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To: Commissioner James Igloliorte
The Public Inquiry Respecting Ground Search and Rescue for Lost and Missing Persons
Ground Floor, East Block
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Commissioner Igloliorte:

This letter constitutes our legal opinion on the respective jurisdictions of the provincial and federal governments with respect to search and rescue operations near the Newfoundland and Labrador coastline.

This opinion focuses on constitutional law and discusses what the Constitution allows the federal and provincial government to do in theory. It does not discuss the actual functions or capacities of the federal and provincial government either as they exist currently, as they have developed historically, or as they might or ought to develop in the future. Nor does it discuss how current law or policy limit existing institutions.

This letter does not address the powers of Indigenous peoples or governments under either Canadian Aboriginal law or Indigenous law. Nor does it address international law.

This opinion does not contain a thorough analysis of any particular fact situation. Instead, it provides a broad overview of the applicable constitutional doctrines.

The starting point is (1) to outline the territorial limits of Newfoundland and Labrador. However, the territorial limits are not the end of the story. The federal government often operates within the province's territory, and in some cases the provincial government can act outside its territorial limits.

The division of powers between the federal and provincial governments is defined by a number of constitutional documents, including the *Constitution Act, 1867*; the *Newfoundland Act*; and the *Constitution Act, 1982*. For example, the *Constitution Act, 1867* gives the federal Parliament jurisdiction over "Navigation and Shipping" and "Sea coast and Inland Fisheries".¹ It also gives jurisdiction over "Property and Civil Rights" within the Province to the provincial House of Assembly.²

The principles set out in the constitutional documents have since been elaborated by many judicial decisions. For example, although the *Constitution Act, 1867* did not address aviation, it has since been decided that the federal Parliament generally has jurisdiction over aerial navigation.³

The remainder of the memo outlines briefly (2) the division of legislative authority over search and rescue operations, (3) when provincial legislation can have extraterritorial effects, and (4) the federal and provincial spending powers. It concludes by describing (5) how provincial and federal jurisdictions over coastal search and rescue overlap.

We hope this memo is helpful to the Inquiry.

Sincerely,



Michael Collins, Barrister and Solicitor



Adrienne Ding, Barrister and Solicitor

¹ *Constitution Act, 1867*, s 91(10) and (12) [*Constitution Act*].

² *Ibid*, s 91(13).

³ *Canada (Attorney General) v Ontario (Attorney General)*, 1931 CanLII 466 (UK JCPC).

(1) Territorial Limits

The territorial limits of Newfoundland and Labrador were discussed in *R v Roff*,⁴ where Gushue CJN adopted the following passage from Hogg's *Constitutional Law of Canada* (3rd edition) at c. 13.3(b):

With respect to coastal provinces, a question arises as to their jurisdiction over offshore waters. If the definition of a province's boundary explicitly includes some portion of the offshore, then of course that area is within the province. If the definition of a province's boundaries is not explicit on the point, the general rule is that the territory of the province ends at the low water mark. The only exceptions are 'inland waters' such as harbours, bays, estuaries and other waters lying 'between the jaws of the land'; these waters are within the province. The territorial sea and the high sea beyond (over the continental shelf) are outside the territory of the province.

The territory of Newfoundland does not contain any part of the offshore (see generally *Reference re: Seabed and subsoil of the continental shelf offshore Newfoundland*⁵). As a result, the territory of the Province includes (1) all the land or waters to the low water mark (that is, the low tide mark) plus (2) inland waters such as harbours, bays, estuaries and other waters lying "between the jaws of the land".

This simple statement of principle leaves many important geographical questions unanswered. For example, does Placentia Bay lie "between the jaws of the land"? What about the waters that lie between the Dog Islands? Resolving these questions is outside the scope of this opinion. However, it is worth noting that the territorial limits of the Province are unchanged even if ice covers the land or water.⁶

Beyond the Province's coastal boundary lies Canada's territorial sea, whose waters are part of Canada but not of any province.⁷

(2) The Division of Powers within Newfoundland and Labrador's Territory

Within the Province's territory, legislative authority is divided between the provincial and federal governments. As a result, both levels of government can pass some laws about search and rescue operations within provincial territory.

To determine whether a particular law relates to a provincial or federal matter, the first step is to *characterize* the "pith and substance" or true subject matter of the law. This analysis can consider both intrinsic evidence (e.g. a preamble) and extrinsic evidence (e.g. Hansard);

⁴ *R v Roff*, [1996] NJ No 287, 1996 CanLII 11042 at para 9.

⁵ *Reference re: Seabed and subsoil of the continental shelf offshore Newfoundland*, [1984] 1 SCR 86, 1984 CanLII 132.

⁶ *R v Turnbull*, [2016] NJ No 181, 2016 NLCA 25.

⁷ *Oceans Act*, SC 1996, c. 31.

both the legal effects and the practical effects of the law; both the purpose of the law and the means used to attain it.⁸

Having identified the pith and substance of the law, the second step is to *classify* it as belonging to a provincial or federal head of power.⁹ Provincial heads of power that could relate to coastal search and rescue include "Property and Civil Rights" (s. 92(13)¹⁰), the "Administration of Justice in the Province" (s. 92(14)¹¹), the "Management and Sale of the Public Lands" (s. 92(5)¹²), and "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)¹³). Federal heads of power that could relate to coastal search and rescue include "The Public Debt and Property" (s. 91(1A)¹⁴); "Militia, Military and Naval Service, and Defence" (s. 91(7)¹⁵); "Navigation and Shipping" (s. 91(10)¹⁶), "Sea coast and Inland Fisheries" (s. 91(12)¹⁷), and (given that parts of the coast are subject to land claims) "Indians, and Lands reserved for the Indians" (s. 91(24)¹⁸).

This approach to the division of powers allows considerable overlap. The "ancillary powers" doctrine recognizes that a valid provincial law can have "necessarily incidental" or "ancillary" effects on federal issues or *vice versa*.¹⁹ The "double aspect doctrine" recognizes that the same fact situation can have both a federal and a provincial aspect, so that the federal government can regulate it from a federal aspect and the provincial government from a provincial aspect.²⁰

Sometimes the same factual situation is subject to incompatible federal and provincial laws. In these situations, the doctrine of paramountcy means that the federal law prevails to the extent of the inconsistency. The provincial law subject to paramountcy is called "inoperative".²¹ Another principle that limits overlapping laws is the "interjurisdictional immunity" doctrine, which establishes that the core of some federal heads of power cannot be affected by provincial laws, even incidentally.²² The provincial law subject to interjurisdictional immunity is called "inapplicable".

A final point about Crown land. Much of the land in Newfoundland and Labrador is provincially administered Crown land. The management of this land is a provincial matter (s. 92(5)). However, large amounts of land within Newfoundland and Labrador is federally

⁸ *References re Greenhouse Gas Pollution Pricing Act*, [2021] SCJ No 11, 2021 SCC 11 at para 51-56 [GHG].

⁹ *Ibid.* at para 56 and 114.

¹⁰ *Constitution Act supra note 1*, s 92(13).

¹¹ *Ibid.* s 92(14).

¹² *Ibid.* s 92(5).

¹³ *Ibid.* s 92(16).

¹⁴ *Ibid.* s 91(1A).

¹⁵ *Ibid.* s 91(7).

¹⁶ *Ibid.* s 91(10).

¹⁷ *Ibid.* s 91(12).

¹⁸ *Ibid.* s 91(24).

¹⁹ *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146, 2002 SCC 31, at para 54 to 58.

²⁰ *GHG*, *supra* note 5, at para 125.

²¹ *Desgagnés Transport Inc v Wärtsilä Canada Inc*, [2019] SCJ No 58, 2019 SCC 58 at para 99 [Desgagnés].

²² *Ibid.* at para 90.

administered Crown land; national parks are one example. This land is a federal matter (s. 91(1A)).

(3) The Extra-territorial Effects of Provincial Legislation

Generally speaking, a provincial government can only regulate matters within the Province's territory. A law whose true subject matter lies outside the Province's borders cannot be classified as belonging to a provincial head of power.

Sometimes a valid provincial law can have incidental effects outside the Province's borders. The provincial law can only be applicable if there is a sufficient connection between the province, the subject matter of the legislation, and the individual or entity the province is regulating. The courts will analyze these issues flexibly in light of the requirements of order and fairness that underlie Canada's federal arrangements.²³

(4) The Federal and Provincial Spending Powers

When the federal and provincial governments decide to hire employees or purchase equipment to conduct search and rescue operations, they do not rely on their coercive legislative powers. Instead, they use their broader "spending power" or ability to spend public money.

The federal government often uses its spending power to influence social or economic policy in areas of provincial jurisdiction. The courts have permitted this as long as the federal spending does not amount to a disguised attempt to regulate.^{24 25 26}

The constitutional text suggests that provinces can only spend money "for Provincial Purposes" (s. 92(2) and 92(9)). So far, the courts have been highly reluctant to second-guess elected governments' assessment of what counts as a provincial purpose. Provinces have been allowed to spend money on international aid,²⁷ building an international railway,²⁸ and offering grants to the families of British sailors.²⁹

When Canada or Newfoundland and Labrador hire employees and direct them to perform search and rescue operations, those employees must comply with applicable laws. Provincial officials or employees can conduct searches or rescues on federal lands or waters only as permitted by federal law. Similarly, federal officials or employees must comply with applicable provincial laws while conducting searches on provincial lands or waters.

²³ *Unifund Assurance Co v Insurance Corp of British Columbia*, [2003] 2 SCR 63, 2003 SCC 40 at para 56.

²⁴ *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, [1991] SCJ No 60.

²⁵ *Canada (Attorney General) v Ontario (Attorney General)*, 1937 CanLII 363 (UK JCPC).

²⁶ *Canada Mortgage and Housing Corporation v Iness et al*, 70 OR (3d) 148, [2004] OJ No 771.

²⁷ *Dunbar v Saskatchewan (Attorney General)*, [1984] SJ No 363, 11 DLR (4th) 374.

²⁸ *Dow v Black* (1875), LR 6 PC 272, 44 LJ (PC) 52.

²⁹ *McMillan v City of Winnipeg*, [1919] MJ No 50, 45 DLR 351.

(5) Conclusion: Overlapping Jurisdiction

Canada's constitution gives the provincial and federal governments overlapping jurisdictions over coastal search and rescue in Newfoundland and Labrador. Both levels of government can spend money on search and rescue equipment personnel or equipment. Both levels of government can legislate about search and rescue operations within the Province, and some provincial laws may even have incidental effects outside provincial boundaries. As a result, the legal framework that governs search and rescue operations changes as the search moves imperceptibly from provincially administered Crown land to federally administered Crown land, from provincial waters above the low-tide mark or between the jaws of the land to the federal waters beyond.

The Constitution describes the federal and provincial governments' powers, not their responsibilities. How the provincial and federal governments use their constitutional powers to allow effective searches in coastal areas is a question of politics and administration rather than law. By providing a wide area of overlapping jurisdiction, the Constitution provides each government with room to act, experiment, and cooperate.

References

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