

Federalism

Interjurisdictional Immunity: The Pendulum Has Swung

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I. INTRODUCTION

In the division of powers analysis, interjurisdictional immunity has traditionally been treated as the second of three potential questions. The first is whether impugned legislation aims at a subject matter outside the jurisdiction of the legislative body enacting it. This question is answered through the use of the pith and substance doctrine.

The second question is whether the law, having been found to be constitutionally valid, is inapplicable to particular persons, places or things by *virtue* of those subjects being within the exclusive jurisdiction of the other level of government. This is the issue that is commonly referred to as interjurisdictional immunity. Practically speaking, this question has been restricted to asking whether a *provincial* law is applicable to federal persons or things.

The third question asks whether a provincial law, found to be both valid and applicable, is inconsistent with valid federal law and therefore inoperative under the doctrine of paramountcy.

Professor Hogg characterizes these three questions, or forms of attack on the legislation, as questions of legislative validity, applicability and operability.¹

In May 2007, the Supreme Court of Canada rendered two decisions dealing with the second and third questions. In *Canadian Western Bank v. Alberta*,² the Court considered whether provisions of the insurance regulatory regime of Alberta which governed the promotion of insurance, were applicable to federally chartered banks engaging in the promotion of certain types of insurance authorized under the *Bank Act*. The Court also considered whether the legislation was inoperative as

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¹ Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), at 15-28.

² [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Canadian Western Bank*"].

being inconsistent with the *Bank Act*. In *British Columbia (Attorney General) v. Lafarge*,³ the Court considered the applicability of a municipal zoning and development by-law to the construction of a concrete batching facility on waterfront lands owned by the Vancouver Port Authority (a federal undertaking under the *Canada Marine Act*)⁴ and leased to Lafarge Canada. In that case, the Court also considered whether the provisions of the municipal by-law, as delegated provincial legislation, were inconsistent with the provisions of the *Canada Marine Act*.

In *Canadian Western Bank*, by a 6-1 majority, the Court upheld the Alberta regulatory regime as being applicable to banks, thereby rejecting the interjurisdictional immunity argument raised by the banks, and held that there was no inconsistency between the provincial and federal legislation, such that the paramouncy doctrine did not render the provincial legislation inoperative. In *Lafarge*, again by a 6-1 majority, the Court rejected the interjurisdictional immunity argument, but unanimously found operational conflict between the municipal by-law in question, and the federal regulatory regime surrounding port lands and lands owned by the Port Authority. Accordingly, the Court held the municipal by-law to be inoperative. On the issue of interjurisdictional immunity, Bastarache J. dissented in both cases (concurring in the result in *Lafarge*).

This paper focuses solely on the doctrine of interjurisdictional immunity, as these two cases have significantly altered the application of that doctrine in favour of allowing valid provincial legislation to apply to federal undertakings, persons, places or things. I will argue that these cases have brought much needed clarity to the methodology of application of the doctrine, though there remains some uncertainty as to how far the Court has gone in limiting its use.

For a full understanding of the importance of these decisions, it is necessary to briefly consider the history of the doctrine, and the significant criticisms levelled at its application.

³ [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.) [hereinafter "*Lafarge*"].

⁴ S.C. 1998, c. 10.

II. THE HISTORY OF INTERJURISDICTIONAL IMMUNITY

1. The Companies Cases

The earliest emergence of the concept that valid provincial legislation could not apply to a federal “thing” arose at the turn of the 19th century, but the articulation of a requirement of impairment fell to the companies cases (*John Deere Plow Co. v. Wharton* and *Great West Saddlery Co. v. The King*).⁵ These cases decided that provincial companies legislation which prohibited “extra-provincial companies” from carrying on business in the province without a licence could apply to companies incorporated under the jurisdiction of other provinces or countries, but could not apply to a federally incorporated company. The rationale behind the decisions was that the effect of the prohibition would be to deprive the federal company of its corporate status or essential power. Since these were powers within the exclusive authority of the federal level of government by virtue of its “incorporation power” (recognized under peace, order and good government), no provincial legislation could apply to deprive such a company of status.

However, even these early cases distinguished between provincial legislation which could deprive a federal company of its corporate status or existence in a province, and provincial legislation which merely regulated business activity. The latter was held to be applicable to federal companies.

This has been confirmed more recently in *Canadian Indemnity Company v. British Columbia (Attorney General)*,⁶ in which the Supreme Court found that the creation of a Crown monopoly over automobile insurance in the province of British Columbia did not impair the corporate status of federally incorporated insurance companies, but was merely an example of regulation of a particular business or industry, and therefore applicable to the federal companies.

2. The Undertakings Cases

The standard of impairment was later expanded and applied to federal undertakings; in these early cases provincial law was found to be inapplicable to federal undertakings only if it “impaired” those

⁵ [1914] J.C.J. No. 2, [1915] A.C. 330 (P.C.); [1921] J.C.J. No. 1, [1921] 2 A.C. 91 (P.C.).

⁶ [1977] S.C.J. No. 83, [1977] 2 S.C.R. 504 (S.C.C.).

undertakings in the sense of “paralyzing” or “sterilizing” the undertakings (*Ontario (Attorney General) v. Winner*).⁷

In *Quebec (Commission de salaire minimum) v. Bell Telephone Co.*,⁸ the Supreme Court considered whether the *Minimum Wage Act* of Quebec⁹ could apply to employees of Bell Telephone, a federal undertaking. The Court considered wage rates, like hours of work and other working conditions, to be a “vital part” of the management and operation of a federal undertaking, and held the legislation inapplicable, because “all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal Parliament”.¹⁰ By virtue of *Bell Canada 1966*, provincial law was now inapplicable to “vital parts” of federal undertakings, without any requirement of “impairing”, “paralyzing” or “sterilizing” the undertaking.

This application of the doctrine was the subject of academic criticism, primarily by Professors Gibson and Hogg.¹¹ These criticisms were addressed and rejected by the Supreme Court in *Bell Canada v. Québec (Commission de santé et de la sécurité du travail)*.¹²

Bell Canada 1988 became the leading contemporary case on the scope of the interjurisdictional immunity doctrine. The Court reasoned that Parliament was vested with exclusive legislative jurisdiction (on the facts of that case) over labour relations and working conditions “when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects”,¹³ which in that case was the federal undertaking of telecommunications.

The Court went on to state that this rule:

... appear[ed] to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for the Indians, and persons, such as Indians, who were within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal

⁷ [1954] J.C.J. No. 1, [1954] 4 D.L.R. 657 (P.C.).

⁸ [1966] S.C.J. No. 51, [1966] S.C.R. 767 (S.C.C.) [hereinafter “*Bell Canada 1966*”].

⁹ R.S.Q. 1941, c. 164.

¹⁰ *Bell Canada 1966*, *supra*, note 8, at 772.

¹¹ Dale Gibson, “Interjurisdictional Immunity in Canadian Federalism” (1969) 47 Can. Bar Rev. 40; Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), at 329-32.

¹² [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at paras. 248-271 (S.C.C.) [hereinafter “*Bell Canada 1988*”].

¹³ *Id.*, at para. 19.

legislation, legislation on adoption, hunting or the distribution of family property, *provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically a federal jurisdiction ...*¹⁴

After addressing and rejecting the academic criticisms of Professors Gibson and Hogg, the Court reaffirmed the “vital aspect test”, stating that the principle of interjurisdictional immunity would be “given effect” if “the provincial statute which purports to apply to the federal undertaking *affects a vital or essential part of that undertaking, without necessarily going so far as impairing or paralyzing it*”¹⁵

In this theory of interjurisdictional immunity, the existence of an “integral” part of the primary and exclusive federal jurisdiction is based on the assertion that, due to this exclusivity, there exists a “basic, minimum and unassailable content”¹⁶ to each federal head of power into which otherwise valid provincial legislation may not intrude.

I would argue that at this stage in the development of the interjurisdictional immunity jurisprudence, the Court had identified two related but different concepts. The first is the concept that valid provincial legislation may not deal with a subject matter which is integral to a particular head of federal legislative power. The second, related concept is that provincial legislation may not affect a vital or essential part of a federally regulated undertaking, person or thing. The first concept is the constitutional principle of interjurisdictional immunity, and the second is merely the test applied by the Court in particular circumstances to determine if that constitutional rule has been violated.

For example, in *Bell Canada 1988*, the Court confirmed that a provincial statute will bear upon the specifically federal nature of a federal undertaking if it affects a vital or essential part *of that undertaking*. The very clear wording used by the Court indicated that the vital aspect test was *not* a question of whether provincial legislation merely “affects” the head of federal power (a formulation that would be quite broad, and threatening to the concepts of “incidental effects” and “double aspect” under the pith and substance analysis). Rather, the appropriate question is whether the provincial legislation affects a vital or essential aspect of the undertaking, person or thing which is subject to that federal legislative power.

¹⁴ *Id.*, at para. 20 (emphasis added).

¹⁵ *Id.*, at para. 312 (emphasis added).

¹⁶ *Id.*, at para. 250.

Further support for this articulation of the doctrine and the vital aspect test is found in the Supreme Court decision in *Irwin Toy*¹⁷ when the Court stated:

The federal government has exclusive jurisdiction as regards “essential and vital elements” of a federal undertaking, including the management of such an undertaking, because those matters form the “basic, minimum and unassailable content” of the head of power created by operation of ss. 91(29) and the exceptions in ss. 92(10) of the *Constitution Act, 1867*.¹⁸

With respect to *Irwin Toy*, it is worth noting that, despite the Court’s rejection of the academic criticisms in *Bell Canada 1988* just one year earlier, the Court began a “reassessment” of the doctrine of interjurisdictional immunity. This “reassessment” consisted of a qualification, such that the vital aspect test would apply only to provincial laws that purported to apply directly to federal undertakings. Where the provincial law was otherwise aimed, and had only an indirect effect on the undertaking, the law would be inapplicable only if it impaired, paralyzed or sterilized the undertaking.

III. CRITICISMS OF INTERJURISDICTIONAL IMMUNITY

The criticisms of the doctrine have been varied. After the decision in *Bell Canada 1988*, the criticisms no longer called for a rejection of the doctrine itself, but rather for a rejection of the vital aspect test, and a return to the impairment standard. A useful summation of the criticisms is found in the reasons of Bastarache J. in *Lafarge*.¹⁹

In the companion cases of *Canadian Western Bank*²⁰ and *Lafarge*, four major criticisms were advanced at the Supreme Court of Canada. The first is that the doctrine, particularly after the adoption of the vital aspect test, had become confused and incapable of consistent application. Second, it was argued that the threshold for invoking the doctrine was too low (*i.e.*, “affect a vital aspect” or “touching Indianness”) and that such a low threshold conflicted with principles of federalism recognized by the Court. Third, the application of the doctrine was one-sided. While in theory both federal and provincial powers are reserved

¹⁷ *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

¹⁸ *Id.*, at 955.

¹⁹ *Supra*, note 3, at paras. 99-100.

²⁰ *Supra*, note 2.

“exclusively” to each level of government, the Court has generally concerned itself only with identifying the “basic, minimum and unassailable content” of federal heads of power. Finally, it was suggested that any form of interjurisdictional immunity, but particularly a doctrine with such a low threshold, was unnecessary in a federal system in which paramountcy rested with the federal level of government.

1. A Confusing Doctrine

Professor Hogg has characterized the vital aspect test as both too broad and too vague.²¹ I certainly agree that a determination of what “affects” a vital or essential part of a federal undertaking, person or thing is a far more difficult proposition than determining what “impairs”, “sterilizes” or “paralyzes”. However, my criticism of the confusion in application of the doctrine stems primarily from its overly broad application, in two ways.

(a) *When Should the Doctrine be Applied?*

The first is the question of when the doctrine is to be applied. As already pointed out, in theory there is a “basic, minimum and unassailable content” or “core” to every head of power, both federal and provincial. However, when addressing the “core” of the various federal heads of power, the Supreme Court has not applied the theory consistently to every federal power. A comparison of two decisions illustrates this point.

In *Ordon Estate v. Grail*,²² the Court considered whether provincial legislation governing damages, negligence and apportionment of liability could fill in any gaps in Canadian maritime law and govern a fatality occurring as a result of a boating accident on inland waters of Ontario. After quoting the seminal passage of Beetz J. from *Bell Canada 1988* (which treated the “general rule” as being restricted to works, things and persons), the Court treated this as a principle “that *each head of federal power* possesses an essential core which the provinces are not permitted to regulate indirectly”.²³

²¹ *Supra*, note 1.

²² [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

²³ *Id.*, at para. 83 (emphasis added); *Bell Canada 1988*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.).

The Court went on to hold that maritime negligence law was part of the unassailable core of the federal power over navigation and shipping (*i.e.*, federal maritime law) and for that reason, provincial legislation could not apply even for the purpose of filling in gaps in federal law.

The extension of interjurisdictional immunity from undertakings, things and persons to a head of federal power which governs an activity (navigation and shipping) was perceived to be necessary on the facts of *Ordon Estate*, in order to preserve a uniform system of maritime negligence law across the country. This desire for uniformity, and the Court's perception that the lack of uniformity would compromise Canada's international treaty obligations relating to maritime matters, was of great concern to the Court.²⁴

This is to be contrasted with the approach taken by the Court in *O.P.S.E.U. v. Ontario (Attorney General)*, in which it was argued that a provincial law limiting political activities of provincial civil servants during federal election campaigns intrudes upon a core of exclusive federal jurisdiction over federal elections. After discussing the history of interjurisdictional immunity, Dickson C.J.C. stated that in his view, it was "not a particularly compelling doctrine", accepted the criticisms as advanced by Professor Hogg and concluded by stating:

I am not prepared to extend the doctrine of interjurisdictional immunity into a field — federal elections — which is unrelated to either the company law cases or the federal undertakings cases, the two historical roots of the doctrine.²⁵

Both *Ordon Estate* and *O.P.S.E.U.* are cases in which the Court was asked to protect the core of a federal power governing an activity, as opposed to federal things or persons. It cannot be seriously argued that navigation and shipping is any more closely related to the companies and undertakings cases than is federal elections. Accordingly, it is exceedingly difficult to reconcile the two cases, other than to say that the Court felt a need for uniformity in maritime negligence law, and no similar considerations governed the fact circumstance in *O.P.S.E.U.* In any event, the treatment of these two cases highlights the confusion surrounding the question of when the doctrine would be applied, particularly outside the context of undertakings, persons or things.

²⁴ *Id.*, at para. 88.

²⁵ [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at para. 23 (S.C.C.) [hereinafter "*O.P.S.E.U.*"].

(b) *The Methodology of Application of the Doctrine*

A second source of confusion has existed in the methodology of application of the doctrine of interjurisdictional immunity. I have already proposed that the correct methodology is to view the constitutional doctrine as a prohibition on valid provincial legislation dealing with a subject matter which is integral to, or at the core of, a particular head of federal legislative power. Since *Bell Canada 1988*,²⁶ determination of that question generally has fallen to the application of the vital aspect test: does the provincial law affect a vital or essential part of the federal undertaking, person or thing? If it does, it deals with a matter integral to the federal power.

In such an analysis, the question of whether the provincial legislation affects a vital part of the federal undertaking, person or thing is necessarily a fact-based assessment.

Examples of such a fact-based assessment exist throughout the Supreme Court jurisprudence. In *Irwin Toy*,²⁷ the Court considered Quebec legislation which prohibited the use of commercial advertising directed at persons under 13 years of age. The focus of the Court's factual inquiry was the effect of that provision on the operations of television broadcasters (as federal undertakings). In *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, the Court found that provincial adoption legislation could not apply of its own force to Indian children on the basis of the Court's factual assessment of the potential that Indian parents could be compelled to surrender Indian children to adopting non-Indian parents, which would "constitute a serious intrusion in the Indian family relationship".²⁸ It was the effect of the legislation upon the rights of persons under federal jurisdiction which drove the reasons of the Court.

Similarly, in *Air Canada v. Ontario (Liquor Control Board)*,²⁹ the Court considered the objection of the airline to the payment of a mark-up charge by a provincial liquor corporation respecting liquor destined for consumption during flight. The Court acknowledged that, while in some circumstances the provision of food and water on aircraft would be essential (*i.e.*, on longer flights), the provision of liquor was simply not essential to the operation of aircrafts. Once again, the Court conducted a

²⁶ *Supra*, note 23.

²⁷ *Supra*, note 17.

²⁸ [1976] S.C.J. No. 101, [1976] 2 S.C.R. 751, at 760-61 (S.C.C.).

²⁹ [1997] S.C.J. No. 66, [1997] 2 S.C.R. 581 (S.C.C.).

fact-specific analysis of the effect of the provincial legislation upon the federally regulated undertaking, in order to determine if the legislation impacted upon the basic, minimum and unassailable core of federal jurisdiction.

However, this methodology of application has not been uniform. A comparison of the treatment in the lower courts of the companion cases of *Canadian Western Bank* and *Lafarge* illustrates the confusion surrounding the application of the doctrine.

In *Canadian Western Bank*, the Alberta Court of Appeal essentially followed this proposed analysis, without expressly stating so. However, the Court explicitly recognized the necessary factual inquiry, when it stated:

What is at the core of a federal power is obviously fact-sensitive, as is the determination of whether the impugned law affects a vital part of a matter within exclusive federal jurisdiction. Recent Supreme Court cases demonstrate this.³⁰

The Alberta Court of Appeal accepted the findings of fact of the trial judge, leading to the conclusion that the promotion of certain types of insurance was not at the core of banking. The relevant factual findings included the voluntary nature of the insurance in question, that it could be cancelled after a loan had been advanced, and the lack of connection between the insurance and loan repayment. These factors were cited as evidence that the promotion of insurance was simply a new source of profitability for banks, rather than a form of protection of loan portfolios. Thus, the Alberta courts concluded that, factually, promotion of insurance could not be at the “core” of banking. It followed that the impugned regulations did not affect anything at the “core”.

In the companion case of *Lafarge*, however, the British Columbia Court of Appeal had applied the doctrine in a much broader fashion. Rather than asking whether the municipal by-law in question (which contained height restrictions that would have prohibited the concrete batch plant proposed by Lafarge) affected a vital or essential part of the federal undertaking in question (the Port Authority) the Court of Appeal instead articulated the test as a question of “whether the application of the city’s by-law to regulate the development of port lands would *affect a vital aspect of the federal power over navigation and shipping*”.³¹

³⁰ [2005] A.J. No. 21, 249 D.L.R. (4th) 523, at para. 44 (Alta. C.A.).

³¹ *Burrardview Neighborhood Assn. v. Vancouver (City)*, [2004] B.C.J. No. 355, 237 D.L.R. (4th) 466, at para. 96 (B.C.C.A.) (emphasis added).

Not surprisingly, the British Columbia Court of Appeal proceeded to find that the exercise of jurisdiction over land use and development on lands owned by the Port Authority was a vital part of the federal power, and that any provincial regulation in that area was therefore inapplicable.

The Court did not factually address the impact of the municipal by-law under attack on the operations of the Port Authority. In short, the Court did not address the question of whether the by-law affected a vital or essential part of the Port Authority's operations. On the facts of the case, the lands upon which Lafarge Canada, as lessee, proposed to build the concrete batch plant were lands that were incidental to the use of the port, not lands used in port operations. The most that could be said on the facts of the case is that the operations of Lafarge Canada on these lands would be supportive of port operations, in the sense that they created a demand for port business, in the form of shipping of aggregate and other products.

The framing of the question by the British Columbia Court of Appeal was, with respect, overly broad. As already stated, such a broad characterization of the test threatened the existence of the "double aspect" doctrine, and the concept that valid legislation can have "incident effects" on the other level of government.

More to the point, however, it was significantly at odds with the methodology of application utilized by the Alberta Court of Appeal in *Canadian Western Bank*.³²

2. The Threshold and Principles of Federalism

Following *Bell Canada 1988*, the threshold for application of the doctrine was crossed when provincial legislation "affected" a vital or essential part of a federal undertaking, person or thing. It is apparent that this is a considerably lower threshold than the previous formulation of the test, which required impairment, in the sense of "paralyzing" or "sterilizing" the undertaking. In *Bell Canada 1988*, Beetz J. contemplated that the doctrine would be applied to preclude application of provincial legislation to a federal undertaking if the legislation affected a vital or essential part of the undertaking, "without necessarily going as far as impairing or paralyzing".³³

³² *Supra*, note 30.

³³ *Bell Canada 1988*, *supra*, note 23, at para. 312.

This lower threshold, combined with the potential that the doctrine could be applied to protect a core of every federal head of power, could represent a significant threat to principles of federalism. What are these principles? They were enunciated by the Court in *O.P.S.E.U.*, where Dickson C.J.C. recognized that “the history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between the federal and provincial powers” and that the concept of interjurisdictional immunity has not been the “dominant tide” of Canadian constitutional law, those being the doctrines of pith and substance and “double aspect”.³⁴

More recently, the Court has summarized the relevant principles of federalism as follows:

In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669, “overlap of legislation is to be expected and accommodated in a federal state”. Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have “incidental effects” upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.³⁵

The doctrine of interjurisdictional immunity, particularly when formulated as the vital aspect test, conflicts with these principles of federalism. Too low a threshold for invocation of the doctrine is threatening to the fundamental constitutional doctrine that laws of one level of government may incidentally affect the jurisdiction of the other level of government.

It is worth noting that in *Law Society of British Columbia v. Mangat*,³⁶ the Supreme Court considered whether agents appearing before the federal Immigration Refugee Board were required to comply with British Columbia’s *Legal Profession Act*.³⁷ The Court rejected the argument that the provincial legislation could not apply because of interjurisdictional immunity, in fact rejecting the application of the doctrine to the particular facts of that case. The Court held that the existence of a “double aspect” to the subject matter at issue favoured

³⁴ *O.P.S.E.U.*, *supra*, note 25, at 18-19.

³⁵ *Reference re Firearms Act*, [2000] 1 S.C.R. 783, at para. 26 (S.C.C.).

³⁶ [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.) [hereinafter “*Mangat*”].

³⁷ S.B.C. 1987, c. 25.

the application of the paramountcy doctrine, rather than that of interjurisdictional immunity. The Court was concerned with the potential that interjurisdictional immunity would exclude the application of the provincial legislation even in circumstances where Parliament chose not to legislate in the area.

3. Unnecessary Where Paramountcy Rests with the Federal Parliament

Mangat is the appropriate lead-in for the criticism that the doctrine is unnecessary to protect federal core jurisdiction in light of federal paramountcy.

In my view, this is one of the more salient criticisms of the vital aspect test. The vast majority, if not all, of the challenges to provincial legislation on the basis of interjurisdictional immunity are not challenges in which the federal level of government seeks to limit the application of provincial legislation. Rather, these challenges are commenced by “federal” persons or organizations such as banks, telecommunications companies, inter-provincial railways, and port authorities who seek to avoid the impact of valid provincial legislation which governs the conduct of all other “non-federal” persons and organizations that would normally be subject to such legislation. If the federal level of government were truly concerned that provincial legislation was encroaching upon the core of federal jurisdiction in a particular area, the federal Parliament need only speak in clear and unambiguous terms to invoke the doctrine of paramountcy, either by creating an operational conflict between federal and provincial legislation, or alternatively, drafting legislation which has a purpose incompatible with the application of provincial legislation to the federally regulated persons, things or undertakings.

This criticism still relates to reconciliation of the doctrine of interjurisdictional immunity with the principles of federalism. Because interjurisdictional immunity is supplemented by the doctrine of federal paramountcy, it is far more consistent with the principles of federalism espoused in *O.P.S.E.U.*³⁸ and the *Firearms Reference*³⁹ if the threshold for application of the doctrine is a threshold of impairment, rather than a threshold of “affecting” a vital aspect.

³⁸ *Supra*, note 25.

³⁹ *Supra*, note 35.

The final point to this criticism is one that had already been made by the Supreme Court prior to its decisions in *Canadian Western Bank*⁴⁰ and *Lafarge*.⁴¹ This is the reality that application of the doctrine of interjurisdictional immunity can oust provincial law even in circumstances when Parliament has not legislated in the area.⁴² This raises the risk of regulatory vacuums, and uneven regulation of federal and provincial organizations involved in essentially the same activity. The facts in *Canadian Western Bank* are a prime illustration of this potential problem. Banks, as federally regulated organizations, having been authorized by the *Bank Act*⁴³ to enter into a provincially regulated field (insurance), could potentially avoid the application of provincial law governing all others who promote insurance in a particular province.

4. One-sided Nature of the Doctrine

As has already been pointed out, the theoretical underpinning for the doctrine is the exclusive nature of federal jurisdiction over the various heads of power set out in section 91 of the *Constitution Act, 1867*,⁴⁴ and the fact that each such head of power has a “core” which must be protected from provincial regulation. However, the heads of power granted to the provinces under section 92 are no less exclusive than federal powers, subject of course to the doctrine of paramountcy in the double aspect cases. There is no recognition of this fact in the form of a basic, minimum and unassailable content attributed to provincial heads of power.

This is perhaps so because of the existence of the doctrine of paramountcy. It could be argued that valid federal legislation could never be held inapplicable to a subject matter which is at the “core” of a provincial power, if the rules of our Constitution state that paramountcy is reserved to the federal Parliament in the event of conflict between valid provincial and valid federal legislation.

However, this does not alter the fact that interjurisdictional immunity is a one-sided doctrine. An illustrative example is found in *Public Service Alliance of Canada v. Canada*.⁴⁵ At first blush, this case

⁴⁰ [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.).

⁴¹ [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.).

⁴² *Mangat, supra*, note 36, at 144-45.

⁴³ S.C. 1991, c. 46.

⁴⁴ 30 & 31 Vict., c. 3.

⁴⁵ [2006] S.C.J. No. 29, [2006] 1 S.C.R. 1027 (S.C.C.) [hereinafter “P.S.A.C.”].

was a simple exercise in the statutory interpretation of section 10 of the *Royal Canadian Mounted Police Act*,⁴⁶ which provides that civilian employees necessary for carrying out the duties of the RCMP are to be appointed under specific federal legislation. The provision was interpreted by the majority of the Federal Court of Appeal as requiring provincial and municipal employees supporting RCMP operations to be employed by the federal government as civilian employees of the RCMP. This of course arose in circumstances in which the RCMP was providing policing services under contract to provinces and municipalities. Ultimately, the Supreme Court issued a one-paragraph decision in which it limited the application of section 10 of the RCMP Act to civilian staff appointed by the RCMP Commissioner, stating that it did not apply to civilian staff appointed or employed by a municipality where that municipality has a policing agreement with the RCMP.

However, but for that interpretation, the case would have raised a significant constitutional issue. Could Parliament require that such employees be federal employees? Such a question would pit provincial jurisdiction over the “administration of justice in the Province” against the federal power to manage its own organizations, in this case the RCMP. It has long been recognized that the enforcement of criminal law, policing and the suppression of crime and disorder is part of provincial jurisdiction over the administration of justice, and is “wholly with the provinces”.⁴⁷

Thus, it is clearly within the authority of the provinces to contract for the provision of policing services from the RCMP, but at the same time employ matrons, guards, receptionists and janitors as provincial employees who provide support services necessary for the operation of a policing detachment. The Attorney General of New Brunswick intervened in this case, and applied to the Court to state two constitutional questions. The first constitutional question asked whether section 10 of the RCMP Act was constitutionally invalid in relation to the administration of justice under section 92(14) of the *Constitution Act, 1867*. This constitutional question was stated by the Chief Justice for the Court.

The second constitutional question proposed by the Attorney General of New Brunswick was whether section 10(1) of the RCMP Act was constitutionally applicable to provincial and municipal civilian

⁴⁶ R.S.C. 1985, c. R-10 [hereinafter “RCMP Act”].

⁴⁷ *In re Prohibitory Liquor Law*, [1895] S.C.J. No. 8, [1895] 24 S.C.R. 170, at 248 (S.C.C.); *Reference re the Adoption Act (Ontario)*, [1938] S.C.J. No. 21, [1938] S.C.R. 398 (S.C.C.).

employees providing support services to the RCMP, where the RCMP is performing provincial policing duties under contract with a province or municipality. This constitutional question, which would have directly raised whether federal legislation could intrude on the core of provincial jurisdiction, was not stated for the Court.

One can only conclude that the Court had no desire to embark on an inquiry of the question of “basic, minimum and unassailable content” of provincial heads of power.

IV. THE DECISIONS

In *Canadian Western Bank*, the Court acknowledged virtually all of the criticisms advanced, and made it clear that the Court did not favour “an intensive reliance on the doctrine”.⁴⁸ Six reasons were advanced for this position, as follows:⁴⁹

1. Broad application of the doctrine to “activities” creates a problem of application which does not exist with respect to undertakings, things or persons.
2. Broad application is inconsistent with principles of federalism, promoted by the constitutional doctrines of pith and substance, double aspect and paramountcy.
3. Excessive reliance on the doctrine would create serious uncertainty.
4. The risk of creating “legal vacuums”, recognized in *Mangat*, is generally speaking not desirable.
5. Broad use of the doctrine creates an “unintentional centralizing tendency of constitutional interpretation”. This “asymmetrical” application of the doctrine is incompatible with contemporary Canadian federalism.
6. The doctrine is superfluous due to the operation of the doctrine of federal paramountcy.

Having accepted the criticisms advanced, the Court has taken three concrete steps that clearly reduce the circumstances in which the doctrine will be applied. I would also argue that the Court has given itself room to further restrict the applicability of the doctrine in future cases. I will first deal with the three limitations the majority has placed on the applicability of the doctrine.

⁴⁸ *Canadian Western Bank*, *supra*, note 40, at para. 47.

⁴⁹ *Id.*, at paras. 42-46.

1. Higher Threshold — A Return to Impairment

The Court spent little time in raising the threshold for the application of the doctrine from “affecting” a vital or essential part of a federal undertaking, person or thing to “impairing” that vital or essential part. “Affecting”, in the opinion of the Court, is not enough to invoke the doctrine, because it does not imply any requirement of “adverse consequence”, whereas the concept of impairment does imply such a consequence to the federal person, thing or undertaking.

Ultimately, the Court concluded:

It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “impairing” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the other level of government (where the vital essential part of an undertaking duly constitutes) is placed in jeopardy, and not before.⁵⁰

This statement raises two points. First, despite the earlier statement of the Court that the law as it stood prior to *Bell Canada 1988*⁵¹ better reflected Canada’s federal scheme, this decision *may* not represent a return to the older impairment concept, which was connoted with “sterilizing” or “paralyzing” the federal undertaking. Rather, the Court seems to be saying that while impairment is required, in the sense that there must be an “adverse consequence” upon the federal undertaking as a result of the provincial law, it is not necessary to “sterilize” or “paralyze” in order to invoke the doctrine.

In this sense, it may be that the view of the majority on the appropriate threshold for the application of the doctrine is not significantly at odds with the standard suggested by Bastarache J. in dissent in *Lafarge*. Justice Bastarache argues for a “kind of middle ground” between the overly vague and broad standards of “touches on” (a phrase which is usually associated with the Indian cases), and the overly restrictive standard of “sterilizes” or “impairs”. In the view of Bastarache J., paralysis of the core of the federal power or the operations of the undertakings is not required, but “the impact of the application of the by-law must be sufficiently serious to trigger immunity”.⁵²

⁵⁰ *Canadian Western Bank*, *supra*, note 40, at para. 48.

⁵¹ *Supra*, note 23.

⁵² *Lafarge*, *supra*, note 41, at para. 139.

It is arguable that, with respect to the sole issue of the threshold of application, these two views are not as divergent as they may first appear. The view of the majority does contemplate a middle ground, because its view of “impairment” does not consist of a requirement for “paralyzing” or “sterilizing”. For Bastarache J., the concept of impairment does imply a requirement of “sterilizing”. For reasons that shall be seen however, I believe a significant difference does exist between the threshold established by the majority, and that relied upon by Bastarache J. in dissent.

The second point concerns the methodology of application of the doctrine, where the majority and Bastarache J. clearly diverge. In his dissent in *Lafarge*, Bastarache J. follows the same approach as that of the British Columbia Court of Appeal when he characterizes the question as whether the municipal by-law would affect *a vital part of the federal legislative authority* over navigation and shipping. This flows from his characterization of interjurisdictional immunity as concerning jurisdiction, rather than action or activities. His analysis is far less concerned about the impact of provincial law on the federal undertaking, person or thing, than it is upon the federal head of power.⁵³

The majority, however, does equate the “core” competence of the federal level of government with the vital or essential part of federally regulated undertakings, persons or things. This approach is much more consistent with the methodology I had earlier referred to, and does engage in the fact-based determination of whether there is an impairment of a vital or essential part of the federal undertaking, in order to determine if the provincial law strikes at what is “integral” to the federal head of power.

As will be seen however, the majority does reserve a slightly different treatment for the cases involving federal heads of power dealing with “activities”.

This difference in methodology determines the result in the *Lafarge* case. The approach of Bastarache J., which is a considerably broader application of the doctrine, results in a finding that the municipal by-law is inapplicable. The approach of the majority led to a decision that interjurisdictional immunity did not apply.

⁵³ *Id.*, at para. 135.

2. “Vital and Essential” Means “Vital and Essential”

Though not as dramatic as altering the threshold for application established in *Bell Canada 1988*, the reinforcement by the majority that the provincial legislation must impair a “vital and essential part” of an undertaking is nonetheless important. The majority treats “vital or essential” in its ordinary grammatical sense, focusing on the meaning of “absolutely indispensable or necessary”.⁵⁴ This clarification, combined with the methodology of application of the majority and the raising of the threshold to one of “impairment”, effectively returns the application of interjurisdictional immunity to a standard of “sterilizing” or “paralyzing”. If a provincial law must impair that part of an undertaking which is “absolutely indispensable or necessary” to the undertaking before the law would be considered inapplicable, it is difficult to see how anything short of “paralyzing” the undertaking would suffice.

The facts in *Canadian Western Bank* are not particularly helpful in demonstrating this point, as the Court made it very clear that the provincial insurance licensing requirements in question did not affect the “core” of banking, let alone impair it. However, the way in which the Court phrases its conclusions on the facts of the case supports a return to the requirement of “sterilizing” or “paralyzing”. The Court states:

It is simply not credible, in our view, to suggest that the promotion of “peace of mind” insurance is “absolutely indispensable or necessary” to enable the banks to carry out their undertakings in what makes them specifically of federal jurisdiction.⁵⁵

If a particular activity is “absolutely indispensable or necessary” to enable a federal undertaking to carry out its undertaking, provincial law which prohibits that activity must surely paralyze the undertaking.

3. Paramountcy Is the Preferred Doctrine

In addition to the alterations in the threshold of application for the doctrine, the majority placed greater restriction on the federal heads of power to which the doctrine will be applied. The majority does this in the context of discussion of the appropriate order of application of the constitutional doctrines of pith and substance, interjurisdictional immunity and paramountcy.

⁵⁴ *Canadian Western Bank*, *supra*, note 40, at para. 51.

⁵⁵ *Id.*, at para. 53 (emphasis added).

It is unfortunate that the majority chose to address this issue in the terms that it did. If interjurisdictional immunity is to be considered, it would always be considered after pith and substance, and before paramountcy. This is so simply because a provincial law which does “impair” a federal undertaking from carrying on its undertaking, would be inapplicable even in the absence of conflicting federal legislation, and because paramountcy considerations are moot if interjurisdictional immunity does apply. The majority clearly recognized this when it stated “in theory, consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis”.⁵⁶

The issue is not really one of the order of application of the doctrines of interjurisdictional immunity and paramountcy. The question is whether interjurisdictional immunity should be applied at all, in particular cases.

It would have been preferable if the majority had restricted itself to its statements that:

[interjurisdictional immunity] will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.⁵⁷

The Court seems to be motivated by its desire to avoid a circumstance in which the “core” of every federal head of power would have to be identified, in order to determine whether or not provincial regulation has intruded into that core. Accordingly, the Court has restricted the doctrine to those federal heads of power governing things, persons or undertakings, and those heads of power which govern activities but in which the doctrine has already been applied.⁵⁸

Remember that the first reason the Court expressed for not favouring “an intensive reliance on the doctrine” was that broad application of the doctrine to “activities” created problems of application which do not

⁵⁶ *Id.*, at para. 78.

⁵⁷ *Id.*, at para. 77.

⁵⁸ *Ordon Estate*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.), in the case of navigation and shipping.

exist with respect to undertakings, things and persons. Application of the doctrine to the latter circumstance is conceptually easier, and the test is much more clearly articulated. It is consistent with the methodology of the analysis suggested in *Bell Canada 1988*⁵⁹ and *Irwin Toy*;⁶⁰ provincial legislation strikes at the core of federal powers over undertakings, persons and things when it impairs the undertaking from carrying on its undertaking, or the person from engaging in activity which is specifically federal in nature (for example, in the case of “Indians”, the exercise of Aboriginal and treaty rights).

The confusion in the analysis and application of interjurisdictional immunity has, in large part, flowed from the difficulty in applying the doctrine to federal heads of power governing “activities”. In those cases, there is not always a federal person, place or undertaking to which the test, whether it be the vital aspect test or an impairment test, can be applied. It is in these types of cases in which courts (like the British Columbia Court of Appeal in *Lafarge*)⁶¹ have asked the overly broad question of whether the provincial legislation affects a vital part of the federal power itself.

The majority seems content to address this methodology of application problem by restricting the application of the doctrine to the undertakings cases, and the “activities” heads of power where the doctrine has already been recognized in the past.

It would probably be unwise to consider this as an absolute bar against the extension of the doctrine to other federal heads of power which govern activities. However, it would likely require quite a dramatic case of provincial intrusion into a federal area of responsibility to justify further extension of the doctrine.

4. Potential for Further Restrictions of the Doctrine

In *Canadian Western Bank*, the majority reaffirmed that the doctrine of paramountcy “is much better suited to contemporary Canadian federalism” than is interjurisdictional immunity, referring to the “double aspect” case of *Mangat*.⁶² It is this preference for paramountcy which led the Court to restrict the application of the doctrine to federal things,

⁵⁹ [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.).

⁶⁰ [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

⁶¹ *Supra*, note 41.

⁶² *Canadian Western Bank*, *supra*, note 40, at para. 69; *Mangat*, *supra*, note 36.

persons or undertakings, and those situations in which the doctrine has already been recognized in the jurisprudence.

The majority goes no further than that in its reasons in *Canadian Western Bank*. However, in *Lafarge*, the Court appears to build on the reasons set out in *Canadian Western Bank*, stating as follows:

For the reasons we gave in *Canadian Western Bank v. Alberta*, 2007 SCC 22, released concurrently, we agree with the approach outlined by the late Chief Justice Dickson in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at p. 18, in which he characterized the arguments for an interjurisdictional immunity as not particularly compelling, and concluded that they ran contrary to the “dominant tide” of Canadian constitutional jurisprudence. *In particular, in our view, the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land use planning controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.*⁶³

Later in the *Lafarge* decision, in discussing the scope of interjurisdictional immunity, the majority states:

The question before us, therefore, is whether it can be said that federal jurisdiction over all development on VPA lands within the port area of Vancouver, even non-Crown lands *not* used for shipping and navigation purposes, is “absolutely indispensable or necessary” to the discharge by the VPA of its responsibilities in relation to federal “public property” or “shipping and navigation”. *We concluded in Canadian Western Bank that interjurisdictional immunity is not essential to make these federal powers effective for the purposes for which they were conferred and therefore this appeal should be decided on the basis of federal paramountcy, not interjurisdictional immunity.*⁶⁴

Taken at face value, the statement that the doctrine should not be used where a case presents a double aspect, has potentially far-reaching restrictions on application of the doctrine. It raises the further question of when a case will be considered to be a “double aspect” case.

In *Mangat*, the Court was considering the constitutional validity of provisions of the federal *Immigration Act*, which governed the

⁶³ *Lafarge*, *supra*, note 41, at para. 4 (emphasis added).

⁶⁴ *Id.*, at para. 43 (emphasis added).

representation of aliens appearing before the Immigration Appeal Board. The Court acknowledged the statement of the Privy Council in *Hodge v. The Queen*⁶⁵ where it was said that “subjects which in one aspect and for one purpose fall into s. 92, may in another aspect and for another purpose fall into s. 91”. The Court was of the view that the provisions had both federal and provincial features, the federal being the regulation of procedures before the Immigration Appeal Board, and the provincial being the regulation of the legal profession. Because the Court found each feature of roughly equivalent importance, the provisions were held to be validly enacted under the “double aspect” doctrine.

Is it not the case, however, that virtually all cases in which interjurisdictional immunity is raised are “double aspect” cases? After all, interjurisdictional immunity questions the applicability of otherwise *valid* provincial legislation to something which is specifically federal. By definition, there is a valid provincial aspect; otherwise the provincial legislation would be *ultra vires*. Similarly, there is a federal feature by virtue of the special federal jurisdiction over federal undertakings and certain other persons or things.

This potential must not be overstated, however. The leading double aspect cases are cases in which the federal “aspect” was one that fell within a federal head of power regulating “activities” as opposed to an undertaking, thing or person. In particular, the leading double aspect cases considered the federal aspect as one coming within criminal law.⁶⁶

This is to be contrasted with the treatment of the double aspect doctrine in the leading undertakings cases, being *Bell Canada 1966*⁶⁷ and *Bell Canada 1988*. The response of the Court in *Bell Canada 1988* to the academic criticisms of *Bell Canada 1966*, particularly those of Professor Hogg, is instructive.⁶⁸ Professor Hogg had criticized *Bell Canada 1966* as “coming down on the wrong side of the issue” because employment was a matter which clearly fell within provincial jurisdiction over property and civil rights in the province. Since the regulation of employment in federal industries still remained a matter related to employment generally, Professor Hogg argued that this was a perfect situation for the application of the double aspect doctrine.⁶⁹

⁶⁵ (1883) 9 App. Cas. 117, at 130 (P.C.).

⁶⁶ *O’Grady v. Sparling*, [1960] S.C.J. No. 48, [1960] S.C.R. 804 (S.C.C.); *Smith v. The Queen*, [1960] S.C.J. No. 47, [1960] S.C.R. 776 (S.C.C.).

⁶⁷ [1966] S.C.J. No. 51, [1966] S.C.R. 767 (S.C.C.).

⁶⁸ *Bell Canada 1988*, *supra*, note 59, at paras. 251-283.

⁶⁹ Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985).

The Court in *Bell Canada 1988* expressly rejected this position with respect to federal undertakings. It would take a further decision of the Court, expressly overturning this part of *Bell Canada 1988*, in order to reconsider application of the double aspect doctrine in the undertakings cases. The Court clearly did not go this far in the companion cases of *Canadian Western Bank* and *Lafarge*.

V. CONCLUSION

In his dissenting reasons in *Canadian Western Bank*, Bastarache J. stated that the approach of the majority “severely restricts” the doctrine of interjurisdictional immunity.⁷⁰ I agree completely with that assessment.

Interjurisdictional immunity is now “largely reserved” for application to federal undertakings, persons and things, and those federal heads of power regulating “activities” which have already been recognized by precedent. Furthermore, the threshold for application of the doctrine has undoubtedly been raised, though how far the bar has risen does remain open to some question.

To borrow from the analogy of Dickson C.J.C. in *O.P.S.E.U.*,⁷¹ the “dominant tide” of the doctrines of “double aspect” and “pith and substance” currently has the upper hand against the “undertow” of interjurisdictional immunity. In that sense, the pendulum truly has swung.

However, as with all general statements, there are potential exceptions. In this case the potential exception is the application of the doctrine to the federal power over “Indians and Lands reserved for the Indians” under section 91(24) of the *Constitution Act, 1867*. In a decision released in December 2006, six months before the decisions in *Canadian Western Bank* and *Lafarge*, the Court considered whether valid provincial hunting legislation prohibiting hunting at night with the aid of a light could apply to Aboriginals exercising treaty rights to hunt.⁷² In a 4-3 decision, the majority affirmed that treaty rights are at the “core” of the federal power over “Indians”, and held that only if the provincial law resulted in an “insignificant interference” with the treaty right could it apply to Aboriginals. Clearly, the threshold applied by the Court was

⁷⁰ *Canadian Western Bank*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 111 (S.C.C.).

⁷¹ [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.).

⁷² *R. v. Morris*, [2006] S.C.J. No. 59, [2006] 2 S.C.R. 915 (S.C.C.).

different than the new impairment standard set out in *Canadian Western Bank* just six months later.

It is beyond the scope of this paper to explore the extent of the difference, or the rationale, if any, that exists for a different standard in the context of the federal power over “Indians”. For the purpose of this paper, suffice it to say that the issues surrounding the standard to be followed in the application of the doctrine of interjurisdictional immunity are not completely resolved.

