SCC File No. 36027

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE JUDGMENT OF THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ROGERS COMMUNICATIONS INC.

APPELLANT
(Appellant)

- and -

VILLE DE CHÂTEAUGUAY

RESPONDENT
(Respondent)

- and -

CHRISTINA WHITE

INTERVENER
(Mise en cause)

- and -

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Mise en cause)

AND BETWEEN:

ROGERS COMMUNICATIONS INC.

APPELLANT
(Appellant)

- and -

VILLE DE CHÂTEAUGUAY

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Mise en cause)

(Style of cause continued inside)

FACTUM OF THE INTERVENER
(Federation of Canadian Municipalities)
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

- and -

WHITE, CHRISTINA
ATTORNEY GENERAL OF CANADA
FEDERATION OF CANADIAN MUNICIPALITIES
CITY OF TORONTO
BELL MOBILITÉ INC., TELUS COMMUNICATIONS INC. ET VIDÉOTRON S.E.N.C.
and UNION DES MUNICIPALITÉS DU QUÉBEC

INTERVENERS

Federation of Canadian Municipalities
24 Clarence Street
Ottawa, Ontario
K1N 5P3
Telephone: (613) 241-5221
Facsimile: (613) 241-7440
Email: stephane_emardchabot@sympatico.ca

Stéphane Émard-Chabot
Counsel for the Intervener,
Federation of Canadian Municipalities

Fasken Martineau DuMoulin LLP
Avocats et notaires
800, Place Victoria, Tour de la Bourse
Bureau 3700
Montréal (Québec) H4Z 1E9
Téléphone: (514) 397-7565
Télécopieur: (514) 397-7600
Courriel: plefebvre@fasken.com

Pierre Y. Lefebvre
Leslie Milton
Vincent Cérat Lagana
John B. Laskin
Nick Kennedy
Procureurs de l'appelante
Rogers Communications Inc.

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
55 Metcalfe Street, Suite 1300
Ottawa, Ontario
K1P 6L5
Telephone: (613) 236-3882
Facsimile: (613) 230-6423
Email: wexler@fasken.com

Yael Wexler

Ottawa Agent for Counsel for the Appellant,
Rogers Communications Inc.

Dunton Rainville
Barristers and Solicitors
800 Victoria Square, 43rd Floor
Montréal, QC H4Z 1H1
Telephone: (514) 866-6743 Ext: 363
Facsimile: (514) 866-8854
Email: pgladu@duntonrainville.com

Patrice Gladu
Sébastien Dorion
Counsel for the Respondent,
City of Châteauguay

Noël & Associés
Barristers and Solicitors
111 Champlain Street
Gatineau, QC J8X 3R1
Telephone: (819) 771-7393
Facsimile: (819) 771-5397
Email: p.landry@noelassocies.com

Pierre Landry

Agent for Counsel for the Respondent,
City of Châteauguay

Bernard, Roy & Associés
Avocats et notaires
800 - 1, rue Notre-Dame Est
Montréal (Quebec) H2Y 1B6
Téléphone: (514) 393-2336 Ext: 51478
Télécopieur: (514) 873-7074
Courriel: benoit.belleau@justice.gouv.qc.ca

Benoit Belleau
Simon Larose
Hugo Jean
Procureurs pour l'intimé,
Procureur général du Québec

Noël & Associés
Barristers and Solicitors
111 Champlain Street
Gatineau, QC J8X 3R1
Telephone: (819) 771-7393
Facsimile: (819) 771-5397
Email: p.landry@noelassocies.com

Pierre Landry

Agent for Counsel for the Respondent,
Attorney General for Canada

André J. Bélanger
Avocat et notaire
295, rue de la Clairière
Rosemère (Quebec) J7A 3Z2
Téléphone: (450) 951-9345
Télécopieur: (450) 951-9347
Courriel: andrejbelanger@videotron.ca

Procureur de l'intervenante,
Christine White

City of Toronto
Corporate Services
55 John Street, 26th Floor
Toronto, ON M5V 3C6
Telephone: (416) 392-8052
Facsimile: (416) 392-3848

Darrel A. Smith
Dianna Dimmer
Counsel for the Intervener,
City of Toronto

Noël & Associés
Barristers and Solicitors
111 Champlain Street
Gatineau, QC J8X 3R1
Telephone: (819) 771-7393
Facsimile: (819) 771-5397
Email: s.labbe@noelassocies.com

Sylvie L'Abbé

Agent for Counsel for the Intervener,
City of Toronto

LeChasseur avocats ltée
Avocats et notaires
393, rue Saint-Jacques, Bureau 258
Montréal (Québec) H2Y 1N9
Téléphone: (514) 845-5342
Télécopieur: (514) 845-0389
Courier: malechasseur@lechasseuravocats.com

Marc-André Lechasseur
Agnès Pignoly
Procureurs de l'intervenant,
Union des municipalités du Québec

Noël & Associés
Barristers and Solicitors
111 Champlain Street
Gatineau, QC J8X 3R1
Telephone: (819) 771-7393
Facsimile: (819) 771-5397
Email: p.landry@noelassocies.com

Pierre Landry

Agent for Counsel for the Intervener,
Union des municipalités du Québec

Côté, Marcoux & Joyal
Avocats et notaires
Complexe Guy-Favreau
200 boulevard René-Lévesque oust
Tour est, 5ieme étage
Montreal (Québec) H2Z 1X4
Téléphone : (514) 283-8733
Télécopieur : (514) 283-3856
Courriel : pierre.salois@justice.gc.ca

Pierre Salois
François Joyal
Procureurs pour l'intervenant,
Procureur général du Canada

Attorney General of Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Telephone: (613) 670-6295
Facsimile: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Christopher M. Rupar

Ottawa Agent for Counsel for the Intervener,
Attorney General for Canada

Prévost Fortin D'Aoust
Avocats et notaires
20 845, chemin de la Côte Nord, Bureau 500
Boisbriand (Québec) J7E 4H5
Téléphone: (450) 979-9696 Ext: 248
Télécopieur: (450) 979-4039
Courriel: m.quenneville@pfdavocats.com

Mathieu Quenneville
Stephen Schmidt
Valérie Beaudin
Roudine Ishak
Procureurs pour les intervenants,
Bell Mobilité Inc., TELUS Communications Inc. et Vidéotron s.e.n.c.

Supreme Advocacy LLP
Barristers and Solicitors
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855
Facsimile: (613) 695-8580
Email mfmajor@supremeadvocacy.ca

Marie-France Major

Ottawa Agent for Counsel for the
Interveners, **Bell Mobilité Inc., TELUS Communications Inc. et Vidéotron s.e.n.c.**

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. In order to fully apprehend the constitutional questions raised by this appeal, it is essential to also rely on the clear distinction made, in the *Constitution Act, 1867*, between the concepts of "undertaking" and "works". This distinction is at play in a good number of cases cited by the parties and, in the Federation of Canadian Municipalities' (FCM) view, is of great assistance in resolving this dispute in a logical and principled manner.

2. FCM relies on the facts as set out in Part I of the Factum of the Respondent, Ville de Châteauguay (Châteauguay).

PART II – STATEMENT OF QUESTIONS IN ISSUE

3. FCM adopts the questions as formulated by Châteauguay in its Factum[1] as they encompass the breadth of the issues raised by this case. Of these five questions, FCM will only speak to the constitutional issues raised in Question 5, namely the application of the modern doctrines of exclusivity and paramountcy to this case.

PART III – STATEMENT OF ARGUMENT

4. The Respondents, Châteauguay and the Attorney General of Quebec, very aptly set out the reasons why matters of antenna siting do not fall within the exclusive jurisdiction of the federal government, especially in light of the parameters of the paramountcy doctrine, as defined by this Court in *Canadian Western Bank*. FCM further submits that the Respondents' application of the doctrine is equally compelling.

5. Instead of reformulating or trying to add to these already strong arguments, FCM will focus its contribution to this appeal on a complementary but equally crucial point of constitutional law: the inherent distinction between "undertakings" and "works" and the relevance of this distinction in this appeal.

6. These two concepts are set out in section 92(10) of the *Constitution Act, 1867* and confer upon provincial legislatures the power to make laws in relation to "local works and undertakings". This section also sets out three exceptions whereby the federal government retains jurisdiction, including over certain purely local works through its

[1] Factum of the Respondent Châteauguay, at p. 8.

declaratory power. By implication, the federal government retains power over works and undertakings that are not local in nature.

7. In reviewing the jurisprudence that has considered these two concepts, Hogg indicates that:

> [...] a work is a "physical thing", while an undertaking is "not a physical thing but an arrangement under which... physical things are used". The term "undertaking" is the one which has been most often invoked in the cases under s. 92(10)(a), and it seems to be equivalent to "organization" or "enterprise" [...][2]

8. FCM submits that this fundamental distinction, incorporated into the Constitution's legal framework, reflects very real practical and policy considerations. Almost invariably, in order to exercise their activities, federally-regulated undertakings must deploy physical infrastructure, works that are built locally, that must co-exist with other infrastructure and uses, as well as generating location-specific impacts. While the undertaking – the types of things used and the manner in which they will be used – remains federal, the ability to manage the purely local aspects of the infrastructure was wisely entrusted to the provincial (and municipal) governments. In a country as large and diverse as Canada, it would be illogical and impractical to proceed otherwise.

9. By contrast, the exclusionary approach argued by the Appellant is not, in FCM's view, founded in law, especially not in light of the value placed by this Court on cooperative federalism and complementary, overlapping jurisdictions. Furthermore, the Appellant's approach is ill-conceived from a public policy perspective. It would result in the complete absence of any oversight whatsoever for key aspects of the infrastructure that are entirely local in nature. The repercussions would go beyond the issue of this antenna siting. They would seriously undermine municipal ability to properly manage complex local issues.

10. Indeed, in many cases, the outcome would be a regulatory gap on issues of importance to local communities and on matters in which municipal officials would normally be able

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[2] Hogg, Peter W., *Constitutional Law of Canada*, 5th ed. Supp., vol. 1, Toronto: Carswell, 2007 (loose-leaf updated 2014, release 10) at pp. 22-4.

and be expected to intervene directly. This Court has qualified such gaps as undesirable in a modern and complex society.[3]

11. If, for example, a new transmission antenna is proposed to be installed on an existing building (a commonplace occurrence in urban centres), the Appellant's interpretation would prevent municipal officials from requesting a Building Permit in order to ensure that this addition does not adversely affect the structural integrity of the building and the safety of its occupants, something which some urban municipalities require.

12. Broadening the discussion to include other forms of telecommunications, if a proposed telephone junction box impedes municipally-mandated sight lines at an intersection, the Appellant's interpretation would prevent municipal officials from requesting that the plans for the box be altered, even slightly, to prevent accidents and ensure public safety. In fact, under the Appellant's interpretation, it is doubtful municipalities would even have the ability to require permits for such work as most typically do.

13. In congested urban areas, competition for space below grade between the different needs – water, waste water, storm water, natural gas lines, fire suppression, electrical and telecommunications infrastructure – is so intense that, without the ability of municipalities to effectively manage the coexistence of all infrastructure, significant logistical and safety issues would quickly arise, to the detriment of all users of the space.

14. In other words, federal jurisdiction over federal undertakings should not, as the Appellants advocate, result in the automatic and unilateral broadening of federal powers in such a way as to swallow up legitimate local authority over works of a local nature such as antennas. If municipal officials cannot address the wide range of logistical issues they currently manage for the public good, including for the benefit of federal undertakings themselves, who will?

15. In this appeal, the selection of the acceptable area for the antenna in order to ensure the viability of the enterprise is a federal matter. However, there is no legal or policy reason to prevent municipal officials from exercising their authority on matters relating purely to the manner in which the infrastructure is deployed or specifically where, within the

[3] See *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at paras 24, 37, 42, 44.

acceptable area, the antenna should be located. A shared jurisdiction on this basis, although untested in Court until now, has long been recognized by experts and the federal government.[4]

16. Of course, this local constitutional authority over local works is not boundless. In FCM's views, jurisprudence has already established two inherent limits to local jurisdiction.

17. The first is the framework set out by this Court in *Canadian Western Bank* and its flexible but clear and practical limitations. The pith and substance of the intervention must be tied to valid local objectives and the measures adopted by the municipality cannot result in conflicting rules nor can they create a barrier to the realization of federal objectives. A municipality cannot force the installation of the latest fibre-optic technology on its territory, no more than it can ban the installation of antennas for cellular telephone service.

18. The second exception consists of the few, well-known instances where the federal undertaking cannot be dissociated from its accompanying works. Airports or ports are prime examples where the "enterprise" and the "physical thing" simply cannot, for logical and practical reasons, be treated as two separate matters. The result is that, by conceptual necessity, most of the local jurisdiction over works is pushed aside. The federal undertaking becomes synonymous with the infrastructure, even if the physical infrastructure, the "works", must be built at a specific location.

19. However, despite this necessary overriding of local authority, it has long been held that, as an exception, such instances must be carefully circumscribed.[5]

20. In its Factum, the Appellant compares aeronautics with radiocommunications and relies on *Lacombe*[6] and *COPA*[7] to illustrate that municipalities have no role to play in antenna sitings. FCM submits that this is a false analogy for three reasons.

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[4] Factum of the Respondent Châteauguay at paras. 57-60
[5] See, for example, *Canadian Pacific Railway v. Notre-Dame-de-Bonsecours*, [1899] A.C. 367 and *Construction Montcalm Inc. v. Min. Wage Com.* [1979] 1 S.C.R. 754 at p. 773.
[6] *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453.
[7] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536.

21. First, as pointed out by Châteauguay, federal exclusivity over antenna sitings has not been established.[8] Second, as indicated above, aeronautics belong to a unique type of federal undertakings. As structures, airports, ports and railways are indivisible from the federal authority in this field and are complex infrastructures to locate. Third, the facts in *Lacombe* and *COPA* are easily distinguished: the effects of the impugned measures in both cases were so restrictive that the federal authority over aeronautics could not be exercised at all.

22. None of these factors are present in this case. Châteauguay's intervention was never intended to affect, nor did it affect or even restrict, the federal "undertaking". In other words, no business aspect of the radiocommunication enterprise were ever brought into play. Châteauguay accepted the "search area" for the new antenna and simply exercised valid power for valid local purposes in order to influence a local work. At no time did it "impair" or have any "adverse consequences" on any essential part of the undertaking,[9] or create any conflict such that Châteauguay's reserve was incompatible or frustrated the federal undertaking.[10]

23. FCM submits that if the fundamental distinction between federal undertakings and their manifestation through works of a local nature is factored into the *Canadian Western Bank* framework, it will provide a comprehensive solution that, unlike the Appellant's approach, is logical, practical and entirely respectful of the letter and intent of the constitutional provisions at play.

PART IV – SUBMISSIONS ON COSTS

24. FCM does not seek costs in this case and requests that no costs be ordered against it.

PART V – ORDER SOUGHT

25. FCM requests permission to make oral arguments at the hearing of this appeal.

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[8] Factum of the Respondent Châteauguay, at paras. 102-110
[9] *Canadian Western Bank* at paras 48-49, 63.
[10] *Canadian Western Bank* at paras 71-73.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of September 2015

Stéphane Émard-Chabot
Counsel for the Intervenor, the FCM

PART VI – TABLE OF AUTHORITIES

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