YOUNG ANDERSON
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CLIENT BULLETIN

SUPREME COURT CONFIRMS EXCLUSIVE FEDERAL AUTHORITY TO REGULATE THE LOCATION OF RADIOCOMMUNICATION ANTENNA SYSTEMS

The Supreme Court of Canada has given judgment in *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, holding that the City lacked the constitutional jurisdiction to regulate the location of radiocommunication antenna systems.

The case began in the fall of 2007 when Rogers entered into a lease of property in Chateauguay with the intention of constructing a new antenna system on the property to fill gaps in its wireless network. After entering the lease, Rogers applied for site approval under the federal *Radiocommunication Act,* which triggered a requirement that Rogers submit to a 120-day public consultation process as set out in the federal Radiocommunications and Broadcasting Circular (CPC-2-0-03). When Rogers notified the City of its intentions, Chateauguay expressed concern about the proposed installation, citing concerns about the visual impact of the antenna system and the potential for adverse health and safety consequences. After several rounds of consultation, numerous communications with the applicable federal Minister and even the initiation of expropriation proceedings by the City to acquire an alternative site for use by Rogers, the federal Minister issued an approval in 2010 for the construction of the antenna system on the property leased by Rogers in 2007. Chateauguay responded by issuing a "notice of reserve" under its enabling legislation prohibiting all construction on the property for a period of two years. Rogers then initiated legal proceedings challenging the validity of the notice of reserve.

The City took the position that the notice of reserve should be upheld under the double aspect doctrine of constitutional law, a doctrine under which a provincial law that affects a matter having a federal aspect may be found valid so long as it also deals with matters within provincial legislative competence. It argued that while the notice of reserve had an effect on a federal matter (the location of radiocommunication infrastructure), it also had provincial aspects, since it was concerned with the "health and well-being of residents living nearby and the harmonious development of the municipality's territory," matters within provincial legislative authority. The Court rejected the City's double aspect argument, concluding that there was no "equivalence" between the federal and provincial aspects of the notice of reserve, but instead the "primary purpose of the notice of reserve was to block the Rogers project." The Court struck down the notice of reserve because in "pith and substance" it concerned the location of

radiocommunication infrastructure, a matter within exclusive federal jurisdiction under the *Constitution Act, 1867.*

The Supreme Court of Canada also held that even if the notice of reserve had been valid provincial legislation under the double aspect doctrine, it would still have been inapplicable to the Rogers project under the doctrine of interjurisdictional immunity. Under the doctrine of interjurisdictional immunity, a constitutionally *valid* law will be held inapplicable to the extent it impairs a core element of a federal legislative power. Thus, for example, in *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39, the Supreme Court of Canada held that while provincial agricultural reserve legislation is valid, it does not apply to the extent it would prohibit the construction of aerodromes within the reserve. The doctrine of interjurisdictional immunity allows a law to stand in its general application, while rendering it inapplicable to the extent it would "impair" a matter within the core of federal legislative jurisdiction under the Constitution. In *Rogers Communications Ltd.,* the Court held that even if the notice of reserve had been valid (and thus applicable to prevent the construction of other infrastructure on the property), the doctrine of interjurisdictional immunity operated to render it inapplicable to the construction of radiocommunication infrastructure, because the location of radiocommunication infrastructure is a core element of federal jurisdiction over radiocommunications. The Court observed that the notice of reserve would have a serious effect on Rogers' ability to meet its obligations to serve the geographic area in question and thus would compromise the ability of the federal government to ensure the "orderly development and efficient operation of radiocommunication." By controlling the location of the infrastructure, the notice of reserve would impermissibly "impair the core of the federal power over radiocommunication in Canada."

Rogers Communications Ltd. v. Chateauguay (City) is an important case because it confirms the generally held view that a municipal bylaw cannot regulate the location of radiocommunication antenna systems, regardless whether the bylaw targets such infrastructure directly (by, for example, expressly prohibiting radiocommunication antennas in specified land use zones) or indirectly (by, for example, prohibiting a broader class of infrastructure that would encompass radiocommunication antenna systems).

Gregg Cockrill