



**University of Toronto
Faculty of Law Review**

84 Queen's Park
Toronto, Ontario
M5S 2C5

FIFTH ANNUAL CONFERENCE ON STUDENT PUBLISHING IN LAW

Hosted by the *University of Toronto Faculty of Law Review*

March 10 2009

On Laferrière v. Québec (Procureur général)

by

Matthew Mundy

Conference Draft – Not to be cited without Permission

The Annual Conference on Student Publishing in Law is sponsored by
BLAKE, CASSELS AND GRAYDON LLP

Introduction

Although both the *Western Bank* and *Lafarge* cases actively discouraged the application of the interjurisdictional immunity doctrine, the Court in *Laferrière* erroneously interpreted and applied it in its judgment. The Court also ignored the paramountcy doctrine, which had greater relevance to the cases at hand.

Interjurisdictional Immunity

In both *Western Bank* and *Lafarge* the Court tightened up the test for the application of interjurisdictional immunity, asserting that its proper application should be in situations where a provincial or federal law “impairs” a core competence of the other level of government or a vital or essential part of its undertaking (*Western Bank*, para. 48). The Court discouraged regular use of the immunity doctrine on the grounds that, among other things, it creates legal vacuums, is inconsistent with “flexible federalism” and overlapping powers, and is largely superfluous in the presence of federal paramountcy (*ibid.*, para. 42-44). The Court also cautioned against resorting to the doctrine first in a division of powers dispute, favouring instead the consideration of paramountcy in the absence of immunity doctrine precedent (*ibid.*, para. 78). The Court confirmed the new hesitance towards immunity by rejecting its application in both cases.

In the first case *Laferrière* looked at, the provincial government halted the operation of a private airport for violating agricultural zoning laws. In terms of federal authorization, while the construction of private strips on land such as the appellants’ is generally allowed, there is no specific regulation requiring permission (*Laferrière*,

para.15). The conflict here arises from the zoning laws, which seem to intrude into exclusive federal jurisdiction.

While the laws do have some spill over into aeronautics, it is unclear and never adequately explained why immunity doctrine should be applied. With the restrictions on the doctrine's application looming large, it was incumbent upon the Court to demonstrate that the provincial laws are impairing, and not just affecting, a vital or essential aspect of aeronautics.

Though the Court marshalled precedent to show that the location of airports falls within exclusive federal jurisdiction, it failed to establish impairment (*ibid.*, para. 47). The Court demanded "adverse consequence" from the impairment that puts the core or vital part of the federal power or undertaking "in jeopardy" was nowhere to be found, as the intrusion failed to trigger any clearly deleterious results (*Western Bank*, para. 48). The provincial law was just incidentally affecting the core here, and in keeping with the new restrictions immunity should not have been applied.

In light of the tightened test for the application of immunity, it is difficult to persuasively argue that there is impairment, for there is no federal regulation for the zoning laws to conflict with. The application of interjurisdictional immunity to such a situation creates a "legal vacuum", a phenomenon expressly cautioned against in *Western Bank* (*ibid.*, para. 44). If the federal government wants prior authorization for private airports, it could enact legislation stipulating this and render any conflicting provincial law inoperable through paramountcy. This legislative strategy was encouraged in *Western Bank* (*ibid.*, para. 46).

In the second case, a company obtained the required federal approval for the building of a commercial seadrome on Gobeil Lake, even though at the time the relevant municipality prohibited the establishment of air transport businesses on the lake. The municipality was not contacted by the federal authorities with regard to the certification, and soon after the municipality ordered the company to cease its activities (*Laferrière*, para. 22-24, 35).

This case diverges from the first one in that the federal government must authorize the location of this airport (*ibid.*, para. 36). However, while there was no legal vacuum created by the application of interjurisdictional immunity, there was also no compelling reason to apply the doctrine. This case would have been properly resolved by the application of paramountcy doctrine, to be discussed in the federal paramountcy section.

A large part of the misinterpretation and misapplication of *Western Bank* and *Lafarge* to both of *Laferrière*'s cases resulted from procedural error. The previous cases made it clear that the preferred process in a division of powers dispute is to resolve the case first through a pith and substance analysis, followed by federal paramountcy if necessary. Only after these have been applied should interjurisdictional immunity be considered. Additionally, in general the immunity doctrine should only be used in situations where there is precedent (*Western Bank*, para. 77).

Laferrière didn't comply with this process, though, skipping over paramountcy and moving directly to the immunity doctrine. In terms of precedence, though *Western Bank* approvingly mentioned previous applications of interjurisdictional immunity to the regulation of airports, it did so in reference to the vital and essential interest

“interprovincial and international carriers” have in being able to land at an airport, and the importance of avoiding jurisdictional disputes over granting landing permission at airports hosting such carriers (*ibid.*, para. 54). The nuances of this distinction negate the utility of this precedence for the *Lafferrière* cases, as neither of the airports in question involved the issues to which precedent applies.

Federal Paramountcy

In the agricultural zoning case paramountcy should have been considered following a pith and substance analysis, as demanded by *Western Bank*. However, this case meets neither of the criteria for applying paramountcy – impossibility of dual compliance or frustration of federal intent.

In the former, the lack of authorization required by the federal government for building a private airport means that there can be no compliance or non-compliance with federal law, ruling out dual compliance as an issue.

Federal intent is not frustrated here either – while an in-depth discussion of federal intent is beyond this paper’s scope, the lack of a specific law regulating private airports has the effect of making federal intent in this area of jurisdiction minimal and difficult to discern, setting the bar for frustration extremely high.

In the municipal zoning case paramountcy should also have been considered first, and in contrast with the agricultural zoning case it would have been appropriately applied, for there is both impossibility of dual compliance and a potential frustration of federal intent.

In terms of dual compliance, in *Lafarge* the majority held that the requirement of municipal approval alone constituted an “operational conflict” that ruled out dual compliance (*Lafarge*, para. 81-82). While this is slightly confusing – as Bastarache noted in his concurring opinion, dual compliance is not impossible until the City actually refuses the permit – employing this reasoning in the *Lafferrière* case is less complicated (*ibid.*, para. 113). While *Lafarge*’s reasoning holds that there is already an impossibility of dual compliance here due to the operational conflict arising from the need for municipal approval, Bastarache’s objection is sidestepped in that the municipality actually denied the operation of the federally approved seadrome.

The question of frustration of federal intent is trickier, though. While in *Lafarge* the majority held that the provincial law frustrates the purpose of the federal law, it is unclear why that was the case. As Hogg notes, the majority never clearly explains what the federal purpose is, and without that conflicting purpose the logic behind the decision reads as if it involves either interjurisdictional immunity reasoning or the invalidated covering-the-field test (*Hogg*, ‘Constitutional Law of Canada’, 16.3(b)). Nevertheless, it would seem that an application of *Lafarge*’s reasoning here would also have been grounds for the application of paramourcy based on frustration, for in both cases federal and municipal approval was required for the development of the relevant projects. The dual compliance test for paramourcy is firmer ground to root this decision in, though.