The Case of the Unwanted Cell Tower: Rogers and the Defence of Federal Jurisdiction

This case solidifies the federal government's jurisdiction over federal undertakings and radiocommunications. The *Constitution* divides legal jurisdiction in Canada between the federal and provincial governments.[1] Although the federal and provincial governments have overlapping jurisdiction over certain topics, in order for a law to be valid it must be sourced from a power that the *Constitution* has granted to the lawmaker. This case halts provincial encroachment on federal jurisdiction.

Facts

Under a license from the federal government, Rogers decided to erect a cell phone tower in a residential area of Chateauguay, Quebec. It considered the site ideal for transmission. The municipality of Chateauguay was concerned that the radiation from cell phone towers posed a health risk, and rezoned the property to prevent the tower from being built there.[2] It also took steps to provide Rogers with an alternative site in an industrial area across town.

Issue

The issue in this case was whether the municipality of Chateauguay had the jurisdiction or power to change the location of Rogers' cell tower.

Rogers argued that Chateauguay's actions dealt primarily with the placement of radiocommunications equipment. Since the location of cell towers is an aspect of a federal undertaking, as well as an aspect of the federal power over radiocommunication, this would fall outside Chateauguay's jurisdiction.[3]

Meanwhile, Chateauguay argued that it had acted to prevent a potential health risk.[4] The provinces and their municipalities have jurisdiction over health and local concerns within the province. [5] Framed in this way, Chateauguay could claim jurisdiction over the local placement of cell towers.

Legal Background

When a law-maker's jurisdiction is challenged, courts conduct a two-step analysis to determine whether the law is constitutional. The first step is to conduct a 'pith and substance' test. This test determines what the law was meant to do, what the law actually does, and whether the level of government that enacted it has the jurisdiction to do so. Secondly, the court will determine whether there is any conflict between the law in question and a law of the other level of government. It will resolve the conflict when necessary.[6] However, in the modern era, courts have emphasised the notion of cooperative federalism,

and try to allow validly enacted laws to co-exist.[7]

Decision and Analysis

The majority of the Supreme Court considered the 'pith and substance' analysis to be a neutral test, with cooperative federalism only being considered at the second stage, when the court is ready to resolve conflict between valid federal and provincial laws.[8] The majority of the court therefore agreed with Rogers, that the 'pith and substance' of Chateauguay's regulation was to control the location of radiocommunication infrastructure.[9] As this is a federal power, the regulation fell outside of Chateauguay's jurisdiction, and was not a valid municipal law.[10]

Gascon J., in a dissenting opinion, argued that the 'pith and substance' of the regulation was the maintenance of public health.[11] He would have held that the principles of cooperative federalism require the courts to broadly interpret provincial and municipal powers at the 'pith and substance' stage of the test, recognizing jurisdiction whenever possible.[12]

Although it had already concluded that Chateauguay's law was unconstitutional at the 'pith and substance stage,' the court further held Chateauguay's regulation would have been inoperative to the extent that it conflicted with the federal law requiring Rogers to provide cell phone coverage. [13] This was due to the doctrine of interjurisdictional immunity, which protects the core of a jurisdictional power from any intrusion.

While the courts, in the spirit of cooperative federalism, try to avoid new uses of interjurisdictional immunity, they will nonetheless apply the doctrine if previous cases have already established that the matter falls within the protected core of a legislative power.[14] The court found that a previous decision had already determined that the location of equipment was at the exclusive core of the federal jurisdiction over radiocommunication.[15] Thus, interjurisdictional immunity would have completely prevented Chateauguay from interfering with equipment placement, even if it had done so through an otherwise valid law.

Implications

Depending on the interpretation given to it by future courts, this case could have a substantial impact in division of powers law. Municipal and provincial governments frequently delay the construction of other federally planned infrastructure projects, such as power lines and oil and gas pipelines, by using local laws and regulations that are within their jurisdiction/powers to enact. This case could suggest that the courts will not be so tolerant of such actions in the future, and will be reluctant to allow local interests to interfere in the planning of national projects. On the other hand, this case could be read narrowly, to apply only to the placement of radiocommunication equipment, with no relevance to other federal projects.

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5 .

[2] *Rogers Communications Inc. v Châteauguay (Ville),* 2016 SCC 23 at paras 6-23.

[3] *Ibid* at para 3.

[4] *Ibid* at para 4.

[5] Through its powers over property and civil rights, and matters of a local and private nature, *Constitution Act, 1867, supra* note 1, ss92(10), (13).

[6] *Ibid* at para 34.

[7] *Canada (Attorney General) v Ontario (Attorney General),* [1937] AC 326 (Canada PC), at p. 354 cited in *Canadian Western Bank v Alberta* 2007 SCC 22 at para 42.

[8] *Ibid* atparas 38-40.

[9] *Ibid* at par 79.

[10] *Ibid* at paras 93-95.

[11] *Ibid* at par 79.

[12] *Ibid* at paras 93-95.

[13] *Ibid* at para 63.

[14] *Ibid* at para 61.

[15] *Ibid.*