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Via E-mail

Ms. Janice Atwood-Petkovski
City Solicitor
City of Hamilton
City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Ms. Atwood-Petkovski:

RE: Hamilton ats Canada Post Corporation

I acknowledge receipt of a copy the Decision of Justice Whitten in the above matter dated June 11, 2015 holding that Hamilton City By-Law No. 15-091 in relation to the installation of "super" community mail boxes (CMBs) on City owned property by Canada Post is "inapplicable and inoperative". You have asked whether in my opinion an appeal to the Court of Appeal is warranted.

My view is that this case raises some quite complex constitutional questions which deserve the consideration of a higher court. While the outcome of an appeal is not free from doubt, it seems to me that there is good reason to dispute the correctness of some of Justice Whitten's conclusions. The issues are of considerable importance across Canada. The clarification of the applicable law by a higher court is, I believe, desirable.

1. THE CITY OF HAMILTON V. THE HAMILTON HARBOUR COMMISSIONERS LITIGATION

In some ways, this litigation is similar to the lengthy battles between the City of Hamilton and the Hamilton Harbour Commissioners in the 1960's and 1970's culminating in the City's victory in the Court of Appeal in *Hamilton vs. Hamilton Harbour Commissioners* (1978) 21 O.R. 2nd 491 (CA). That contest, as here, involved a "federal undertaking". The Commissioners sought immunity from the regulatory authority of the City. They complained that their plans for the development of harbour lands were unduly impaired

by the City of Hamilton municipal land use by-laws. The courts disagreed and concluded that the Harbour Commissioners had exaggerated any valid protected federal purpose. It is arguable that here Justice Whitten had similarly overstated the federal purpose and conflated federal constitutional power with Canada Post's business plan. In paragraph 86, he speaks of "the right of CP to deliver mail in an economically viable fashion" [the existence of such a *"right"* may be questioned] and in paragraph 87:

> The by-law would in effect give the City the final say of the location of CMBs after a permit application process which has no relationship to the temporal exigencies facing CP, both in terms of satisfying its **existing collective agreements** and CP's **cost reduction goals** to achieve financial sustainability in an era of steadily reducing transaction mail. [emphasis added]

And at paragraph 57:

> The effect of the permit process contemplated by the by-law is that it jeopardizes the timelines of CP. Timelines established to maintain its objective of a self-sustaining financial basis and a level of satisfactory services to citizens. [emphasis added]

The City, of course cannot block Canada Post from establishing "super boxes", but just as Canada Post trucks comply with municipal speed limits when delivering the mail within the City it is certainly arguable that under the frequently endorsed principle of "cooperative federalism" Canada Post can achieve its plans while fully respecting the City's interest in safe roads and good planning. The Court of Appeal might conclude that whether a super box is located at one end of the block or the other or within the required setbacks is unlikely to jeopardize the "economic viability" of Canada Post. Equally, the Court of Appeal might conclude that the 120 day moratorium is prudent rather than obstructive.

However, at this stage of the litigation, the only issue is whether the City wishes to take the opportunity to make its arguments in the higher court.

2. INTER-JURISDICTIONAL IMMUNITY

Canada Post argued here, as did the Hamilton Habour Commissioners in the 1970's, that provincial/municipal regulation cannot invade a "core" federal jurisdiction. This is

known as the doctrine of inter-jurisdictional immunity. However, the Supreme Court of Canada in *Canadian Western Banks vs. Alberta* [2007] 2 SCR 3, 2007 SCC 22 made it clear that federal undertakings (in that case the chartered banks) cannot set themselves up as judges of what is essential to their undertakings. In *Canadian Western Banks*, the federally regulated banks argued that provincial consumer legislation regulating the sale of insurance did not apply to banks when banks sold insurance because banks were a "federal undertaking" and they preferred not to comply with provincial standards. The court rejected the federal argument. In doing so, the Court said that inter-jurisdictional immunity "is a doctrine of limited application…" and:

> The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly. [emphasis added] (para. 42)

The fact that the business plan was to improve the p rofits of the banks by selling insurance did not expand federal jurisdiction at the expense of the provinces even when the insurance was sold to secure bank loans. Equally, in the present case, it is certainly arguable that the laudable desire of Canada Post's business plan to achieve "cost reductions" is without constitutional significance.

3. FEDERAL PARAMOUNTCY OR FRUSTRATION OF FEDERAL PURPOSE

Justice Whitten references s. 14 (1) of the *Municipal Act* in holding that the City's by-law is in conflict with the federal *Mail Receptacle Regulation* SOR/83-743. Quite apart from the *Municipal Act* it is well established as a matter of constitutional law that where there is an operational conflict between a valid federal regulation and an otherwise valid municipal by-law, the federal regulation will prevail. However, in order for "federal paramountcy" to apply, it must be impossible for Canada Post to comply with both the federal regulation and, at the same time, comply with the Hamilton municipal by-law. Justice Whitten does not find dual compliance to be impossible but he concludes at paragraph 104 that the municipal by-law "frustrated the purpose of the *Mail Receptacles Regulation*". It is certainly arguable by the City that there is no such frustration. The

federal purpose is to replace home delivery with "super boxes". This mandate can be achieved in a number of ways that fully comply with the City's requirements for road safety and good planning.

Undoubtedly it would be more convenient for Canada Post to proceed to install super boxes without compliance with the City's procedures but Canada Post's convenience is not the constitutional test. If the Court of Appeal agrees with the City that Canada Post can implement its super box program while also complying with municipal regulations then the "federal purpose" is not frustrated and the municipal by-law would **not** be rendered inoperative on this ground.

4. IS BY-LAW 15-091 VOID FOR UNCERTAINTY OR VAGUENESS?

Justice Whitten concludes at paragraph 49 that City By-Law 15-091 is "standardless" and thus vague and uncertain and therefore invalid. However, one of the Supreme Court authorities on which he relies, *R v Nova. Scotia Pharmaceutical Society* [1992] 2 SCR 606, cautions that "the threshold for finding a law to be vague is relatively high. The factors to be considered include (a) the need for flexibility and the interpretive rule of the courts; (b) the impossibility of achieving absolute certainty … [the] standard of intelligibility being more appropriate and; (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist". The Court went on to say that a challenge on the basis of vagueness must establish that the law **"so lacks in precision as not to give sufficient guidance for legal debate** – that is for reaching a conclusion as to its meaning by analysis applying legal criteria … no higher requirement as to certainty can be imposed on law in our modern state". [emphasis added]

Despite finding the City's approach to lack any intelligible standards, Justice Whitten acknowledges at paragraph 43 that Chapter 5 of the City's manual (*Above Ground Plant, Above Ground Equipment Intended to be Accessed by the Public*, pages 25-16) does in fact address the need to ensure "the ease of safety and of users". The installation itself, Justice Whitten observes,

> is not to be "overly intrusive" to neighbouring residential and commercial uses. Permit explanations are to explain why CMB

> [super box] cannot be located abutting a corner lot or non-arterial road. Obviously the authors are expressing their preferences as to location at the outset, and shift the burden of proof to the applicant to justify why these preferences cannot be met. Mandatory language stipulates basis considerations of safety, accessibility, illumination, avoidance of hazards, non-interference with snow removal, and a location on a flat, stable surface. One cannot imagine any of these mandatory items escaping the attention of CP. [emphasis added]

The Court of Appeal might conclude that while Canada Post should think of these things, it might not. Road safety is a matter that lies within the regulating authority of the City not the "business plan" of Canada Post.

It is certainly arguable that in fact By-Law 15-091 does not fail the standard of "sufficient guidance for legal debate".

5. CROWN IMMUNITY

Finally, Justice Whitten says that Canada Post as a crown agent enjoys a level of "immunity" from the municipal by-law. This argument was pursued by the Hamilton Harbour Commissioners over many years of litigation with the City of Hamilton and (although those cases are not cited by Justice Whitten), the Ontario Court of Appeal rejected the Hamilton Harbour Commissioners' argument based on crown immunity. It is certainly arguable that the argument should be rejected when raised by Canada Post as well.

6. CONCLUSION

This case raises a number of difficult constitutional issues dealing with the interaction between federal and provincial/municipal enactments. Within the relatively succinct reasons for judgment of 20 pages, Justice Whitten deals with complex constitutional doctrines of inter-jurisdictional immunity, federal paramountcy and Crown immunity as related to Canada Post. Justice Whitten finds that the federal and municipal regulations are in conflict. These are all legal questions deserving of consideration by the Ontario Court of Appeal if not by the Supreme Court of Canada.

In my view, the City has a good arguable case to go forward to the Court of Appeal.

I would, of course, be glad to respond to any questions you may have in this regard.

Yours very truly,

Ian Binnie

IB/pc