Stare Decisis or Selective Judicial Reasoning?

Precedent Application Analysis of *Quebec (Attorney General) v. Lacombe*

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The division of powers has remained a contentious issue in Canada since Confederation. Judicial precedents set in federalism cases can be inconsistently applied. This paper will serve as a case study which will examine one such example that arose in the 2010 Supreme Court case *Quebec (Attorney General) v. Lacombe*.¹ We will begin by highlighting the legal dispute that occurred in this case and its relation to federalism. In essence, there is a conflict between a federal law relating to the construction of aerodromes (landing areas for aircraft) within a specific area, and a municipal by-law, which prohibits it. After discussing the conflict, we will then highlight the numerous viewpoints and doctrines relating to federalism which arise in *Lacombe* and rely on two lower court decisions to show how they are inconsistently applied.

Beverley McLachlin, Chief Justice of Canada (C.J.), writing for the majority, ruled that the municipal by-law is invalid, as it regulates a federal power not saved by the ancillary power. LeBel, Justice (J.) on the Supreme Court of Canada, concurs and cites the doctrine of federal paramountcy. Deschamps J. dissents by ruling the by-law valid, applicable, and operable, and thus, constitutional. While this case is relatively new, it highlights the inconsistency within Canadian federalism jurisprudence in three ways. Firstly, applying the same methodology cited in one precedent can lead to a different result. For example, McLachlin C.J.'s centralizing argument is arrived at through a pith and substance and legislative jurisdictional analysis, but this same analysis leads Ross J. of the Alberta Court of Queen's Bench to rule in favour of the provincial power in *R. v. Keshane*.² Secondly, both McLachlin C.J.'s decision and Deschamps J.'s dissent capture crucial legal principles, and while not explicitly cited in lower-court decisions, they

¹ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38.

² *R. v. Keshane*, 2011 ABQB 525.

result in contradictions in precedent application. Thirdly, sometimes elements of both of these fundamentally differing decisions are cited in the same decision, as in the Quebec Court of Appeal's Forget J. in *Quebec (Procureur general) c. Canada (Procureur general)*,³ raising the question of selective reasoning by judges.

The *Lacombe* Precedent Case History.

In *Lacombe*, a dispute arose between the directors of an air excursion company operating in Globeil Lake and the Quebec municipality of Sacré-Coeur relating to the operation of aerodromes. The owners of summer homes on Globeil Lake asked their municipal government to take measures to prevent the operation of aerodromes which disturbed the peace in the area.⁴ The municipality passed by-law no. 260 to amend an older by-law no. 210 to allow the construction of aerodromes in a specific zone outside of Globeil Lake.⁵ The municipality argues that the business violated the zoning regulations in the newly passed by-law no. 260 for Globeil Lake by operating aerodromes within an unauthorized area. The federal Department of Transport, however, provided a licence to the respondents to operate aerodromes from Globeil Lake, pursuant to the *Canadian Aviation Regulations* and the federal *Aeronautics Act*.⁶ A conflict thus arises between the federal law, which allows the operation of aerodromes within Globeil Lake, and the municipal by-law, which bans it. While the Constitution does not recognize the municipality as a legal entity, the provinces are able to delegate authority to municipalities and provide authorization to legally exercise the

provincial law power.⁷

Majority Argument.

The purpose of the by-law is one of the main points of dispute between Justices McLachlin and Deschamps. McLachlin C.J. argues that the purpose of the by-law is to prohibit aerodromes. Since aerodromes are specifically authorized in one zone, wherever they are not mentioned, they are effectively prohibited.⁸ McLachlin C.J. first sets out to determine whether this prohibition is valid provincial law by analyzing its "pith and substance." She argues the municipal council intended to remove the float planes which were disturbing homeowners on Globeil Lake, and thus, the substance of the law is the regulation of aeronautics, an exclusive federal power.⁹ Since the by-law is *ultra vires*, or outside its jurisdiction, McLachlin C.J. then analyzes whether or not it can be saved under the ancillary powers doctrine. This provision applies if the measures taken are "an integral part of a legislative scheme that comes within provincial jurisdiction."¹⁰ Zoning law in general "treats similar areas similarly" and avoids stand-alone prohibitions.¹¹ Since by-law no. 260 bans aerodromes in a single area, it functions as a prohibition. It is thus not rationally and functionally connected to zoning legislation and cannot be saved under the ancillary powers doctrine, according to McLachlin C.J.¹²

³ *Quebec (Procureur general) c. Canada (Procureur general)*, 2011 QCCA 591.

⁴ *Ibid.* at para. 1.

⁵ *Ibid.* at para. 14.

⁶ *Ibid.* at para. 5.

⁷ Michael Dewing, William R. Young, and Erin Tolley, "Municipalities, the Constitution, and the Canadian Federal System," prepared on behalf of the Parliamentary Information and Research Service (Ottawa: Library of Parliament, 2006), 2.

⁸ *Lacombe*, 2010 SCC 38 at para. 14.

⁹ *Ibid.* at para. 22, 23.

¹⁰ *Ibid.* at para. 32.

¹¹ *Ibid.* at para. 50.

¹² *Ibid.* at para. 58.

Dissenting Argument.

Deschamps J. contests many of the arguments raised by McLachlin C.J. She argues that the by-law is constitutional using a three-pronged test: validity, applicability, and operability.¹³ To be valid, a rule must be within the jurisdiction of the government which adopted it. Firstly, Deschamps J. argues that the pith and substance of by-law no. 260 is to set out certain uses of territory, which is within the provincial responsibility and is valid.¹⁴ However, she argues that “contrary to what the Chief Justice is suggesting,” that specifically allowing a use in one zone does not mean it is prohibited in other zones: rather, it is “generally authorized.”¹⁵ Secondly, Deschamps J. analyzes the by-law’s applicability. She argues that the Chief Justice does not consider the recent precedent applied in *Canadian Western Bank v. Alberta*:¹⁶ for a law to be inapplicable, it must not only overlap the other power, but impair it. McLachlin C.J. only states that the by-law and the federal power overlap but she does not analyze impairment.¹⁷ In Deschamps J.’s view, the by-law allows sufficient space for aviation activities, and thus, does not impair the federal core over aviation, contrary to the Chief Justice’s opinion.¹⁸ The by-law is thus applicable. The third prong of the analysis tests for an operational conflict between the by-law and the federal power. The federal act does not regulate land usage. The federal certificate issued does not give the respondents a right to that territory, since the certificate deals with safety.¹⁹ Thus, the by-law is operable. Since all three tests have been met, Deschamps J. argues that the by-law is constitutional.

Concurring Argument.

LeBel J. concurs with the majority decision for different reasons. He does agree with Deschamps J. that by-law no. 260 was a valid exercise of the municipality’s land use power and not a major intrusion on the core of the federal aeronautics power.²⁰ However, he disagrees with Deschamps J.’s argument that the land use certificate does not give the respondents absolute rights to operate in their territory.²¹ He argues there is an operational conflict since the federal government granted authority within that specific area, and thus, the federal authorization must prevail due to the doctrine of federal paramountcy.²² He reaches the same decision as McLachlin C.J., but for ultimately different reasons. While both LeBel J. and McLachlin C.J. ultimately read down the by-law, the latter does so because the pith and substance of the by-law is outside the provincial power and cannot be saved under the ancillary powers doctrine, while the former takes a more centralizing approach. LeBel J. argues simply that a conflict exists and that the federal power is supreme in such cases. He thus decides to dismiss the appeal and concurs with the majority.

Lacombe’s Application by the Lower Courts

The *Lacombe* precedent is fairly recent and deals with a very specific issue. As such, it has not been extensively cited in subsequent cases. It has been followed in only two cases, considered in four, and referred to in three. However, it addresses a particularly contentious issue of the division of powers in the Canadian political system. The jurisprudence surrounding its interpretation is thus still evolving. I will focus on two cases, *Keshane* and *Quebec c.*

¹³ Ibid. at para. 95.

¹⁴ Ibid. at para. 134.

¹⁵ Ibid. at para. 141.

¹⁶ *Canadian Western Bank v. Alberta*, 2007 SCC 22.

¹⁷ *Lacombe*, 2010 SCC 38 at para. 158.

¹⁸ Ibid. at para. 168.

¹⁹ Ibid. at para. 179.

²⁰ Ibid. at para. 71.

²¹ Ibid. at para. 72.

²² Ibid. at para. 73.

Canada, to highlight how lower courts can selectively consider the *Lacombe* precedent.

R. v. Keshane.

In *Keshane* (2011), a dispute exists between the federal and provincial division of powers, similarly to *Lacombe*. In this case, the respondent, Keshane, was slapped by a man outside a bar and fought back, engaging the aggressor in a fistfight. Police arrived and gave Keshane a municipal violation ticket for fighting in public.²³ The respondent argues that the by-law violated the *Constitution Act, 1867* because it infringes federal jurisdiction over criminal law. The Alberta trial court judge agrees, stating that the by-law possesses all the prerequisites of criminal law, namely that it is in pith and substance a valid criminal law purpose backed by a prohibition and penalty.²⁴ Additionally, the trial judge says that it cannot be saved by the double aspect doctrine as the by-law does not relate to the control of property. Ross J., of the Alberta Court of Queen's Bench, follows the steps employed by the majority in *Lacombe*. Thus, the first step in determining whether a provision is outside the jurisdiction of the *Constitution Act, 1867* is to determine its "pith and substance," and secondly to determine which level of government has jurisdiction to enact laws.²⁵ This is the only explicit reference to the *Lacombe* precedent given by Ross J., but much of her decision-making is shaped by the same factors guiding McLachlin C.J.'s decision.

To determine the pith and substance of the legislation, Ross J. argues that both the purpose of the legislation and the effect must be considered; indeed, this is precisely what McLachlin C.J. decides.²⁶ Both also rely on the

same precedent.²⁷ The Appeal Court in *Keshane* affirms this line of reasoning and relies on the same paragraph by McLachlin C.J.²⁸ To determine pith and substance, Ross J. analyzes intrinsic and extrinsic evidence as well as the practical effect of the by-law. In determining intrinsic evidence, the appellant argues that the purpose clause in the by-law outlines legislative intent and supports the view that the by-law is aimed at making public places safe, while the respondent argues the by-law as a whole deals with a diverse set of subjects with no clear theme.²⁹ Ross J. agrees that legislative intent should be considered, and that the pith and substance is directed at providing safe and enjoyable public space.³⁰ McLachlin C.J. also argues that legislative intent should be analyzed, and both intrinsic and extrinsic evidence is crucial.³¹ Indeed, both judges analyze the statements made by city council and arrive at their determinations of the pith and substance of the legislation based on this intrinsic evidence. Ross J. argues that the legislation's practical effect must be considered in determining the pith and substance of the by-law, a view identical to Deschamps J.'s in *Lacombe*.³²

Ross J. proceeds to determine which level of government this appropriately falls under, as per McLachlin C.J. in *Lacombe*.³³ Specifically, s. 91(27) of the *Constitution Act, 1867* assigns criminal law as a federal power, while ss. 92(13) and 92(16) give the province the power over property, civil, and local matters. Ross J. cites the double aspect doctrine: some subjects can fall under both federal and provincial jurisdiction depending on

²³ *Keshane*, 2011 ABQB 525 at para. 2.

²⁴ *Ibid.* at para. 7.

²⁵ *Ibid.* at para. 13, citing *Lacombe*, 2010 SCC 38 at para. 20 and 24, per McLachlin C.J.

²⁶ *Ibid.* at para. 15, citing *Lacombe*, 2010 SCC 38 at para. 20, per McLachlin C.J.

²⁷ *Kitkatla Band v. British Columbia*, 2002 SCC 31.

²⁸ *R. v. Keshane*, 2012 ABCA 330 at para. 16.

²⁹ *Keshane*, 2011 ABQB 25 at para. 49.

³⁰ *Ibid.* at para. 61.

³¹ *Lacombe*, 2010 SCC 38 at para. 20.

³² *Keshane*, 2011 ABQB 25 at para. 58; *Lacombe*, 2010 SCC 38 at para. 185, per Deschamps J.

³³ *Keshane*, 2011 ABQB 25 at para. 59.

the context.³⁴ Provincial law can be declared invalid if in pith and substance it is criminal law.³⁵ The appellant argues that the purpose of the by-law is to maintain safe and enjoyable public places, while the respondent Keshane states that it is done to achieve the *Criminal Code* purposes to preserve public order and peace.³⁶ Ross J. finds that the double aspect doctrine applies: she looks at the by-law in context and finds that it regulates a variety of activities, like littering, bullying, and smoking, which “by their very nature interfere with the safe and enjoyable use of public spaces.”³⁷ The by-law offence bans all fighting, while the *Criminal Code* offence of assault does not treat consensual fighting as a crime. Thus, the by-law and the criminal offence are intentionally different and serve different purposes.³⁸ As a result, Ross J. concludes that the by-law, in pith and substance, relates to providing safe and enjoyable public spaces, and is thus within provincial legislative authority under the ss. 92(13) and 92(16) provincial powers.³⁹ This interpretation was upheld unanimously by the Court of Appeal, which found that the by-law “substantially overlaps both domains” of criminal law and “property and civil rights” and that both of these aspects are roughly equal in importance.⁴⁰

While Ross J. uses the steps employed by McLachlin C.J. in *Lacombe*, her reasoning more closely mirrors Deschamps J.’s. McLachlin C.J. rules that the by-law restricting aerodromes is in pith and substance a federal power and so she rejects the double aspect doctrine, which can only be used if a law is within its jurisdiction.⁴¹ In contrast, Deschamps J. cites *Canadian Western Bank’s* double aspect

doctrine, which allows both Parliament and the provincial legislatures to adopt valid legislation depending on the aspect of the matter in question.⁴² Ross J. uses this precedent to highlight that the practical effect of the law is context-dependent.⁴³ Furthermore, Ross J. analyzes the specific contested provision within the general regulatory sphere of the by-laws, similarly to Deschamps J.⁴⁴ Ross J. and Deschamps J. also reach similar, decentralization-friendly conclusions: that the contested by-laws are not, in pith and substance, purely federal matters due to the double aspect doctrine and declare the by-laws are not *ultra vires*.⁴⁵ Thus, it is evident that while McLachlin C.J.’s steps were followed, Ross J.’s reasoning is more consistent with Deschamps J.’s, indicating the contradictions inherent in federalism decision-making in Canada.

Quebec c. Canada.

In *Quebec c. Canada*, a reference question was posed to the Quebec Court of Appeal regarding the constitutionality of a proposed national securities regulator.⁴⁶ The *Lacombe* precedent is cited only once by Forget J., writing for the majority, who explicitly rejects the rational function test employed by McLachlin C.J., stating that a more thorough analysis is needed. Forget J. considers the legislation as part of a general regulatory scheme, citing the *General Motors of Canada Ltd. v. City National Leasing* precedent.⁴⁷ Ultimately, Forget J. finds the *Securities Act* would violate the requirement in *General Motors* requiring provinces to be constitutionally incapable of enacting similar legislation.⁴⁸ Deschamps J. in *Lacombe* criticizes

³⁴ Ibid. at para. 67.

³⁵ Ibid. at para. 70.

³⁶ Ibid. at para. 90.

³⁷ Ibid. at para. 107.

³⁸ Ibid. at para. 113.

³⁹ Ibid. at para. 118.

⁴⁰ Keshane, 2012 ABCA 330 at para. 41, 42.

⁴¹ Lacombe, 2010 SCC 38 at para. 37.

⁴² Ibid. at para. 99.

⁴³ Keshane, 2011 ABQB 25 at para. 19.

⁴⁴ Lacombe, 2010 SCC 38 at para. 135.

⁴⁵ Ibid. at para. 135; Keshane, 2011 ABQB 25 at para. 104.

⁴⁶ Quebec c. Canada, 2011 QCCA 591 at para. 1.

⁴⁷ Ibid. at para. 348, citing General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641.

⁴⁸ Ibid. at para. 363.

this test, saying it has tended to benefit mainly the federal government and has upset the balance of Canadian federalism, instead applying the *General Motors* test.⁴⁹ Thus, in this case, the majority decision in *Quebec* rejects the majority's reasoning in *Lacombe* and instead applies Deschamps J.'s argument and comes to a similar, province-friendly conclusion. However, Forget J. upholds the offences contained in the *Securities Act* as they fall under the federal criminal law power, as well as sections 295 and 296 of the *Budget Implementation Act*, as they are valid under the federal spending power.⁵⁰ Ultimately, Forget J. highlights the importance of abiding by co-operative federalism, similarly to Deschamps J. in *Lacombe*.⁵¹ The *Securities Act* is ultimately ruled *ultra vires* to Parliament, save for the criminal provisions.

Robert C.J. in *Quebec c. Canada* similarly rules that the *Act* is *ultra vires* the Parliament, except for the criminal law provisions, and also allows ss. 295-297 of the *Budget Implementation Act*. Similarly to Ross J., Robert C.J. arrives at a province-friendly conclusion by using the methodology employed by McLachlin C.J. Firstly, Robert C.J. undertakes a pith and substance analysis of the purpose of the *Securities Act* by analyzing both the purpose and legal effect of the law.⁵² He analyzes the purposive clause as intrinsic evidence and Parliamentary debates and statements as extrinsic legislation, applying the precedent in *Kitkatla Band* which is also used by McLachlin C.J.⁵³ Robert C.J. finds that the pith and substance is the regulation of the securities trade which falls under exclusive provincial jurisdiction.⁵⁴ He also considers the double

aspect doctrine, and, like McLachlin C.J., ultimately decides that no concurrent pith and substance exists which would be allowed under this section. However, his judgment favours the provincial government, unlike McLachlin C.J. Additionally, Robert C.J. argues that a single securities regulator would threaten the balance of powers and the federal compromise, similar to the principles guiding Deschamps J.'s dissent in *Lacombe*.⁵⁵

Dalphond J., in his lone dissent, argues that securities are not an enumerated ground within the *Constitution Act, 1867*.⁵⁶ Additionally, he cites precedent which accepts the validity of federal securities regulation under the double aspect doctrine.⁵⁷ He also relies on the *General Motors* test precedent which is utilized by McLachlin C.J.⁵⁸ While Forget J. uses the same test and decides in favour of the provincial power, Dalphond J. finds that all contested provisions of the *Securities Act* are valid because "the tie that is required under *General Motors*" exists in this case.⁵⁹ McLachlin C.J. uses a similar rational-functional test from *General Motors* and ultimately decides that it falls under the federal power.⁶⁰ Dalphond J.'s philosophy is most closely aligned with the majority's decision in *Lacombe*, and thus, he follows the precedent used instead of distinguishing it. Contrastingly, Justices Forget and Robert are more convinced by principles of co-operative federalism, and their decisions closely mirror Deschamps J.'s dissent in *Lacombe*. From the contradictions between the majority and minority, including Robert C.J.'s reasons, it is evident that a single precedent can be interpreted differently and arguments can be selectively chosen by judges based on their preferences.

⁴⁹ *Lacombe*, 2010 SCC 38 at para. 104.

⁵⁰ *Quebec c. Canada*, 2011 QCCA 591 at para. 391.

⁵¹ *Ibid.* at para. 393; *Lacombe*, 2010 SCC 38 at para. 106.

⁵² *Quebec c. Canada*, 2011 QCCA 591 at para. 46.

⁵³ *Ibid.* at para. 55; *Lacombe*, 2010 SCC 38 at para. 20.

⁵⁴ *Quebec c. Canada*, 2011 QCCA 591 at para. 121.

⁵⁵ *Ibid.* at para. 186.

⁵⁶ *Ibid.* at para. 412.

⁵⁷ *Ibid.* at para. 424.

⁵⁸ *Lacombe*, 2010 SCC 38 at para. 99.

⁵⁹ *Quebec c. Canada*, 2011 QCCA 591 at para. 530.

⁶⁰ *Lacombe*, 2010 SCC 38 at para. 58.

Conclusion

Both McLachlin C.J.'s methodology and the principles espoused in Deschamps J.'s dissent are central principles in Canadian jurisprudence. While a blanket statement concerning precedent cannot be developed from this sample, it is clear from these two examples that precedent is not always applied consistently. Additionally, using the same methodology from a precedent can often lead to radically different results, as evidenced by McLachlin C.J.'s undertaking of the pith and substance and legislative jurisdiction analysis, who ruled in favour of the central government, while Ross J. in *Keshane* reached the completely opposite conclusion. However, certain precedents feature prominently in all three cases, even though they are distinguished and followed to differing extent, including *Kitkatla Band*, *General Motors*, and *Canadian Western Bank*. Additionally, the majority in *Quebec* and the judge in *Keshane* both consider the federalist compromise heavily in their decision-making, similarly to Deschamps J.'s minority in *Lacombe*.

It is evident that certain principles of federalism, including the dual aspect doctrine, federal paramountcy, interjurisdictional immunity, and pith and substance analyses heavily influence decisions involving division of powers cases. Additionally, both the majority and the minority's decision in *Lacombe* have been shown to guide the same decision. Thus, judges can address multiple aspects of a case and ultimately pick the strongest argument. However, they are also able to gloss over certain arguments, as evidenced in the three different judgments in *Quebec c. Canada* which ultimately do not consider all arguments. This is supported by Dalphond J. when he states "my colleagues in the group of three avoid that point, undoubtedly being aware that it jeopardizes their hypothesis."⁶¹ Thus, precedent

can be followed, distinguished, or even selectively discussed. This case study shows that while *stare decisis* is a crucial legal principle in the common-law system, a variety of other subtle factors are responsible for shaping judicial decision-making, leading to inconsistency in Canadian federalism jurisprudence.

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⁶¹ *Quebec c. Canada*, 2011 QCCA 591 at para. 489.

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