

# Federalism and the Regulation of Summertime Fun in Calgary

Drifting down the river on a rubber dingy is a popular way to pass a hot summer day in Calgary. But anyone who floats on the river without wearing a lifejacket faces a \$500 fine. The City of Calgary's *Water Safety Bylaw* demands that no-one may be "in [or] on," or even "hold on to" an "inflatable rubber or canvas device capable of sustaining a person afloat" on any body of water within city limits unless he or she wears a personal flotation device.<sup>[1]</sup>

Fined for breaking this city bylaw, a brother and sister challenged its constitutionality in court. They claimed that the bylaw is not within the authority of the municipal government, so it should be declared of no force or effect. On May 11, 2010, the Provincial Court of Alberta ruled in *R. v. Latouche* that the bylaw is constitutionally valid, but it acknowledged that the bylaw's subject matter overlaps with the federal realm of authority.<sup>[2]</sup>

## Division of Legislative Powers

Canadian federalism is based on a [division of powers](#). The *Constitution Act, 1867* divides the subject matters of laws between Parliament in Ottawa and the legislative assemblies of the provinces. Sections 91 and 92 list the areas of law-making authority granted exclusively to either the federal or the provincial level of government.

Section 91(10) gives legislative authority to Parliament over matters related to "Navigation and Shipping." For legislative purposes, navigability includes even shallow waters that allow only for recreational travel on canoes or rafts.<sup>[3]</sup> Even relatively small rivers or large creeks within municipal boundaries are subjects that Parliament may legislate on.

Section 92(16) gives legislative authority to the provincial legislatures over "all matters of a merely local or private Nature within the Province." Municipal governments, such as the City of Calgary, are not assigned any law-making power by Canada's Constitution Acts. Instead, city governments are established by provincial legislation. Alberta's [Municipal Government Act \(MGA\)](#)<sup>[4]</sup> is provincial legislation passed under authority of section 92(16). The *MGA* allows the City of Calgary to enact delegated legislation, which are called municipal bylaws.

Section 60(1) of the *MGA* gives Alberta's municipalities "direction, control and management of the rivers, streams, watercourses, lakes and other natural bodies of water within the municipality, including the air space above and the ground below."<sup>[5]</sup>

The brother and sister who were fined for not wearing lifejackets claimed that section 60(1) of the *MGA* is beyond the power of the Province to enact. They said that Alberta could not pass such a law because it impermissibly encroaches on Parliament's jurisdiction over navigation. Thus, the applicants submitted, the legislation and the bylaw should both be struck down as unconstitutional.

The City of Calgary and the Alberta government argued that the bylaw and the MGA are both constitutionally valid. Despite their relevance to matters of navigation, they deal fundamentally with local matters.[6]

### **Double Aspect Doctrine**

The Provincial Court relied on the reasoning of the Supreme Court of Canada in its 2007 decision in *Canadian Western Bank v. Alberta*. [7] In that case, Justice Binnie describes Canadian federalism as “co-operative” [8] and “flexible” [9] and able to accommodate some shared areas of legislative authority under the “double aspect” doctrine.

[S]ome matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence.... The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered.... [10]

### **Interjurisdictional Immunity and Federal Paramountcy**

Interjurisdictional immunity is a constitutional doctrine that maintains separate, exclusive areas of jurisdiction for different levels of government. It applies when a law enacted by one level of government “could be shown to impair an essential and vital element” of a valid law of another level of government. [11] In *Canadian Western Bank*, Justice Binnie described a shift away from the doctrine of interjurisdictional immunity in recent constitutional interpretation. The “dominant tide” now is towards a presumption that legislation is constitutional. [12]

The doctrine of paramountcy “recognizes that where the laws of two levels of government conflict, federal law prevails.” [13] However, unless there is an actual conflict between the provisions of federal and local laws, there is no reason to apply paramountcy. [14]

### **Federalism and the Lifejacket Bylaw**

In *R. v. Latouche*, the Provincial Court saw the purpose and effect of the bylaw (its so-called “pith and substance”) as promoting the “safety and welfare of Calgarians ... within Calgary city limits.” [15] Its “principal purposes” are therefore “within local competence” and any impact of the bylaw on federal jurisdiction is merely incidental. [16]

The court found “no real incompatibility between the provisions of the federal and local laws, in that Calgarians are not simultaneously required to do inconsistent things. The absence of a federally imposed obligation to wear or carry a flotation device is not inconsistent with the City Bylaw requirement to actually wear it.” [17] If there was a conflict or inconsistency, the doctrine of paramountcy would apply. But in this case the bylaw did not unconstitutionally encroach on federal authority.

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[1] City of Calgary, Bylaw No. 9084. [2] *R. v. Latouche*, 2010 ABPC 166 at para. 21. [3] *Ibid.* at para. 31. [4] *Municipal Government Act*, R.S.A. 2000, c. M-26. [5] *Ibid.* [6] *Supra* note 2 at paras. 18-25. [7] *Canadian Western Bank v. Alberta*, 2007 SCC 22. [8] *Ibid.* at para. 24. [9] *Ibid.* at para. 42. [10] *Ibid.* at para. 30. [11] *Supra* note 2 at para. 94, *supra* note 6 at paras. 48, 51. [12] *Supra* note 7 at paras. 35-37. [13] *Supra* note 2 at para. 86. [14] *Ibid.* at para. 100. [15] *Ibid.* at para. 105. [16] *Ibid.* at para. 107. [17] *Ibid.* at para. 111.