This opinion has been provided by McCarthy Tétrault LLP to the Railway Association of Canada in support of its submission to the *Railway Safety Act* Review Panel.

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Railway Association of Canada
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Attention: Mr. Michael Bourque
President & CEO

Re: Canadian Federal Proximity Jurisdiction

I. Opinion Requested

The Railway Association of Canada ("**Association**") requested our opinion as to the constitutional authority of the Canadian federal government to adopt the following types of measures ("Proposals") related to railway safety:

- The establishment of a 30 m setback for the construction of residential or other "public" buildings (categories of buildings to be determined) on land adjacent to railway lines;
- The requirement that land use planning authorities (provincial, municipal or otherwise) provide pre-notice and seek input from the affected railway company before authorizing land-use plan amendments, zoning amendments, new subdivisions for lands or construction permits within 300 m of a railway corridor.

II. Conclusion

Based on our analysis of the relevant authorities, in our opinion, the federal government has the constitutional authority under s. 92(10)(a) of the *Constitution Act, 1867* to adopt regulations of the type described by the Proposals. The constitutional authority of the federal government is based on our opinion that the subject matter of the Proposals is an integral element of Parliament's legislative authority over railways as federal undertakings.

III. Analysis

1. *Introduction*

In this opinion, we have considered if the Proposals, whether implemented through the current *Railway Safety Act*[1] or otherwise, fall within federal legislative competence.

Our analysis is intended to determine whether the types of measures described above fall within federal constitutional authority. It is our understanding that the details of the Proposals will be determined at a future date and we are, therefore, not providing an opinion as to the validity of specific measures or specific wording for possible measures..

The focus of this opinion is a constitutional law analysis of the *ultra vires* doctrine. As a preliminary matter, we describe the parameters of the constitutional analysis and the scope of our analysis of the *ultra vires* doctrine. Subsequently, we consider the scope of federal legislative authority over federal undertakings.

2. *Scope of the ultra vires doctrine analysis*

The *ultra vires* doctrine is a matter of determining whether legislation enacted by one level of government falls within its legislative authority according to the division of powers under the *Constitution Act, 1867*.The analysis entails first identifying the "pith and substance" of the impugned legislation and then determining whether the matter regulated by the impugned legislation falls within the legislative authority of the legislature that enacted it.[2]

The "pith and substance" analysis entails a characterization of the impugned legislation according to its purpose and effects by considering the legislation itself, its history and the circumstances of its adoption, as well as its legal and practical effects. Where the dominant characteristic of legislation falls within the legislative authority of the enacting government, the *ultra vires* doctrine will not apply even if the law has incidental effects on the exclusive legislative authority of another level of government. The permitted "incidental effects" of legislation are those that are collateral to the dominant characteristic and purpose of the legislation, despite their practical significance.[3]

According to the "double aspect doctrine", the subject matter or pith and substance of legislation can be viewed as relating to a federal power from one normative perspective and to a provincial power from another. The double aspect doctrine, therefore, permits the concurrent application of federal and provincial legislation enacted under their respective legislative authority.[4] Where the "double aspect" doctrine applies, it is possible for provincial legislation to be "inoperative" as a result of the federal paramountcy doctrine or "inapplicable" as a result of the doctrine of interjurisdictional immunity.

Even if the impugned legislation falls outside the legislative authority of the enacting government, it may nevertheless be valid or *intra vires* under the "ancillary powers doctrine" if the legislation forms an integral part of an otherwise valid regulatory scheme.[5] The degree of integration required to

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1 R.S.C. 1985, c. 32 (4th Supp.).

2 See *Canadian Western Bank* v. *Alberta*, [2007] 2 SCR 3, para. 27; *Rogers Communications Inc.* v. *Châteauguay (City)*, 2016 SCC 23, para. 36-37; *Chatterjee* v. *Ontario (Attorney General)*, [2009] 1 SCR 624, para. 16; *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association*, [2010] 2 SCR 536, paras. 17-18.

3 *Canadian Western Bank v. Alberta*, supra, para. 28; *Rogers Communications Inc.* v. *Châteauguay* (City), supra, para. 37.

4 Ibid, para. 30.

5 See *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association*, supra, para. 16; *Quebec (Attorney General)* v. *Lacombe* [2010] 2 SCR 453, paras. 32-46; *Marcoux* v. *Municipality of Saint-Charles-de-Bellechasse* 2015 CanLII 59742 (CS), paras. 55-64.

validate legislation under the ancillary powers doctrine depends upon the extent to which the impugned legislation encroaches upon the jurisdiction of the other level of government. The minimum requirement is that the impugned legislation complement a valid legislative scheme on a rational and functional basis.[6]

In this opinion, our *ultra vires* doctrine analysis determines whether the federal government has legislative authority to validly adopt regulations of the type described by the Proposals under its authority related to federal undertakings.

3. *Source of federal legislative authority over federal undertakings*

The source of federal legislative authority over federal undertakings is found in sections 92 (10)(a) and (c) and 91 (29) of the *Constitution Act, 1867*. Sections 92 (10) (a) and (c) provide as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ....
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> ...
>
> (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Similarly, the federal jurisdiction over such undertakings would be based on s. 91 (29) which gives the federal Parliament authority over:

> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Therefore, our analysis considers whether the federal legislative authority under sections 92 (10) (a) and (c) of the *Constitution Act, 1867* has been interpreted so as to support the adoption of regulations such as the Proposals.

4. *Scope of legislative authority over federal undertakings*

It is clear that Parliament has exclusive legislative competence over federal undertakings including railways under s. 92(10) (a). The issue is to determine the scope of this legislative competence as to matters related to the undertaking.

Our analysis of the scope of federal competence over federal undertakings considers the test developed by the case law, examples from the regimes of aeronautics and railways, and dicta from the cases regarding safety and uniformity as applied to federal undertakings.

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[6] See *Quebec (Attorney General)* v. *Lacombe*, supra, paras. 32, 35-38; *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association*, supra, para. 16; *Marcoux* v. *Municipality of Saint-Charles-de-Bellechasse* 2015 CanLII 59742 (CS), paras. 55-64.

(a) *Test for the scope of legislative authority*

In general terms, the test to determine if federal legislative competence applies to a particular matter is whether the federal jurisdiction as to that particular matter is an integral part of Parliament's primary competence over another federal matter.[7] Similarly, an enterprise or activity will be subject to federal authority over federal undertakings if the enterprise or activity is essential to the federal undertaking. The test for federal legislative competence is a bi-product of the rule that federal undertakings are subject to provincial laws of general application except as to matters that are an integral part of federal authority over the undertaking.[8]

Recent authorities indicate that a functional or practical approach applies to determine if legislative authority is integral or essential to an established subject of federal competence.[9] A good example of the application of the functional test arises in *Lloyd's Register North America Inc.* v. *Dalziel*.[10] The issue in *Lloyd's* was whether federal employment law applied to an employee of a marine classification society. In commercial shipping, classification societies set technical standards and inspected vessels and were held by the court to be a practical, rather than legal, necessity to the shipping industry. The court decided that the work performed by the employees of the classification society was an integral part of the undertaking within federal jurisdiction. The Federal Court described the functional test as follows:

> The test involves looking for a practical or functional integration between the core federal work or undertaking and the employees in question. This involves something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking.[11]

The Federal Court stated that the test of integration is not restricted to the physical operation of the federal work. The court stated:

> [27] I look to the trilogy of cases[12] as helpful in establishing certain principles. Most importantly, federal jurisdiction will only be found in the exceptional circumstances of an integral or essential link between the services provided by the contractor and the federal work or undertaking. While each of these cases dealt with aspects of physical operation, it was not an error for the Adjudicator to turn to this set of jurisprudence for some overarching principles. The Applicant would have the Adjudicator and me read these cases as standing for the negative - that, unless the activities in question are part of the physical operation of the federal work, there can be no federal jurisdiction. That would be an incorrect application of this important jurisprudence.

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7 See *Lloyd's Register North America Inc.* v. *Dalziel*, 2004 FC 822, para. 19; *Construction Montcalm Inc.* v. *Min. Wage Com.*, [1979] 1 SCR 754 at 768; *Bell Canada* v. *Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, paras. 20, 255; *Jim Pattison Enterprises Ltd.* v. *British Columbia (Workers' Compensation Board)*, 2011 BCCA 35, para. 93; *CAW-Canada* v. *Ontario (Superintendent Financial Services)*, 2007 ONFST 8; *Clark* v. *Canadian National Railway Co.*, [1988] 2 SCR 680 at 705-706; *Canadian National Railway Company* c. *Sumitomo Marine & Fire Insurance Company Ltd.*, 2007 QCCA 985, paras. 30-31; *Québec (Procureur général)* c. *Midland Transport ltée*, 2007 QCCA 467

8 See *Construction Montcalm Inc.* v. *Min. Wage Com.*, supra, at 768, 774; *Clark* v. *Canadian National Railway Co.*, supra, at 704-706.

9 See for example *Lloyd's Register North America Inc.* v. *Dalziel*, 2004 FC 822, para. 19; *Jim Pattison Enterprises Ltd.* v. *British Columbia (Workers' Compensation Board)*, 2011 BCCA 35, para. 95-98; *CAW-Canada* v. *Ontario (Superintendent Financial Services)*, 2007 ONFST 8.

10 *Lloyd's Register North America Inc.* v. *Dalziel*, supra.

11 Ibid., para. 19.

12 The court is referring to *Reference re Industrial Relations and Disputes Investigation Act (Canada)*, 1955 CanLII 1 (SCC), *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1983]1 S.C.R. 733 and *Letter Carriers' Union of Canada* v. *Canadian Union of Postal Workers*, 1973 CanLII 183 (SCC).

> [28] Further, the Applicant has adopted extremely narrow definitions of "operations" and of "navigation and shipping". In my view, the concept of "shipping" is not confined to the contract of carriage as the Applicant appears to argue. The definition of the terms "federal work, undertaking or business" in the Canada Labour Code includes a business "carried on for or in connection with navigation and shipping". It would be unduly restrictive to limit the definition to instances of physical operation or fulfilment of the contracts of carriage. Such reading down would render meaningless a substantial portion of the definition.

Similarly, the functional test was described as follows in the *Pattison* decision, dealing with the application of provincial occupational health regulations to fishing operations:

> [98] Thus, under the "functional test" the court must examine the nature, habitual activities and daily operations of the appellants' operations to determine if they are a vital, essential or integral aspect of a federal head of power. In those circumstances, the appellants' operations would be properly characterized as a federal undertaking.
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> [114] Based on the "functional test", characterization of the appellants' fishing operations as a federal or provincial undertaking does not depend on where the vessels cast their nets, or the waters in which they navigate. Rather, it requires a consideration of the nature of their operations, their habitual activities as a going concern, and whether those activities engage national or foreign interests.[13]

The *Lloyd's* and *Pattison* decisions are important for this opinion because they emphasize that characterization of a matter as integral to a federal undertaking is not restricted to the physical operation of the undertaking. Rather, whether a service or an activity is integral to a federal undertaking is considered according to its importance within the particular operations of the undertaking as a going concern.

(b) *Aeronautics*

Instructive examples of the application of the "integral element" test arise in the context of aeronautics as federal undertakings. These examples generally arise within a determination as to whether a provincial law is *ultra vires* and does not apply to a federal undertaking. In this context, the absence of provincial legislative authority can assist in determining the parameters of federal legislative authority.

The federal authority over aeronautics derives from its power to make laws for the "peace, order and good government of Canada" under the preamble to s. 91 of the *Constitution Act, 1867* and under the federal undertaking power in s. 92(10)(a). The "integral element" test and other constitutional doctrines apply to the federal power derived from both sources.[14]

Authorities relating to aeronautics have determined that municipal and provincial land use and zoning regulations do not apply to the following matters, related *inter alia* to aeronautics safety, which are considered to be integral to Parliament's authority over aeronautics as a federal undertaking:

- regulation of the demolition, alteration and construction of buildings in the redevelopment project at Pearson Airport including its airside development, air traffic control tower, utilities, air support project and passenger terminal;[15]

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13 *Jim Pattison Enterprises Ltd.* v. *British Columbia (Workers' Compensation Board)*, supra, paras. 98, 114.

14 *Mississauga (City)* v. *Greater Toronto Airports Authority*, 2000 CanLII 16948 (ON CA), para. 61.

15 *Mississauga (City)* v. *Greater Toronto Airports Authority*, supra.

- specific restrictions related to the building setback from a runway, height of buildings within the vicinity of an airfield and emissions affecting visibility near an airport described as "directed squarely and indisputably at airport improvement, operation, safety, capacity, and future upgrading";[16]

- height restrictions on lands at the end of the runways at a municipal airport to protect flight paths for the safe and effective use of the airport;[17]

- the installation, to increase public security, of a control zone on land leased by the Montreal airport from the federal government and adjacent to the existing airport;[18]

- restrictions as to the building of airports;[19]

- the prohibition of water aerodromes;[20] and

- the testing of airplane engines in accordance with federal regulations by a manufacturer on land adjacent to an airport in contravention of a municipal noise and gas emission by-law;[21]

This line of cases related to aeronautics indicates that provincial and municipal legislative authority does not extend to land use planning that is specifically directed to airport operations. In particular, it appears that a province or municipality has no authority to regulate the use of land adjoining an airport for aeronautics purposes such as setbacks and height restrictions, even to increase safety. The decisions indicate that these types of regulatory regimes are an integral part of the federal legislative competence over aeronautics.

Federal authority over aeronautics has also been examined in the context of interjurisdictional immunity. The doctrine of interjurisdictional immunity prevents the application of a law of one level of government (usually a provincial law) to the extent that it impairs the core or a vital and essential element of the exclusive legislative competence of the other level of government. In this context, it has been decided that:

- a provincial building code did not apply to demolition, alteration and construction of buildings in the redevelopment project at Pearson Airport including its airside development, air traffic control tower, utilities, air support project and passenger terminal;[22]

- the core federal power over aeronautics included regulation of the location, design and construction of aerodrome structures or buildings, including hangars and passenger terminals and was not subject to a provincial building code;[23]

- the location of airports was not subject to provincial agricultural zoning;[24]

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16 *Mullaney* v. *Red Deer (County No. 23)*, 1999 ABQB 434, para. 37.

17 *Re Walker et al. and Minister of Housing for Ontario Re Walker and City of Chatham*, 1983 CanLII 1966 (ON CA).

18 *Orr* c. *Aéroports de Montréal*, 2015 QCCS 6130.

19 *Johannesson* v. *Municipality of West St. Paul*, [1952] 1 SCR 292.

20 *Quebec (Attorney General)* v. *Lacombe*, [2010] 2 SCR 453.

21 *R.* v. *De Havilland Aircraft of Canada Ltd.*, 1981 CanLII 2873 (ON CJ), decided on the basis of federal paramountcy.

22 *Mississauga (City)* v. *Greater Toronto Airports Authority*, 2000 CanLII 16948 (ON CA).

23 *Oshawa (City)* v. *536813 Ontario Limited*, 2016 ONCJ 287.

24 *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association*, [2010] 2 SCR 536.

- a provincial statutory lien did not apply to the leasehold interest of an airport in federal lands.[25]

By contrast, municipal by-laws of general application regulating the quality of landfill applied to the construction of airport runways.[26] Further, provincial minimum wage legislation was held to apply to the employees of a contractor that built airport runways.[27]

(c) *Railways*

There is consistency in the decisions related to the scope of federal authority over railways. In 1899, the Privy Council described the federal authority over railways as follows:

> ... the exclusive right to prescribe regulations for the construction, repair and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.[28]

Since then, caselaw has determined that the federal Parliament has exclusive authority to legislate "to control the construction, management and operation of railways"[29] or to legislate as to the management and control of the railway.[30] In *Clark* v. *Canadian National Railway Co.*,[31] the court states:

> The core federal responsibility regarding railways is to plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies, and related operations.

The following matters have been held to fall within the federal power over railways:

- the order for a municipality to share the costs of a fence as a protective measure;[32]
- the prohibition for railway companies to limit their liability to employees for injury;[33]
- the power to establish a mechanism for the investigation of accidents and to make recommendations regarding railway safety where it was held that comparable provincial authority would have a determinative effect on the railway ;[34]
- regulation of the liability regime of a railway company for goods transported.[35]

By contrast, provincial environmental laws of general application were held to apply to a railway so that the railway was liable for breaching the law as a result of controlled burns of grass on its right-

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25 *Vancouver International Airport Authority* v. *British Columbia (Attorney General)*, 2011 BCCA 89.

26 *Burlington Airpark* v. *City of Burlington*, 2013 ONSC 6990.

27 *Construction Montcalm Inc.* v. *Min. Wage Com.*, supra.

28 *Canadian Pacific Railway Co.* v. *Notre Dame de Bonsecours* [1899] A.C. 367 (PC).

29 See *In re Railway Act*, (1905) 36 SCR 136 at 142-143; *City of Toronto* v. *Grand Trunk Ry. Co.*, (1906) 37 SCR 232 at 240;

30 *Ontario* v. *Canadian Pacific Ltd.*, 1993 CanLII 8608 (ON CA), confirmed [1995] S.C.R. 1030.

31 [1988] 2 SCR 680, para. 54. See also *Canadian National Railway Company* c. *Sumitomo Marine & Fire Insurance Company Ltd*, supra, para. 36.

32 *City of Toronto* v. *Grand Trunk Ry. Co.*, supra; *Metropolitan Toronto (Municipality)* v. *Canadian National Railway Co.*, supra.

33 *In re Railway Act*, supra.

34 *Canadian National Railway Co.* v. *Courtois*, [1988] 1 SCR 868.

35 *Canadian National Railway Company* c. *Sumitomo Marine & Fire Insurance Company Ltd.*, supra.

of-way.[36] Federal legislation establishing a limitation period for negligence actions for injury caused by a railway was *ultra vires*.[37] The limitation provision was held not to be an integral part of the federal jurisdiction.

The general statements in the case law as to the scope of federal authority over railways indicate a wide legislative power over the construction, management and operation of railways which includes railway safety.

(d) *Safety and uniformity*

The case law recognizes the importance of safety and national uniformity as inherent to regimes governing federal undertakings. As a preliminary comment, "safety" is not a separate subject matter for constitutional law purposes under sections 91 and 92 of the *Constitution Act, 1867*.[38] Therefore, the constitutional validity of a regulatory safety regime depends on its inclusion in a recognized federal or provincial matter. The following case law extracts provide compelling reasons for railway safety in its broadest sense to fall within federal legislative authority under s. 92(10)(a).

In *City of Toronto* v. *Grand Trunk Ry. Co.*[39], the issue was whether a federal railway committee could order protective safety measures at crossings and impose part of the cost on the relevant municipality. The Supreme Court of Canada stated:

> Looking at the question in the large and as applicable to the conditions existing in Canada, we find three great transcontinental railways built or being built across our Dominion connecting one ocean with the other. These roads necessarily cross hundreds of highways where there is little if any traffic. As population increases the traffic grows until a railway crossing of a highway on a level which one year required no special protection, in a few years might require watchmen and gates, and in a few years more either an overhead bridge or an expensive subway.
>
> The increasing traffic demanding these prudent "measures of protection" may be due largely to the operation of the railway, or causes quite foreign to it, or to a combination of both. If Parliament is not justified by the necessity of the case in dealing with this traffic and doing so effectively, what authority can do so?
>
> The power to deal, and to do so effectively, with the special conditions arising from a rapidly increasing traffic at a railway crossing of a highway must necessarily be dealt with by some paramount authority.
>
> The power which the local legislature possesses of legislating with respect to property and civil rights would be manifestly inefficient and limited. The subject is not one admitting of dual legislation.
>
> The only power capable of dealing fully and effectively with such a condition is that of the Parliament of Canada.
>
> That in dealing with it property and civil rights are effected is a matter of course, but all interested parties may be dealt with and all interests affected legislated for. It seems to me in

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36 *Ontario* v. *Canadian Pacific Ltd.*, 1993 CanLII 8608 (ON CA) confirmed by *Ontario* v. *Canadian Pacific Ltd.*, [1995] 2 SCR 1031.

37 *Clark* v. *Canadian National Railway Co.*, supra.

38 *Greater Toronto Airports Authority* v. *Mississauga (City)*, 1999 CanLII 14773 (ON SC) confirmed by 2000 CanLII 16948 (ON CA).

39 Supra, at 240-241, 243.

> the very nature of things this must be so or the legislation would fail to fulfil its object, the public safety. (emphasis added)
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> ...
>
> Once you reach the point that the subject matter is one for Parliament to deal with, then it is for Parliament exclusively. There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings. (emphasis added)

In the decision *In re Railway Act*,[40] the Supreme Court of Canada considered the validity of federal legislation that prevented a railway from limiting its liability to employees. The need for uniform national legislation was recognized as follows:

> The exclusive jurisdiction of Parliament over federal railways must include the power to enlarge or restrict their rights and duties in the administration of their various roads so as to make them uniform all through the Dominion. It is certainly expedient, not to say more, that upon such railways the relations between the corporation and its employees should be governed by the same rules all over the Dominion ....
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> These federal corporations are created and these railways are operated in the public interest of the Dominion at large, and whatever the federal Parliament thinks it expedient to decree in relation to their management and administration in that same public interest it must have the power to do.
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> ...
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> If legislation affecting the contracts entered into by the railways with their employees and the limitations which may be placed upon the companies' liability for damages to their workmen when injured or killed in the course of their employment, are matters for the several provincial legislatures and not for the Dominion Parliament, then, of course, such legislation may be as various and conflicting as there are legislatures to legislate, and it may well result that such various and conflicting legislation would materially affect the management and operation of the roads.

Similar statements arise in relation to caselaw relating to maritime law.[41] These authorities indicate that the nature of shipping, as a national and international activity, requires uniform rules and that the need for uniformity is one reason for the federal legislative authority over the undertakings described in s. 92(10)(a) of the *Constitution Act, 1867*.

The matters described in s. 92(10)(a) transcend provincial and national boundaries. These undertakings operate as integrated and unified networks. The regulatory regime governing federal undertakings should not be subject to the variations and potential conflicts that would ensue as a result of the application of provincial or local law to elements that are integral to federal undertakings. The functional test related to integral elements requires considering the matter in issue on an operational basis. This also implies considering how the federal undertaking would function if the particular matter in issue were subject to provincial or local law.

5. *Application of constitutional analysis of federal legislative authority to the Proposals*

Based upon the above, in our view, the federal government has authority under s. 92(10)(a) of the *Constitution Act, 1867* to adopt regulations of the type described by the Proposals. The scope of the

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[40] Supra, at 141, per Taschereau, CJ; 146, per Davies, J.

[41] See *Whitbread* v. *Walley*, [1990] 3 SCR 1273at 1288,1294-1296, 1298-1299; *Lloyd's Register North America Inc.* v. *Dalziel*, supra at 40-41; *Ordon Estate* v. *Grail*, [1998] 3 SCR 437, paras. 84, 88-91.

federal authority over railways as federal undertakings as described in the case law is extensive. The federal authority includes planning, building and supervising the construction and operation of rail lines, railroad companies, and related operations.

Regulations to implement the Proposals would have an incidental effect on the provincial jurisdiction over property and civil rights. Any such incidental effect would not, in our view, invalidate the regulations to implement the Proposals.

It is clear that safety in the operations of railways is an exclusive federal matter. CN's railway constitutes an integrated transportation system that operates throughout Canada, as well as in parts of the United States. Its operations are standardized across the country. The operations of a railway include the activities or process for running the railway. The process of planning and operating a railway includes identifying the risks of accidents and taking measures to prevent accidents and should include measures to mitigate the potential harm to persons and property from accidents.

As indicated in some of the cases related to aeronautics, a province or municipality cannot adopt regulations to establish building setbacks or height restrictions on land adjacent to airports where the regulations are intended to improve safety for airport use as these matters are within federal legislative authority over aeronautics. Further, federal authority over aeronautics and railways is not restricted to the immediate property of an airport or rail lines and cars. It extends to the operation or business as a whole.

A functional analysis leads us to the conclusion that matters addressed by the Proposals are integral elements of the federal undertaking authority under s. 92(10)(a) of the *Constitution Act, 1867* over railways. As mentioned above, the prevention of harm to property and persons in addition to those transported is an integral part of the process for planning and operating a railway in a manner that addresses operational risks.

In addition, if legislative authority as to the Proposals were within provincial authority, the goal of risk and injury reduction would not, in our view, likely be realized. As indicated above, the operation of a national railway requires uniformity. Provincial legislative competence would very likely result in the adoption of multiple, inconsistent and possibly conflicting standards. The potential for conflicting measures would be even greater if the Proposals were matters delegated to municipal governments. In addition, Provincial legislative competence could result in the absence of regulations to implement the Proposals in some jurisdictions.

6. *Conclusion*

Based on the above analysis, we conclude that the federal government has the constitutional authority under s. 92(10)(a) of the *Constitution Act, 1867* to adopt regulations of the type described by the Proposals.

We are providing this opinion letter to the Association with the understanding that it will notify us prior to communicating the opinion to persons, other than Association members.

Yours truly,

McCarthy Tétrault LLP.