles along the streets and highways of the city of Toronto for the purpose of carrying on its business. At issue was the constitutionality of an Ontario law that required Bell to obtain the City of Toronto's consent before exercising that power. The Privy Council held that the provincial law was unconstitutional, stating that "no provincial legislature was or is competent to interfere with [Bell's] operations, as authorized by the Parliament of Canada".

In *Attorney-General for British Columbia v Canadian Pacific Railway Co*.,[19] the Privy Council was asked to consider certain actions taken by a railway company in the Vancouver area. Canadian Pacific had, pursuant to statutory powers granted by Parliament, taken provincial Crown lands along a waterfront for construction of a railway. This railway, it was later alleged, violated certain public rights-of-way. Furthermore, it was argued that a federal law could not validly authorize the taking of provincial Crown lands. The Board, based in part on its earlier decision in *Bell Canada*, found that Parliament could in fact validly legislate in this manner (para 16).

The last decision that I relied on in this connection was *City of Toronto v Grand Trunk Ry Co.*[20] This case dealt with an order by the Railway Committee of the Privy Council requiring the City of Toronto to bear half the expense of safety measures required by at-grade crossings of the Grand Trunk railway over various city streets. The city contested the jurisdiction of the Railway Committee to make such an order and questioned the

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18 [1905] AC 52 (PC), 1904 CarswellOnt 809.

19 [1906] AC 204, 1906 CarswellBC 109,

20 (1906), 37 SCR 232.

validity of the federal legislation that purported to authorize it. Girouard J., concurring in the majority opinion, held that "the Dominion Parliament may interfere with property and civil rights and impose obligations upon municipalities as being incidents to the subject matter assigned to its jurisdiction". He specifically noted that:

> …[i]t cannot but be considered reasonable and right that the public, as represented by the municipalities through which the road passes, sharing in the advantages conferred by it and directly benefited by the measure of protection imposed and required, should share also in the cost of maintaining them.

This latter point is especially relevant given that one question at issue here is whether the CRTC can validly be empowered to determine the rate of compensation for use and access to Utilities' existing infrastructure.

Equally relevant, Davies J., also concurring in the majority, underscored the necessity of there being some "paramount authority" capable of managing the logistical conflicts arising from the growth of intercontinental railroads and their interactions with local infrastructure. Interestingly, in light of present purposes, he also noted the following:

> But it is said all this can be accomplished at the expense of the railway, and without assigning any portion of that expense to the municipality. Just so. It can be so. <u>But Parliament having authority over the premises has chosen to say, we think a more equitable plan will be to invest a competent tribunal with the power of apportioning between the railway and interested parties the share of the cost of the protective measures each should bear</u>.

In addition to these earlier cases, I also relied on a 2002 decision of the Federal Court of Appeal affirming the constitutional validity of sections 42 to 44 of the Act, *Federation of Canadian Municipalities v AT & T Canada Corp*.[21] Unfortunately, the majority in that case found that the constitutional question had been effectively abandoned by the appellants and did not analyse the issue in any detail. However, Pelletier JA. disagreed with the majority that the appellants had abandoned the issue. His characterization of their position is of interest here:

> [39]The notices of constitutional question filed by the appellants put into the question the validity of subsection 43(4) of the Act. However, in argument, the appellants took the position that subsection 43(4) could be construed in such a way as to avoid a finding of invalidity. In their view, subsection 43(4) was valid federal legislation if it was interpreted to allow the CRTC to make orders with respect to matters falling within

[21] 2002 FCA 500 (CanLII), [2003] 3 FC 379.

> provincial jurisdiction only if they affected a vital part of a federal undertaking. According to the appellants, subsection 43(4) gives the CRTC the power to settle questions which a federally regulated carrier and a municipality have been unable to negotiate if those questions are either otherwise within federal jurisdiction or if they are matters within provincial jurisdiction which affect a carrier in a vital aspect of its operation.

Pelletier JA.'s reasons do not make the reasoning underpinning this claim explicit. Taken at face value, however, it appears to rest on an error of law. Pelletier JA. framed the appellants' proposition using the language of interjurisdictional immunity ("IJI")—the orders would be valid "only if they affected a vital part of a federal undertaking"—, but the logic of this doctrine is improperly reversed. Pursuant to IJI, a *provincial* law will be held to be invalid if it impairs a "vital part of a federal undertaking". The validity of a federal law in relation to such an undertaking, however, does not hinge on the concept of a "vital part". Rather, one must conduct the standard division of powers analysis and determine whether it is valid federal legislation. Moreover, a federal law may validly encroach upon areas of provincial jurisdiction under certain circumstances based on the "ancillary powers" or "incidental effects" doctrine. In short, valid federal legislation is not confined to matters dealing with a "vital part" of a federal undertaking. This would therefore not be the appropriate framework with which to test the validity of subsection 43(4) or the proposed amendment to subsection 43(5).

As Pelletier JA. went on to note, the appellants' position appeared to rest on the implicit proposition that there exists a form of interjurisdictional immunity in favour of provincial undertakings, such as municipalities. Pelletier JA. rejected this idea, as did I in *Barrie* (at para 110). However, the case law on interjurisdictional immunity has evolved considerably since then, and in such a way that the validity of these conclusions cannot be assumed. I will return to this point below.

(d) Rogers Communications Inc v Châteauguay (City)

The above line of cases was recently reaffirmed by the Supreme Court of Canada in *Rogers Communications Inc v Châteauguay (City)*.[22] In that case, the issue was whether a municipal resolution prohibiting construction of a cell tower at a certain location was an unconstitutional attempt to regulate the location of a federal work or undertaking (a radiocommunication antenna system).

In *Châteauguay*, the challenger claimed that the "sole purpose and effect of" the municipality's action was to prevent Rogers from constructing its antenna system in its

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22 [2016] 1 SCR 467, 397 DLR (4th) 611 [*Châteauguay*].

chosen location, which was a matter that fell solely within federal jurisdiction. In effect, it claimed that there was no proper provincial purpose underlying the municipal order.[23]

In response, the City claimed that the "ultimate purpose in establishing the reserve was to protect the health and wellbeing of its residents", which falls within provincial jurisdiction over "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province".[24]

A majority of the Court agreed with Rogers. It held that the federal jurisdiction over interprovincial communications undertakings included the power "to choose the location of radiocommunication infrastructure"[25] and therefore the municipal order which purported to block or dictate the placement of the antennae was unconstitutional because it related in pith and substance to an exclusive federal power.

The majority also rejected the argument that the siting of radiocommunication infrastructure has a double aspect, implying that both the federal and provincial governments can legislate in this regard. Wagner and Côté JJ., for the majority, held that this would contradict the precedent established by the Privy Council in *Re Regulation and Control of Radio Communication in Canada* to the effect that the federal jurisdiction over the siting of such infrastructure is exclusive.

(e) Addition of Proposed Amendments to the Telecom Act

The dominant purpose of the proposed amendments to the Act deals precisely with the siting of telecommunications infrastructure. Accordingly, I am of the view that *Châteauguay* would clearly apply so as to confirm that the proposed measure is *intra vires* pursuant to Parliament's jurisdiction over telecommunications.

I have affirmed that the federal jurisdiction over telecommunications permits orders affecting provincial infrastructure. Nevertheless, provinces may argue that the exercise of that power interferes with the provincial power over civil rights and local affairs. If that position were accepted, it would be necessary to consider the incidental effects rule.[26]

As explained by the Supreme Court of Canada in *Quebec (Attorney General) v Lacombe*:

> The incidental effects rule, by contrast, applies when 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. It holds

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23 *Châteauguay* at para 40.

24 *Châteauguay* at para 41.

25 *Châteauguay* at para 42.

26 *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 SCR 641, [*General Motors*].

> 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. Mere incidental effects will not warrant the invocation of ancillary powers.[27]

Before arriving at a final conclusion on the *vires* issue, we should then determine whether the overlap of the legislation with areas of provincial jurisdiction is incidental or a serious intrusion.

A key element in the analysis is the degree to which the impugned provision is integrated into the scheme of the legislation as a whole. In this case, the legislation at issue is the Telecom Act, which is clearly within federal jurisdiction. As explained by Chief Justice Dickson in *General Motors*:

> The final question is whether the provision can be constitutionally justified by reason of its connection with valid legislation. As Laskin C.J. remarked in Vapor Canada, [*MacDonald v. Vapor Canada Ltd.*, 1976 CanLII 181 (SCC), [1977] 2 S.C.R. 134], inclusion of an invalid provision in a valid statute does not necessarily stamp the provision with validity. Here the court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive vis-à-vis provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.[28] [Emphasis added]

In this case, my opinion is that the intrusion would be held to have a low degree of intrusion on provincial powers. As will be seen below, in many cases, provincial

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27 *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 36, [2010] 2 SCR 453.

28 *General Motors* at 668.

jurisdiction has been implied on account of the legislative vacuum. Accordingly, any impact on provincial heads of power would be held to be incidental in nature.

5. PROVINCIAL MEASURES ADDRESSING THE SAME SUBJECT MATTER

(a) Vires

As noted above, partly as a result of the Supreme Court of Canada's decision in *Barrie*, Canada presently has a patchwork of rates, rate-setting methodologies, and terms of access for Carriers to access Utilities' support structures, varying from province to province, municipality to municipality. Given the number and diversity of such measures, an assessment of their constitutionality is beyond the scope of this opinion. However, two general points bear noting.

First, such measures may, if they single out telecommunications undertakings, as in *Châteauguay*, or if they confer excessively broad oversight powers, as in *Vidéotron c. Ville de Gatineau*,[29] be *ultra vires* on the grounds that they are in pith and substance measures attempting to regulate telecommunications.

Second, the argument that the provinces would likely raise in response to such a claim is that provincial measures are protected because of having only incidental effects on telecommunications. Again, this argument would turn on the specific content and context of the local measure.

Generally speaking, however, the existing measures have been adopted because there is a legal vacuum at the federal level. The new proposed federal legislation is valid and comprehensive, leaving no room for provincial legislation without overlap. Once there is overlap, my opinion is that the provincial legislation would be held to be either inoperative pursuant to the doctrine of paramountcy or inapplicable pursuant to the doctrine of interjurisdictional immunity.

(b) Inoperative Pursuant to the Doctrine of Paramountcy

Even if the measures merely purport to apply to telecommunications undertakings as part of an otherwise valid scheme of general application, they would likely be held to be inoperative pursuant to the doctrine of "paramountcy".

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[29] *Vidéotron c. Ville de Gatineau,* 2017 QCCS 3571 (CanLII) [*Vidéotron*].

Paramountcy provides that an otherwise valid provincial law, regulation or authorization must not directly (i) conflict with or (ii) frustrate the purpose of a federal law, regulation or authorization. In those cases, the federal law will supersede the provincial measure.[30]

I will address both branches of the paramountcy test below, before applying them to the proposed amendment.

(i) Operational Conflict

In *Multiple Access v. McCuthcheon*, the Court held that there will be an operational conflict triggering federal paramountcy "where one enactment says 'yes' and the other says 'no'".[31] In a similar vein, other cases have suggested a test of whether "compliance with one law involves breach of the other".[32]

This is the orthodox approach to the "operational conflict", sometimes known as the "impossibility of dual compliance" branch of the paramountcy test, which focuses on whether a person is able to simultaneously comply with both laws.

It should be noted that it will rarely be *impossible* for a person to comply with two sets of laws in this sense. Generally, one law is more permissive than the other, and it is possible for the regulated person to comply with the more restrictive law.[33] This necessarily entails forgoing the latitude allowed by the less restrictive law.

The case often cited in this respect is *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, where the federal law in question restricted tobacco advertising in certain respects but not others, while the provincial law effectively prohibited all tobacco advertising in premises that served anyone below the age of 18. The Court held that this did not raise an operational conflict:

> [22] It is plain that dual compliance is possible in this case. A retailer can easily comply with both s. 30 of the Tobacco Act and s. 6 of The Tobacco Control Act in one of two ways: by admitting no one under 18

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30 As also discussed below, and unlike with respect to interjurisdictional immunity, paramountcy depends on the extent to which the federal government has exercised its legislative authority, for instance, by approving or licensing a project.

31 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1.

32 *Smith v The Queen*, [1960] SCR 776, at p 800, 25 DLR (2d) 225.

33 See e.g. *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 25, [2015] 3 SCR 419 ("The parties essentially accepted the conclusion of the chambers judge and the Court of Appeal about the absence of operational conflict because it is possible to comply with both statutes by obtaining an order under the SFSA before seeking the appointment of a receiver under s. 243 of the BIA. The creditor can comply with both laws by observing the longer periods required by provincial law. In that regard, the federal law is permissive and the provincial law, more restrictive. This has been regularly considered not to constitute an operational conflict...").

> years of age on to the premises or by not displaying tobacco or tobaccorelated products.
>
> [23] Similarly, a judge called upon to apply one of the statutes does not face any difficulty in doing so occasioned by the existence of the other. The judge, like this Court, can proceed on the understanding that The Tobacco Control Act simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations.
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> [24] For an impossibility of dual compliance to exist, s. 30 of the Tobacco Act would have to require retailers to do what s. 6 of The Tobacco Control Act prohibits — i.e., to display tobacco or tobacco-related products to young persons.[34]

The "impossibility of dual compliance" approach to operational conflicts was also applied in *COPA*, as follows:

> [65] We are not here concerned with an operational conflict. Federal legislation says "yes, you can build an aerodrome" while provincial legislation says "no, you cannot". However, the federal legislation does not require the construction of an aerodrome. Thus, in Dickson J.'s formulation in *McCutcheon*, compliance with one is not defiance of the other. Here, it is possible to comply with both the provincial and federal legislation by demolishing the aerodrome.[35]

On this "impossibility of dual compliance" standard, an "operational conflict" will be very rare indeed, as it is quite uncommon that one legislature specifically *requires* conduct that the other prohibits. Indeed, taken to its logical conclusion, it is generally possible to comply with all laws at once by doing nothing.

However, this "impossibility of dual compliance" formulation has been relaxed recently, and some broader formulations have been favoured at the "operational conflict" stage. These are not based on whether the regulated entity can comply with both sets of laws, but whether the laws themselves appear to direct inconsistent outcomes.[36] These broader formulations have included whether both laws "can operate side by side without

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34 *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188 [*Rothmans*].

35 *COPA* at para 65.

36 As Monahan, Shaw and Ryan note, the analytical shift occurs by conceiving of the statutes as "directives to the judiciary" for the laws to be applied simultaneously, rather than as directives to the regulated person or entity. See generally Monahan, Shaw & Ryan at 135, citing *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961, 176 DLR (4th) 585.

conflict", whether both "laws can apply concurrently",[37] or whether there is an "impossibility of... simultaneous application".[38]

These formulations shift the focus from whether the regulated individual is able to comply with both laws, which is almost always possible, to whether both laws can comfortably or sensibly apply at once.

For instance, in *Alberta (Attorney General) v Moloney*, the Court had before it a federal law which provided that all debts were released once a person was discharged from bankruptcy, and a provincial law that required a debt incurred through a motor vehicle accident to be paid as a condition of driving.[39]

In these circumstances, it was possible for the regulated person to comply with both laws by either satisfying the debt or forgoing the entitlement to drive, which is what the lower court (and dissenting Justices) held in relation to the "operational conflict" branch of the paramountcy test.

But the majority of the Supreme Court disagreed, holding that there was an operational conflict between the two laws, on the following grounds:

> [63] One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently (*Sun Indalex*, at para 60; *Lafarge*, at para 82; *M & D Farm*, at para 41; *Multiple Access*, at p 191), "apply concurrently" (*Western Bank*, at para 72) or "operate side by side without conflict" (*Marine Services*, at para 76). The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes" ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. This conflict can hardly be characterized as "indirect" as my colleague suggests (paras 92 and 128).

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37 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 19, [2015] 3 SCR 327.

38 *Lafarge* at para 77.

39 *Alberta (Attorney General) v Moloney*, [2015] 3 SCR 327, 2015 SCC 51 [*Moloney*].

Thus, although treated as an operational conflict, *Moloney* is not an example where it was "impossible" for the person to comply with both laws, in the sense that term has traditionally been used.

Rather, what occurred was that an individual was forced to choose between a "benefit" flowing from the federal law (*i.e.*, a discharge of the debt) and a privilege afforded by provincial law (*i.e.*, the ability to drive). The Court held, in essence, that to deprive the individual of the benefit provided by federal law, as a condition of maintaining the provincial privilege, constituted a conflict between the laws themselves.[40]

Similar logic was employed in *Lafarge*, where a federal body had approved the construction of a facility on port lands and the provincial body (a municipality) had placed further conditions on the project in order to obtain provincial approval. In that context, the Court determined that this created a direct conflict between the two laws:

> [75] The provincial Attorneys General argue that there is no operational conflict because Lafarge could apply for and obtain building permits from both the VPA and the City. But that argument overlooks the fact that the Lafarge project in its present form does not comply with the City's by-law. The by-law imposes a 30-foot height restriction. It would be within the City's discretion to waive the height limit up to 100 feet, but that would impose the condition precedent of an exercise of a discretion by the City to approve a project that has already been approved by the VPA. This would create an operational conflict that would flout the federal purpose, by depriving the VPA of its final decisional authority on the development of the port, in respect of matters which fall within the legislative authority of Parliament.
>
> (...)
>
> [82] If the Ratepayers had succeeded in persuading the City to seek an injunction to stop the Lafarge project from going ahead without a city permit, the judge could not have given effect both to the federal law (which would have led to a dismissal of the application) and the municipal law (which would have led to the granting of an injunction).

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[40] Indeed, in the companion case to *Moloney*, the Court in *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397 [*407 ETR*] at para 25, it was stated that there was an operational conflict, not because one law *required* what the other *prohibited*, but because "(o)ne law *allows* what the other precisely prohibits." The difficulty is that such a proposition is true in respect of all of the cases in this area, including *Rothmans* and *COPA*, where no conflict could be found because it was possible to comply with both laws.

> That is an operational conflict, as held in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp*, [1999] 2 S.C.R. 961.[41]

As in the other cases surveyed above, it would not have been impossible for the project proponent in *Lafarge* to comply with both sets of conditions.

Rather, what was not possible to do was to *take advantage* of the approval of the federal government, to its fullest extent, because the other body placed certain restrictions or additional conditions on the federal approval.

While it does not say so expressly, what the Court appears to be basing its decision on in these cases is whether the purpose or effect of the federal approval was to specifically authorize, approve, grant an entitlement, or deliberately permit certain conduct (as in *Lafarge* and *Moloney*) or was rather to either incompletely prohibit conduct (as in *Rothmans*) or to permit conduct without specifically 'authorizing' it (as in *COPA*).

This analysis starts to blend into the second test for paramountcy, which involves circumstances where compliance with both laws would "frustrate" the purpose of the federal law, regulation or authorization.

(ii) Frustration of Federal Purpose

The "frustration of the federal purpose" test initially arose in those situations where it was possible to comply with both the federal and provincial laws, but where it was clear that the provincial law would undermine the purpose of the federal law.

This additional 'branch' of paramountcy mitigated the sharp edges of the "impossibility of dual compliance" formulation, which, as noted above, is a very difficult standard to meet.

The case often cited as the first example of the "frustration" strand of the paramountcy test is *Bank of Montreal v. Hall*, wherein Justice Laforest stated that:

> A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the

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41 *Lafarge, supra.*

> federal legislative purpose. Absent this compatibility, dual compliance is impossible.[42]

Perhaps the clearest expression of this principle is found in *Law Society of British Columbia v. Mangat*,[43] which involved a provincial law barring the practice of law by non-lawyers in the province, and a federal law authorizing non-lawyers to appear before a federal tribunal, the Immigration and Refugee Board ("IRB").

As in other cases where the provincial law is more restrictive than the federal law, there was no "impossibility of dual compliance": a non-lawyer could comply with both laws by simply not practising before the IRB, because the federal law did not *require* all non-lawyers to practise before the IRB.

However, as the Court explained, permitting that outcome would directly undermine the federal government's purpose in permitting non-lawyers to represent clients before the IRB:

> [72] In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal*, *supra*, dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the Immigration Act. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts.[44]

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42 *Bank of Montreal v Hall*, [1990] 1 SCR 121 at 154-155, 65 DLR (4th) 361 [*Bank of Montreal*].

43 *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 [*Mangat*].

44 *Mangat* at para 72.

Thus, although it was clearly possible for the regulated persons to comply with both regulations, complying with the provincial regulation would directly undermine the purpose of the federal provision.

The extent to which this "frustration" branch of the paramountcy test has begun to converge with the more modern approach to "operational conflicts" is an interesting question.[45] As recent decisions have expanded the "operational conflict" branch of the test, they have arguably contracted the frustration of federal purpose analysis.[46]

This question is largely academic, however, because the tests converge on a reasonably simple proposition: would applying the provincial laws serve to frustrate or undermine a deliberate approval, permission or authorization of conduct by federal Parliament or federal bodies acting pursuant to Parliament's purpose?

(iii) Application to the Proposed Amendments

Whether or not the proposed amendments would directly conflict with the various provincial and municipal by-laws currently in place largely depends on the specific provisions of those laws. That said, any provincial regime that purported to set the terms for access to support structures would likely be held to give rise to a direct conflict, because one would end up with different terms or rates.

Currently, provincial measures do not always expressly confer jurisdiction on provincial boards to set rates for pole attachment. In Ontario, for example, the Ontario Energy Board ("OEB") has set annual pole attachment charges as a condition of licence for each electrical utility in Ontario. Of note, however, neither section 74 nor section 78 of the *Ontario Energy Board Act, 1998*[47] expressly confers jurisdiction on the OEB to determine pole attachment rates. Moreover, the OEB does not consider telecommunications policy objectives when determining these rates.

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45 As can be seen, there is a considerable amount of overlap and confusion in relation to what have become known as the two branches of the paramountcy analysis. For instance, although both *Bank of Montreal, supra* and *Mangat, supra* are typically cited as examples of the "frustration" branch (see e.g. *Canadian Western Bank* at para 73; *Moloney* at paras 25-26), those cases use the terms "operational conflict" and "impossibility of dual compliance" to describe the conflict at issue. See *Mangat* at para 72; *Bank of Montreal* at 154 ("dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose"). Similarly, while the majority of paragraph 72 in *Mangat* is directed to the fact that the provincial legislation would undermine the *purpose* of the federal enactment, the final sentence – with respect to whether a judge or official could 'comply' with both acts at once – seems to duplicate the 'operational conflict' standard, as described in cases like *Moloney* and *Lafarge*.

46 See e.g. *Moloney, supra* at para 86 ("This Court has repeatedly cautioned against giving "too broad a scope to paramountcy on the basis of frustration of federal purpose"").

47 SO 1998, c 15 [*OEB Act*].

In the event that the proposed amendments to the Telecom Act were to be adopted, the two regimes could give rise to two different results in terms of the amounts to be charged to the carriers.

It could be argued by the province that the OEB measure would be a valid exercise of the "consent power" the proposed legislative scheme would grant such authorities,[48] although it may be inapplicable to Carriers pursuant to interjurisdictional immunity which is addressed in more detail, below. However, even under this scenario, should a Carrier think that the rate set by the OEB is too high, it could apply to the CRTC for an order setting a lower rate. Should the order be granted, the doctrine of paramountcy would apply and render the OEB measure inoperative. While in theory the Carrier could comply with both legislative schemes by simply paying the higher rate, thus avoiding an operational conflict in the strict or orthodox sense, my view is that complying with the provincial regulation would create an operational conflict and would, in any event, directly undermine the purpose of the federal provision.

In defining the federal purpose, it is useful to consider the unique nature of federal communications undertakings under subsections 91(29) and 92(10)(a) and the rationale behind assigning the constitutional authority over those undertakings exclusively to the federal government.

This was explained by the Supreme Court in *Consolidated Fastfrate*, as follows:

> [36] Thus, while the preference in s. 92(10) was for local regulation of works and undertakings, some works and undertakings were of sufficient national importance that they required centralized control. The works and undertakings specifically excepted in s. 92(10)(*a*) include some of those most important to the development and continued flourishing of the Canadian nation. As C. H. McNairn argues, I think persuasively, "[t]he maintenance of transport and communication facilities adequate to Canadian needs has historically been regarded as a vital factor in securing the economic and political viability of Canada as

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48 As we noted at the outset, the recent disputes in Québec (*Vidéotron c. Ville de Gatineau*, 2017 QCCS 3571 *(CanLII)*) and Alberta (*Telus et al. v. City of Calgary*, Court File No. 1701-03414) demonstrate that the interactions between the scheme set out in ss. 43(2) to 43(4) of the Act, which mirrors that proposed for support structures, and municipal or provincial measures can give rise to complex questions. For instance, if the "consent" of a public body or third-party is required before accessing a support structure, this would presume that the latter can impose certain conditions, subject of course to the CRTC's dispute resolution power. In the case of a municipality or other public body, could that consent be expressed by means of a generally applicable by-law or regulation, or would such a measure be inapplicable under interjurisdictional immunity, meaning that the issue must be settled by means of an individually negotiated agreement? This question overlaps with the question of what conditions provincially-regulated bodies would be entitled to demand of TUs that desire access to their support structures. As these questions are beyond the scope of the requested opinion, we will not examine them here, save to signal their existence as a potential issue in future.

> a federal union": see "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 *Can. Bar Rev.* 355, at p 355. As Professor Whyte emphasizes, the *Constitution Act, 1867* evidences a concern with activities that produce a nation state that despite its illogicality in terms of geography, will function as a single state and as an economically viable whole. This view explains . . . the special place of interconnecting (or nationcreating) transportation and communication systems created by sss. (*a*), (*b*) and (*c*) of s. 92(10). [Emphasis added.] (J. D. Whyte, "Constitutional Aspects of Economic Development Policy", in *Division of Powers and Public Policy* (1985), 29, at p 45)
>
> [37] The fact that works and undertakings that physically connected the provinces were subject to exceptional federal jurisdiction is not surprising. For example, it would be difficult to imagine the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province. If the legislature of the province did not grant railway companies the power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied.[49] (emphasis added)

This logic applies equally to other federal undertakings, such as radio and telecommunications, which by necessity must be centrally regulated. Put simply, the purpose of giving Parliament exclusive jurisdiction over such undertakings is precisely to avoid the risk of having large-scale interprovincial transportation and communication undertakings "hobbled by local interests".[50]

The current situation in relation to utility pole access is indeed an example of a telecommunications undertaking that is "hobbled by local interests."

Our understanding is that significant increases in pole attachment rates by provincial energy regulators have dramatically affected the operations, growth opportunities and financial circumstances of federally-regulated telecommunications undertakings, both large and small. As noted at the outset, the provincial energy boards are not required to consider telecommunications policy goals when setting rates.

The smaller, rural Carriers are especially hard hit by decisions of this nature. That is because the smaller Carriers typically serve low-density markets and, as a result require

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49 *Consolidated Fastfrate*, *supra*.

50 *Lafarge*, *supra* at para 64.

attachment to a much greater number of poles than would be the case in higher-density urban markets. Those smaller Carriers also lack the scale to absorb the dramatic increase in costs that these pole attachment rate increases represent. Accordingly, our understanding is that significant rate increases by provincial energy regulators are actively undermining the federal government's initiatives to extend broadband services to Canadians in rural and remote communities.

(c) Interjurisdictional Immunity

The doctrine of interjurisdictional immunity provides that an otherwise valid statute or regulation will be held inapplicable in cases where it "impairs" the "core" of an exclusive head of power.

The doctrine initially arose out of the granting of immunity from provincial legislation that had the effect of "sterilizing" or "paralyzing" the activities of federally-incorporated companies[51] and federal transportation and communications undertakings,[52] but has since expanded to a wider range of works and undertakings, persons or things, specifically falling within federal jurisdiction.

The theory underlying the creation of interjurisdictional immunity is "that each head of federal power not only grants power to the federal Parliament but, being exclusive, denies power to the provincial Legislatures".[53] As such, it was held that a province cannot encroach upon a "core" aspect of federal jurisdiction, even if it does so pursuant to a generally applicable law that is constitutionally sound in most of its applications.

At least since the SCC's decision in *Canadian Western Bank*, interjurisdictional immunity can in principle apply to shield both federal and provincial heads of power from intrusions by the other level of government.[54] Therefore, in a situation like the present one, its application should, strictly speaking, be considered in both "directions". Accordingly, a province, utility or municipality may seek to argue that the proposed legislative amendment is inapplicable on interjurisdictional immunity grounds, as was done in *Barrie*. I will consider both possibilities, after reviewing the general principles applicable to the doctrine.

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51 See the so-called "company cases", including *John Deere Plow Co v Wharton*, [1915] AC 330, 18 DLR 353; *Great West Saddlery Co v The King*, [1921] 2 AC 91, [1921] 1 WWR 1034; *Attorney-General for Manitoba v Attorney- General for Canada (Manitoba Securities Case)*, [1929] AC 260, [1929] 1 DLR 369.

52 See e.g. *Toronto Corporation v Bell Telephone Company of Canada*, [1905] AC 52, [1904] JCJ No 2 (QL); *Attorney-General of Ontario v Winner*, [1954] AC 541, [1954] 4 DLR 657 [*Winner*].

53 Hogg, *supra* at 15.8(e).

54 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 131, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

(i) General principles

The essence of the modern doctrine of interjurisdictional immunity was set out succinctly by the Supreme Court of Canada in the *Tsihlqot'in Nation* case, as follows:

> [131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power?[55]

While there has been both academic and judicial commentary questioning the usefulness of interjurisdictional immunity in light of the modern emphasis on flexibility and jurisdictional overlap, the doctrine was firmly reasserted by the Supreme Court of Canada in the *COPA* case in 2010,[56] and on numerous occasions by different courts since then.[57]

In *COPA*, the province issued an order under valid provincial land use and planning legislation that precluded the placement of an aerodrome in areas zoned as for agricultural land uses.

The province argued that even though its land use and planning legislation impacted the location of aerodromes (a matter generally falling within the federal aeronautics power), the interjurisdictional immunity doctrine should not be applied because, if the federal government wanted to preclude provincial regulation, "let it enact positive legislation creating an operative conflict and rely on the doctrine of federal paramountcy."[58]

The Court expressly rejected this logic, and responded as follows in *COPA*:

> [57] This objection misapprehends the doctrine of interjurisdictional immunity. The interjurisdictional immunity analysis presumes the

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55 *Tsilhqot'in Nation* at para 131.

56 See *COPA*.

57 Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Markham, ON: LexisNexis Canada, 2017) at 221. As Professors Régimbald & Newman point out, "recent cases show the doctrine to be an ongoing essential part of division of powers analysis".

58 *COPA*, *supra* at para 56.

> validity of a law and focuses exclusively on the law's effects on the core of a federal power: *Canadian Western Bank*, at para 48. What matters, from the perspective of interjurisdictional immunity, is that the law has the effect of impairing the core of a federal competency. In those cases where the doctrine applies, it serves to protect the immunized core of federal power from any provincial impairment.
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> [58] The Province's argument that interjurisdictional immunity cannot apply to laws possessing a double aspect is, at bottom, a challenge to the very existence of the doctrine of interjurisdictional immunity. Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the *Constitution Act, 1867*, itself refers to exclusivity: *Canadian Western Bank*, at para 34. The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in *Canadian Western Bank* and *Lafarge Canada*: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.

The Court went on to find that the doctrine of interjurisdictional immunity precluded the application of the (otherwise valid) provincial land use legislation to the extent that it had the impact of dictating the location of aerodromes, which was a core element of federal jurisdiction over aeronautics.[59]

Finally, it is worth noting that while the Court has been reluctant to employ interjurisdictional immunity in relation to certain federal heads of power – for instance, in

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[59] *COPA, supra* at paras 60-61. As the Court explained:

> [60] To sum up, the doctrine of interjurisdictional immunity is applicable in this case. The location of aerodromes lies at the core of the federal competence over aeronautics. Section 26 of the Act impinges on this core in a way that impairs this federal power. 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.
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> [61] 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, Parliament's exclusive power to decide the location of aircraft landing facilities is vital to the viability of aviation in Canada. As stated in *Lafarge Canada*: "The transportation needs of the country cannot be allowed to be hobbled by local interests. Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the Flying Dutchman to forever travel the seas" (para 64).

relation to banking[60] and other activities –, it has been more active in protecting federal transportation and communications undertakings from provincial regulation.

This is likely a function of the fact that the entire rationale for federal jurisdiction over such undertakings is to avoid jeopardizing the viability of links between the provinces through divided and uncertain jurisdiction. As Professor Newman observed with respect to interprovincial pipelines:

> Indeed, the reasons for interprovincial pipelines being in federal jurisdiction are precisely that they exist for national purposes and should not be held subject to the vagaries of particular provincial politics. On this more structural basis, there is every reason for interjurisdictional immunity to offer strong protection to a federal pipeline...[61]

In addition to the importance of respecting the exclusivity of the heads of power in relation to communication and transportation undertakings, the other benefit of the interjurisdictional immunity doctrine in this context is pragmatic: it avoids subjecting single integrated transportation and communications undertakings to multiple and overlapping systems of regulation, the effect of which is to confuse jurisdictional lines and make coherent regulation of such undertakings enormously difficult.

(ii) Interjurisdictional immunity to render provincial measures inapplicable to Carriers

While it is obviously of general relevance, the question of whether provincial or municipal measures, like the OEB rate-setting decision mentioned above, are inapplicable to Carriers pursuant to interjurisdictional immunity is, strictly speaking, outside the scope of the requested opinion, which concerns the validity of the proposed federal legislative measure. This latter question does not depend upon, nor is it influenced by, the question of whether interjurisdictional immunity would render measures like the OEB decision inapplicable to Carriers.

Moreover, it is highly unlikely that interjurisdictional immunity would ever become a live issue in relation to the proposed legislative amendments. As the SCC held in *Canadian Western Bank*, this doctrine should not be a "first recourse" in a division of powers dispute, especially in cases where paramountcy can be used to resolve the matter. Should the amendment to the Telecom Act be adopted, it would clearly pre-empt any

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60 See e.g. *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, 2007 SCC 22 ("*Canadian Western Bank*"); *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55 at paras 67-68.

61 Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013) at 125.

provincial or municipal measure on the matter, making recourse to the doctrine of interjurisdictional immunity unnecessary.

Nevertheless, it is worth making the following comments.

There is a *prima facie* argument to be made that such measures are inapplicable. However, the question is heavily fact-based. As noted above, the interjurisdictional immunity doctrine involves two inquiries: first, what is the "core" aspect of a federal head of power or the "essential and vital elements" of federal works or undertakings; and second, whether the provincial regulation in question "impaired" that core, vital or essential aspect.

The jurisprudence on what constitutes the "core" is not entirely consistent and is very fact specific.

In *Construction Montcalm*, the Court provided a summary of the elements that would fall within the core of the federal jurisdiction over airports, and therefore be immune from impairment by provincial laws. The first aspect is obvious: the decision of whether, when, and where to build the undertaking falls exclusively within federal competence.[62] However, the core or vital aspects of the undertaking go beyond that, to include at least the following:

> Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics.[63]

Similarly, in the early case of *Ontario (AG) v. Winner*, the Privy Council held that a provincial law that prevented an interprovincial bus company from picking up or

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62 *Construction Montcalm Inc. v. Min. Wage Com.*, [1979] 1 SCR 754 ("***Construction Montcalm***") at 770 ("To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern (...)"). See also *COPA*, *supra* at para 47 ("the federal power to decide when and where aerodromes should be build").

63 *Construction Montcalm*, *supra* at 770-771. However, the Court also held that, for instance, provincial laws requiring the wearing of hardhats while engaged in construction activities could apply to the construction workers on such a project (who were not themselves part of the federal undertaking), because "the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics".

dropping off passengers or cargo while on New Brunswick roads was inapplicable as it would "destroy the efficacy" of the bus company as an interprovincial carrier.[64]

Guidance can also be found in *Commission de Transport*, where the question was the extent to which provincial transportation regulations could be applied to a federally run and regulated guided bus transportation service operating in a federal park, which was analogized to a federal undertaking.

The Court held that none of the provincial transportation regulations would be applicable to the federal service, as they all went to the core of the undertaking in question. This included provincial regulations regarding:

> "routes and procedures, including the obligation to provide a guide, tariffs and the period in which the service will be provided";
>
> the regulation of "areas where the service may be provided, schedules that must be observed, frequency of trips, categories of buses and clientele of the service";
>
> "certain conditions for obtaining a permit", including where the provincial regulator "considers that the service provided does not fulfill the needs of the population of the territory to be served", or in relation to "the gratuitous nature of the service, the budget assigned to it and the amount paid by the Commission to a contractor for providing it"; and
>
> Requirements for a permit holder to "obtain authorization from the Commission des transports to alter the services it provides" and "over the substance of the service it offers".[65]

As can be seen, determining what constitutes the core or vital elements of a federal undertaking – and therefore what types of provincial regulation will unduly encroach upon core aspects of federal jurisdiction in relation to those undertakings – is a fact-specific exercise, and necessarily depends on the type of federal undertaking at issue. This can lead to difficult, if not somewhat arbitrary, line drawing focussed on the nature of the undertaking and the expected impact of the proposed regulation.

The next question is whether the impugned provincial conduct "impairs" the core of the federal power or vital part of the undertaking. In *COPA*, the Court described the modern breadth of impairment in these terms:

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64 *Winner, supra* at 668, 675.

65 *Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 SCR 838 ("*Commission de Transport*").

> [45] "Impairment" is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.[66]

In cases where the operations of a federal undertaking are in issue, this analysis will often depend on the consequences of enforcing the provincial laws or regulations against the federal undertaking, and the impact this will have on its continued ability to operate.

In *Commission de Transport*, the consequences of failing to abide by the provincial regulations were severe: the provincial commission could refuse to issue, or could revoke, a permit for failure to comply with the provincial regulations, and could order the withdrawal of the registration plate and registration certificate of any vehicle used by the holder of a permit.

According to the Court, these consequences "affect the fundamental decision to create a service and so impinges on its very existence", and "leave much too great a scope for the Commission des transports to interfere in the very design of the service".[67]

Therefore, at least where the restrictions or regulations in question touch on the core or vital aspect of a federal undertaking, and where those regulations are enforceable by effectively blocking, prohibiting or destroying the undertaking, the case for interjurisdictional immunity will be clearly made out.

The Supreme Court has also held that delays in terms of a project falling within federal jurisdiction also constitutes an impairment, even if it was not clear that the project would be blocked entirely.

That was the holding in *Châteauguay*, where the Court held that the provincial order would have required Rogers "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", which meant that "Rogers was unable to meet its obligation to serve the geographic area in question as required by its spectrum licence".[68] The Court therefore held that the municipal regulation relating to the location of the antennae system (a federal "work") was barred by the doctrine of interjurisdictional immunity; the provincial restriction on

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66 *COPA* at para 45.

67 *Commission de Transport, supra*.

68 *Châteauguay, supra* at paras 71-72,

the construction of the antennae "compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada."[69]

The same comment could be said to apply in the present case. Based on the facts as we understand them, the varying conditions applied to pole attachment is indeed compromising the orderly and efficient development and operation of telecommunications. That said, this would have to be made out on the evidence.

In summary, what amounts to "impairment" in terms of an undertaking will often have more to do with the consequences following a failure or inability to abide by the provincial regulations, rather than the nature of the regulations themselves. The more serious those consequences, the more likely the provincial regulations will impair the exclusive federal jurisdiction in relation to the works or undertakings in question.

(iii) Interjurisdictional immunity invoked by the province

As noted at the outset, the doctrine of IJI contemplates the possibility of application in both directions. It is therefore possible that a province could attempt to invoke the doctrine so as to protect the current provisions relating to rate-setting.

In light of the most recent decisions from the SCC on the issue, it is in my view highly unlikely that a province or utility would succeed in establishing that the proposed legislative scheme is inapplicable to provincial undertakings pursuant to interjurisdictional immunity. There are two main reasons for this.

First, as noted above, in *Rogers Communications v. Châteauguay* the SCC held that the location of telecommunications infrastructure is part of the "core" of federal jurisdiction in such matters, and that a municipal measure purporting to regulate this question would therefore be inapplicable to a Carrier as a result of interjurisdictional immunity. In my opinion, legislation governing access to support structures for the purpose of installing or maintaining telecommunications infrastructure falls within the same aspect of federal jurisdiction. This would therefore be fatal to the putative argument. Legislation emanating from the "core" of federal jurisdiction, like the proposed legislative amendments at issue here, cannot be found to be inapplicable under interjurisdictional immunity, as this would effectively sterilize Parliament's legislative power in the relevant context and thus override the federal division of powers.

In *Châteauguay*, the Court began by noting that the concepts of "cooperative federalism" and overlapping jurisdictions, while important, cannot be taken too far:

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69 *Châteauguay*, *supra* at para 71.

> [39] However, although cooperative 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: *Quebec (Attorney General) v. Canada (Attorney General)*, at paras 1719. Nor can it support a finding that an otherwise unconstitutional law is valid. This Court commented as follows in *Reference re Securities Act*, at para 62:

In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

Second, starting with *Canadian Western Bank*, the SCC has repeatedly stated that the "dominant tide" of constitutional law does not favour the doctrine of interjurisdictional immunity, and indicated that its application should be confined to situations already covered by precedent. While not strictly impossible, entirely novel applications of the doctrine, such as one involving the shielding of a provincial head of power (which has never occurred), are likely to be met with great skepticism by the lower courts and, ultimately, by the SCC.

6. CONCLUSION

The proposed amendments to sections 43 and 44 of the *Telecommunications Act* as set out in 2. above are *intra vires* because of Parliament's legislative power over telecommunications.

Any provincial measures that address the same subject matter would be inoperative pursuant to the federal paramountcy doctrine and not saved by the doctrine of incidental effects.

While more fact specific, it is also likely that provincial measures would be inapplicable pursuant to the doctrine of interjurisdictional immunity, in the event it can be shown that such measures are compromising the orderly development and efficient operation of telecommunications.

Yours truly,

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