

# Narrowing Interjurisdictional Immunity

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## I. INTRODUCTION

Canada is a federal state with governmental power distributed between one federal and 10 provincial authorities. Although each level of government enjoys a measure of constitutional sovereignty, laws enacted by the federal Parliament may have ramifications for the provinces and laws enacted by the provincial legislatures may have ramifications for the federal realm. The “interjurisdictional immunity” doctrine is part of the framework of principles of Canadian federalism aimed at reconciling federal values with the reality that laws enacted by one level of government will inevitably have an impact on matters within the jurisdiction of the other level of government. The dominant principle is the “pith and substance” doctrine, which tolerates the co-existence of laws of the two levels of government in the same field. One exception to this general principle of concurrency is the “paramountcy” doctrine, which provides for the priority of federal laws in cases where there is a direct conflict between federal and provincial law. A second exception to the general principle of concurrency is the interjurisdictional immunity doctrine, which provides for a limited degree of immunity for federal undertakings from laws enacted by the provinces. It is the interjurisdictional immunity doctrine that is the subject of this paper.

The law on interjurisdictional immunity has undergone considerable evolution in the last few decades. The most recent development is the Supreme Court of Canada’s ruling in the two landmark decisions of

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*Canadian Western Bank*<sup>1</sup> and *Lafarge*,<sup>2</sup> which were decided in 2007, where the court shifted the balance of federalism in the direction of the provinces by restricting the application of interjurisdictional immunity. The first part of this paper will describe the interjurisdictional immunity doctrine and distinguish it from the pith and substance doctrine and the paramountcy doctrine. The second part of the paper will describe the history and development of interjurisdictional immunity. Historically, the inquiry was framed in terms of whether a provincial law sterilized, paralyzed or impaired a federal undertaking or subject. The Supreme Court relaxed this strict test in the seminal cases of *Commission du Salaire Minimum v. Bell Telephone Co.*<sup>3</sup> and *Bell Canada v. Quebec*,<sup>4</sup> by eliminating the requirement of impairment or sterilization and holding that provincial legislation was inapplicable to federal undertakings whenever it “affected” a vital part of a federal undertaking or core of federal jurisdiction. After applying the more relaxed test for over 40 years, the Supreme Court in *Canadian Western Bank* and *Lafarge* has reverted back to the more restrictive approach to interjurisdictional immunity, rejecting the “affects” test in favour of an “impairment” test. The doctrine of interjurisdictional immunity is now restricted to the case where a core competence of Parliament, or a vital part of a federal undertaking, would be impaired by a provincial law. In the last part of this paper, we will comment on the wisdom of this move from a legal and policy perspective.

## II. WHAT IS INTERJURISDICTIONAL IMMUNITY?

### 1. Meaning of Interjurisdictional Immunity

The term interjurisdictional immunity does not have a precise meaning,<sup>5</sup> but the doctrine is rooted in the idea that legislation enacted by one order of government cannot interfere with the core of any subject matter that is under the jurisdiction of the other order of government. When the doctrine applies, the law is valid in most of its applications,

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<sup>1</sup> *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.).

<sup>2</sup> *British Columbia (Attorney General) v. Lafarge*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.).

<sup>3</sup> [1966] S.C.J. No. 51, [1966] S.C.R. 767 (S.C.C.) [hereinafter “*Bell 1966*”].

<sup>4</sup> [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.) [hereinafter “*Bell 1988*”].

<sup>5</sup> P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), annually supplemented, s. 15.8 [hereinafter “Hogg”].

but it is interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. The technique for limiting the application of the law to matters within the jurisdiction is to read it down, that is, to construe it narrowly so as to exclude matters outside the jurisdiction of the enacting body. In this regard, the doctrine of interjurisdictional immunity is distinct from the pith and substance doctrine as well as the paramountcy doctrine, as discussed below.<sup>6</sup> The latter two deal with questions of validity and operability, respectively, whereas interjurisdictional immunity is concerned with the issue of application.

The logic of interjurisdictional immunity would make it applicable to both federal and provincial laws, but in fact it has only been used against provincial laws.<sup>7</sup> A provincial law that is otherwise valid in relation to a provincial subject matter is read down in order to exclude the core of a federal subject matter to which it also ostensibly applies.

## 2. Difference between Interjurisdictional Immunity and Pith and Substance

The pith and substance doctrine comes into play in determining the validity or constitutionality of a statute on federal grounds. It is concerned with the characterization of the challenged law by identifying its dominant or most important characteristic, or its leading feature, also sometimes referred to as the “matter” of the challenged law, keeping in mind that statutes can often have more than one feature or aspect. Depending on how the “pith and substance” of a statute is characterized, a law enacted by one level of government may validly affect matters outside its jurisdiction, or it may be declared invalid. For example, in the leading case of *Bank of Toronto v. Lambe*,<sup>8</sup> the Privy Council upheld a provincial law which imposed a tax on banks, notwithstanding that banks are federal undertakings. This is because the dominant feature of the law was to raise revenue, and accordingly its “pith and substance” was found to be “in relation to” taxation (a provincial matter), which merely “affected” banking (a federal matter). The pith and substance doctrine permitted the law to validly “affect” banking, even though banking was outside the legislative authority of the province. On the

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<sup>6</sup> *Id.*, s. 15.8(f).

<sup>7</sup> See section II.2 of this article.

<sup>8</sup> (1887) 12 App. Cas. 575 (P.C.).

other hand, a provincial law imposing a tax on banks was struck down in *Alberta (Attorney General) v. Canada (Attorney General)*.<sup>9</sup> The provincial law in that case was part of a social credit programme. It imposed a special tax on banks, and the magnitude of the tax was such that it could have the effect of preventing banks from carrying on their business in the province. In that case, the Privy Council held that the purpose of the law was to discourage the operation of banks in the province. Its pith and substance was in relation to the federal subject of banking and the raising of revenue was merely incidental.

Interjurisdictional immunity is an exception to the pith and substance doctrine because it stipulates that there is a core to each federal subject matter that cannot be reached by provincial laws. In *Bank of Toronto v. Lambe*,<sup>10</sup> the obligation to pay a tax was not regarded as part of the protected core of banking, which meant that an otherwise valid provincial tax could validly apply to the banks. But a provincial law that limited the right of creditors in the province to enforce their debts would touch the protected core of banking and would therefore be inapplicable to the banks, although it would be a valid provincial law in relation to property and civil rights in most if not all of its other applications. Such a law would be read down to exclude the banks from the definition of creditors to whom the law applied.

### 3. Difference between Interjurisdictional Immunity and Paramountcy

The doctrine of paramountcy stipulates that when there is a valid federal law and a valid provincial law governing the same matter, and there is a conflict (or inconsistency) between the two, the federal law prevails and the provincial law is rendered inoperative to the extent of the inconsistency. Paramountcy only applies to the extent of the inconsistency and does not affect the operation of those parts of the provincial law which are not inconsistent with the federal law. Moreover, it only affects the operation of provincial law so long as the inconsistent federal law is in force.

Interjurisdictional immunity differs from paramountcy in that it is a restriction on the constitutional authority of the provincial legislatures. When the doctrine applies, the provincial law is invalid in its application

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<sup>9</sup> [1939] A.C. 117 (P.C.).

<sup>10</sup> *Supra*, note 8.

to a core federal subject matter. It does not matter whether the federal Parliament has enacted conflicting or inconsistent federal legislation, or any legislation at all. The province is constitutionally disabled from going there. Paramountcy, on the other hand, only comes into play when there is valid federal legislation as well as valid provincial legislation, and there is conflict or inconsistency between the two. When paramountcy applies, the provincial law is not invalid, it is merely “inoperative”. If the federal law were repealed or amended to remove the conflict, the provincial law, which was always valid, would spring back into operation.

### III. HISTORY AND DEVELOPMENT OF INTERJURISDICTIONAL IMMUNITY

#### 1. Sterilizing or Impairing Status or Essential Powers of a Federal Company

The doctrine of interjurisdictional immunity finds its roots in cases dealing with federally incorporated companies, where it was held that otherwise valid provincial laws cannot sterilize or impair the status or essential powers of a federally incorporated company (“federal company”). Thus, if a province enacts a law which is within its legislative competence, but which would have the effect of impairing the status or essential powers of a federal company, then the law is inapplicable to federal companies.

This form of interjurisdictional immunity was established in the famous cases of *John Deere Plow Co. v. Wharton*<sup>11</sup> and *Great West Saddlery Co. v. The King*.<sup>12</sup> In those cases, the Privy Council had to determine the validity of several provincial statutes (“extra-provincial companies statutes”) which prohibited companies that were not incorporated under the law of the enacting province from carrying on business within the province, unless they obtained a licence from a provincial official. The laws were not directed solely at federal companies but applied indifferently to all companies incorporated outside the province, including companies incorporated in other provinces and other countries. The Privy Council held that the laws essentially denied corporate status to companies incorporated outside the

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<sup>11</sup> [1914] J.C.J. No. 2, [1915] A.C. 330 (P.C.).

<sup>12</sup> [1921] J.C.J. No. 1, [1921] 2 A.C. 91 (P.C.).

province. It was open to the provinces to deny corporate status to companies incorporated in other provinces or other countries, but the laws were inapplicable to federal companies.

As well as the extra-provincial companies statute, a second law was challenged in *Great West Saddlery*, and that was the Ontario *Mortmain Act*,<sup>13</sup> which prohibited all companies from acquiring or holding land in the province, except with a provincial licence. The Privy Council reached the opposite conclusion with respect to that law, holding that federal companies were not excluded from its application. The rationale for this distinction is that provincial regulation of federal companies through licensing is not inherently problematic — there is no constitutional objection to a province providing for the licensing of federal companies, demanding the payment of licence fees, and imposing financial penalties for non-payment of fees. The constitutionally objectionable aspect of the extra-provincial companies statutes was the fact that failure to obtain a licence resulted in the prohibition of all corporate activity in the province, amounting to a complete loss of corporate status or an essential corporate power. The *Mortmain Act*, on the other hand, while it undoubtedly restricted the powers of a federal company in Ontario by prohibiting the holding of land, did not impair the status or essential powers of the federal companies that operated within the province.<sup>14</sup>

## 2. Sterilizing, Paralyzing or Impairing a Federal Undertaking

The idea of interjurisdictional immunity expanded from the company cases into cases concerning federally regulated undertakings. Until 1966, undertakings which came within federal jurisdiction (for example, banks or companies engaged in interprovincial or international communication or transportation) were held to be immune from otherwise valid provincial laws only if the laws had the effect of sterilizing, paralyzing or impairing the federally authorized activity. For

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<sup>13</sup> *Mortmain and Charitable Uses Act*, R.S.O. 1914, c. 103.

<sup>14</sup> Similar decisions were rendered in the context of securities regulation. A provincial licensing requirement for the issue of stocks or bonds was held inapplicable to federal companies: *Reference re The Sale of Shares Act, 1924 (Man.)*, [1928] J.C.J. No. 6, [1929] A.C. 260 (P.C.); while a provincial requirement that companies issue stocks or bonds only through licensed sales personnel was held applicable to federal companies: *Lymburn v. Mayland*, [1932] J.C.J. No. 2, [1932] A.C. 318 (P.C.).

example, in *Bell 1905*,<sup>15</sup> an interprovincial telephone company was found to be immune from provincial law requiring the consent of a municipality for the erection of telephone poles and wires. Similarly, an international bus line was held immune from provincial regulation regarding routes and rates in *Ontario (Attorney General) v. Winner*<sup>16</sup> and an interprovincial pipeline was held immune from provincial mechanics liens legislation in *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*<sup>17</sup> In all of these cases, the courts took the view that, if the provincial law were applicable, it had the potential to bring a halt to the federally regulated activity. The provincial law was held to be inapplicable.

### 3. Affecting a Vital Part of a Federal Undertaking

In *Bell 1966*,<sup>18</sup> the Supreme Court of Canada relaxed the test for interjurisdictional immunity. Abandoning the language of sterilization, paralysis or impairment, the Court held that the Bell Telephone Company (an interprovincial undertaking) was immune from a provincial minimum wage law on the lesser standard that such a law “affects a vital part of the management and operation of the undertaking”.<sup>19</sup> The decision significantly expanded the scope of interjurisdictional immunity. Imposing a provincial minimum wage on the Bell Telephone Company could hardly sterilize, paralyze or even impair the operation of the company’s undertaking. That did not matter. It was sufficient if the law “affected” a vital part of the undertaking, and the regulation of labour standards affected a vital part of the management of the undertaking. There was no federal minimum wage at that time (there is now), so that the decision meant that workers in federal industries were no longer protected by minimum wage laws.

“Affecting a vital part” continued to be the test for interjurisdictional immunity for the next four decades. The Supreme Court of Canada reaffirmed its commitment to this test in a trilogy of cases decided in 1988, where provincial occupational health and safety laws were held to be inapplicable to three federal undertakings engaged in interprovincial transportation and communication.

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<sup>15</sup> *Toronto (City) v. Bell Telephone Co. of Canada*, [1904] J.C.J. No. 2, [1905] A.C. 52 (P.C.) [hereinafter “*Bell 1905*”].

<sup>16</sup> [1954] J.C.J. No. 1, [1954] A.C. 541 (P.C.).

<sup>17</sup> [1954] S.C.J. No. 14, [1954] S.C.R. 207 (S.C.C.).

<sup>18</sup> *Supra*, note 3.

<sup>19</sup> *Id.*, at 774.

The leading case in the trilogy is *Bell 1988*.<sup>20</sup> The issue in that case was whether Bell Canada, an interprovincial telephone company, was bound by the Quebec *Act Respecting Occupational Health and Safety*,<sup>21</sup> which required the protective reassignment of pregnant workers who worked with video monitors. Justice Beetz wrote for the Court that the provincial law was constitutionally incapable of applying to the federal undertaking, and must be read down. He acknowledged that the law did not paralyze or impair the operation of the federal undertaking, but held that “it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it”.<sup>22</sup> Since the occupational health and safety law regulated labour relations, that was enough to affect a vital part of the management and operation of the firm.<sup>23</sup>

In the second case of the trilogy, *Canadian National Railway*,<sup>24</sup> an inspector under the Quebec *Act Respecting Occupational Health and Safety* initiated an investigation into a collision in the province between two trains owned by Canadian National Railway. The provisions of the Act authorized the inspector to issue remedial orders, to fix a time for compliance with these orders, and even to close down a workplace if the safety of workers was endangered. The Court held that Canadian National Railway, as a federal undertaking, was not bound by the provincial law authorizing accident investigation.

In the third case of the trilogy, *Alltrans Express*,<sup>25</sup> an officer of the British Columbia Workers’ Compensation Board inspecting Alltrans’ place of business in British Columbia, discovered that certain employees were wearing footwear prohibited by the British Columbia regulations. He issued a report ordering the donning of proper footwear and the formation of a safety committee under the British Columbia *Workers’ Compensation Act*.<sup>26</sup> The Court held that Alltrans, as a federal undertaking,

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<sup>20</sup> *Bell Canada v. Quebec*, *supra*, note 4.

<sup>21</sup> S.Q. 1979, c. 63.

<sup>22</sup> *Id.*, at 859-60.

<sup>23</sup> *Id.*, at 762.

<sup>24</sup> *Canadian National Railway Co. v. Courtois*, [1988] S.C.J. No. 37, [1988] 1 S.C.R. 868 (S.C.C.).

<sup>25</sup> *Alltrans Express v. British Columbia (Workers’ Compensation Board)*, [1988] S.C.J. No. 38, [1988] 1 S.C.R. 897 (S.C.C.).

<sup>26</sup> R.S.B.C. 1979, c. 437.

was not bound by the provincial law requiring the safety committee and protective footwear.

In *Bell 1988*<sup>27</sup> and the other cases of the trilogy, Beetz J. rejected the notion that there could be any concurrent provincial jurisdiction over a vital part of a federal undertaking. He held that provincial statutes would be inapplicable if they affected matters falling within the primary jurisdiction of Parliament over federal works and undertakings. Any effect on such matters would be fatal, regardless of the degree of impairment or indeed any impairment at all. For Beetz J., each head of federal legislative power is assigned “a basic, minimum and unassailable content”,<sup>28</sup> which falls within the primary jurisdiction of Parliament, and because federal legislative authority is exclusive, that unassailable core is immune from provincial laws. There is no requirement of any form of adverse effect on the part of the provincial law. Outside the vital part of a federal undertaking, and outside the core of a federal head of power, the general pith and substance rule would still prevail, and provincial laws could apply. In the world of *Bell 1988*, concurrent jurisdiction still had life, but only outside the vital part or core of federal powers.

#### 4. Direct Effect on a Vital Part of a Federal Undertaking

Only 11 months after the decision in *Bell 1988*, the Supreme Court of Canada started wavering in its commitment to the “affecting a vital part” test. In *Irwin Toy v. Quebec*<sup>29</sup> the Court had to decide whether a Quebec law that prohibited advertising directed at children could apply to advertising on television, a federally regulated medium. The Court held that the provincial law was applicable to advertising on television, notwithstanding that advertising is a “vital part of the operation of a television broadcast undertaking”.<sup>30</sup> The Court in that case qualified the broad articulation of the “affecting a vital part” test in *Bell 1988*<sup>31</sup> by holding that the test only applied to provincial laws that purported to apply “directly” to federal undertakings. Where a provincial law only had an “indirect” effect on the undertaking, the law would not be constitutionally inapplicable unless it *impaired* a vital part of the

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<sup>27</sup> [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.).

<sup>28</sup> *Id.*, at para. 250.

<sup>29</sup> [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

<sup>30</sup> *Id.*, at 957.

<sup>31</sup> *Supra*, note 28.

undertaking.<sup>32</sup> Since the provincial prohibition on advertising in that case applied to advertisers, and the media were not directly prohibited from carrying the advertising, the effect of the provincial law on the television undertaking was indirect. Therefore, the test was impairment. Since the Court held that the loss of children's advertising could not impair the operation of the television undertaking, the provincial law applied to preclude advertisers in Quebec from placing advertisements directed at children on television.

The distinction between direct and indirect effect made little sense. This move was likely a result of the Court's concern and realization in the aftermath of *Bell 1988* that the "affecting a vital part" test unduly restricted provincial power over federal undertakings operating within the province and the Court "saw this new refinement as a way of loosening the constraints."<sup>33</sup> The vital part test continued to be used by the courts<sup>34</sup> until the Supreme Court revisited the issue in 2007.

## 5. Impairing a Vital Part of a Federal Undertaking

In 2007, a majority of the Supreme Court confirmed in *Canadian Western Bank v. Alberta*<sup>35</sup> that it had changed its mind about the test for interjurisdictional immunity. The Court eliminated the direct-indirect distinction introduced in *Irwin Toy*,<sup>36</sup> and replaced "affecting" with "impairment" as the universal standard for interjurisdictional immunity from provincial laws purporting to apply to a vital part of a federal undertaking. Writing for the majority, Binnie and LeBel JJ. held that interjurisdictional immunity would apply only if a "core competence" of Parliament or "a vital or essential part of an undertaking it constitutes" would be "impaired" by a provincial law. Impairment would involve an "adverse consequence" that placed the core or vital part "in jeopardy", although "without necessarily 'sterilizing' or 'paralyzing'".<sup>37</sup> If the core

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<sup>32</sup> *Supra*, note 29, at 955.

<sup>33</sup> D. Gibson, "Comment" (1990) 69 Can. Bar Rev. 339, at 353.

<sup>34</sup> For example, see *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.); *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.); *Mississauga (City) v. Greater Toronto Airports Authority*, [2000] O.J. No. 4086, 50 O.R. (3d) 641 (Ont. C.A.); leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 83 (S.C.C.).

<sup>35</sup> [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.).

<sup>36</sup> *Supra*, note 29.

<sup>37</sup> *Supra*, note 35, at para. 48.

competence or vital part was merely “affected” by a provincial law (without any adverse consequence), no immunity would apply.

The issue in *Canadian Western Bank* was whether the licensing regime of Alberta’s *Insurance Act*,<sup>38</sup> which required a “deposit-taking institution” to obtain a licence from the province and comply with provincial consumer-protection laws in order to promote insurance to its customers, constitutionally applied to the banks, which are federally regulated undertakings. The federal *Bank Act*<sup>39</sup> had been amended in 1991 to grant the banks the power to promote to their customers certain types of creditors’ insurance against events that would impair their borrowers’ ability to repay a loan from the bank, for example, the death, disability or loss of employment of the borrower. The bank argued that the lending of money and the taking of security by banks were vital functions of banking, and the close relationship of creditors’ insurance to those functions made the promotion of insurance by banks a vital part of banking. The Court held that the vital part of an undertaking should be limited to functions that were “essential” or “indispensable” or “necessary” to the federal character of the undertaking; and that the promotion of insurance by banks was too far removed from the core of banking to qualify as a vital part of the banking undertaking.<sup>40</sup> Consequently, the Alberta *Insurance Act* validly applied to the banks when they promoted insurance.

A second decision was handed down by the Supreme Court at the same time as *Canadian Western Bank*. *British Columbia v. Lafarge Canada*<sup>41</sup> dealt with the application of municipal zoning and property development by-laws to the construction of a concrete-mixing facility on port lands owned by the Vancouver Port Authority, a federal undertaking. On the federal side, the *Canada Marine Act*,<sup>42</sup> enacted under the federal power over navigation and shipping, authorizes land-use regulation in Canada’s ports, and the Vancouver Port Authority is the regulator in Vancouver. On the provincial side, no fewer than eight municipalities intersect with the port, each with the authority under provincial law to enact zoning by-laws and require land-use approvals. Lafarge proposed to build a concrete batch plant at a site in the port,

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<sup>38</sup> R.S.A. 2000, c. I-3.

<sup>39</sup> S.C. 1991, c. 46.

<sup>40</sup> *Supra*, note 35, at paras. 51, 63.

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

<sup>42</sup> S.C. 1998, c. 10.

which was approved by the Vancouver Port Authority. The development was challenged by a local ratepayers' association, which relied on the fact that the proposed site was also within the boundaries of the City of Vancouver, and which argued that the City by-law requiring a development permit should have also been complied with.

Justices Binnie and LeBel, writing for the majority, affirmed the Court's commitment to the new policy of restraint on interjurisdictional immunity. Although the development of a marine facility on port lands for the mixing of concrete was within the federal power over navigation and shipping, they held that the regulation of the development "lies beyond the core of s. 91(10)".<sup>43</sup> Therefore, interjurisdictional immunity did not apply. The Court, however, went on to hold that the by-law conflicted with the *Canada Marine Act* and was therefore inoperative by reason of federal paramountcy. Justice Bastarache, in a concurring opinion, placed his decision firmly on interjurisdictional immunity. He held that the regulation of land use in support of port operations on port lands was within "the core" of navigation and shipping,<sup>44</sup> and therefore immune from provincial or municipal laws that would impair the federal regime. In the end, then, the Court was unanimous that the Vancouver Port Authority's approval was all that was needed for the Lafarge development.

The Supreme Court of Canada has a very active view of its judicial role and does not hesitate from time to time to reformulate doctrine that has appeared settled for some time. That is clearly what has happened with *Canadian Western Bank* and *Lafarge*. However, it is interesting to notice that in neither case was it necessary to rule on the requirement of impairment because in both cases the majority held that the provincial law did not touch the vital part or core of the federal undertaking. It made no difference to the result whether the test was impairing or affecting, because the provincial law would apply in either case (unless pre-empted by paramountcy as the majority held in *Lafarge*). The new standard of impairment has its provenance only in *obiter dicta*, but it is plain that the majority of the Court is determined to change the standard from affecting to impairing, thereby narrowing the doctrine of interjurisdictional immunity.

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<sup>43</sup> *Supra*, note 41, at para. 72. Title to the site was in the Vancouver Port Authority ("VPA"), which was not for that purpose an agent of the federal Crown. If, however, the VPA had been a Crown agent, or if the site had been federal Crown land, then its development would have been "exclusively within federal jurisdiction" (at para. 51).

<sup>44</sup> *Id.*, at paras. 127-133.

#### IV. SHOULD INTERJURISDICTIONAL IMMUNITY BE NARROWED?

The Supreme Court of Canada's decisions in *Canadian Western Bank*<sup>45</sup> and *Lafarge*<sup>46</sup> are perhaps the most important federalism rulings in 20 years. Moving back from an "affects" test to a stricter test based on "impairment", the Court has considerably restrained the application of the interjurisdictional immunity doctrine. This move can be justified on at least two grounds.

First, a stricter application of interjurisdictional immunity is more consistent with the pith and substance doctrine, which embraces the possibility of overlap between federal and provincial laws. The "affecting a vital part" test for interjurisdictional immunity carved a considerable exception out of the general (pith and substance) rule of concurrency between federal and provincial laws. It precluded the application of provincial law to federal undertakings whenever there was any effect on a vital part of the federal undertaking. The pith and substance doctrine, which stipulates that a law in relation to a provincial matter may validly affect a federal matter, remained relevant only if the law did not touch a vital part of a federal undertaking or a core element of a federal subject matter. A narrower doctrine of interjurisdictional immunity, grounded in impairment, leaves more room for the concurrence of provincial and federal jurisdiction and more room for provincial legislatures to regulate property and civil rights within provincial boundaries.

Second, from a policy perspective, the immunity of federal undertakings from provincial law can be seen as superfluous since the rule of federal paramountcy already limits the ability of provincial legislatures to intrude into federal jurisdiction — as long as there is federal regulation in place that creates a conflict with the provincial law. Even in the absence of federal regulation, Parliament always has the choice of legislating if it does not approve of the application of a provincial law to a matter within federal jurisdiction. Pursuant to paramountcy, if the new federal law conflicts with the provincial law, the federal law will prevail. In that way, Parliament retains the option to provide whatever protection from provincial law it believes is necessary for federal undertakings. However, unless Parliament has acted in this deliberate way, a stricter test of interjurisdictional immunity promotes

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<sup>45</sup> *Supra*, note 35.

<sup>46</sup> *Supra*, note 41.

greater respect for the ordinary operation of statutes enacted by both levels of government. It also respects the principle of subsidiarity that decision-making should take place at the level of government closest to the individuals affected.

Those two points of principle are what drove the Court to narrow the doctrine of interjurisdictional immunity, and they certainly have force. On the other side of the issue, is the practical inconvenience that the new rule will cause for federally regulated undertakings such as telephone companies, airlines, railways and banks. These undertakings, which are already subject to federal regulation, now also have to comply with the law of every province and territory in which they operate. Many of the provinces have enacted new consumer protection laws in the past decade, and they differ considerably one from another. The licensing requirement imposed on the banks in *Canadian Western Bank* means that the protection of bank portfolios by creditors' insurance now comes at the cost of compliance with as many as 13 distinct licensing regimes. It is true, of course, that national enterprises that are not federally regulated also have to comply with distinct laws in every province or territory in which they operate, but that is inescapable in the absence of any federal regulatory power, and at least their businesses are subject to only one level of regulation within each province or territory.

And it goes beyond inconvenience. The federal regulation governing a federal undertaking will have been enacted pursuant to a policy that has been developed specifically for that business, whether it be banking, telephones, radio, television, railways or airlines. The provincial laws potentially applicable to the federal undertaking, on the other hand, will be laws of general application. Provincial regulators will not have thought about the impact of their laws on federal undertakings, and if they had given the matter any thought they would lack the expertise that the federal regulators possess by virtue of being the primary regulator of that business. Provincial laws will inevitably have unintended consequences for federal undertakings. Narrowing the doctrine of interjurisdictional immunity, therefore, not only enhances the exposure of federal undertakings to double regulation, it risks the infliction of collateral damage from provincial laws of general application that were not directed at them. It is true that federally regulated undertakings are still exempt from provincial laws that impair a vital part of the undertaking, but the Court's narrow definition of the vital part in *Canadian Western Bank* and *Lafarge* undoubtedly leaves much of the business of federal undertakings subject to provincial law. The merit of

the old “affecting” standard, coupled as it was with a generous view of the vital part or core of the undertaking, was to liberate federal undertakings from much provincial regulation, simplifying their ability to operate throughout the country in accordance with the national policies developed by federal regulators.

It is also true that federally regulated undertakings could be protected from provincial regulation by enacting a federal law that ousted provincial law through the doctrine of paramountcy. However, Parliament’s ability to accomplish that result is fraught with legal and political challenges. In the first place, as a legal matter, it is not easy to design the federal law that would unarguably create a conflict with all provincial regulation, because the definition of conflict for the purpose of paramountcy has been drawn very narrowly by the Supreme Court. Second, as a political matter, the enactment of a law with the express intention of ousting provincial law is likely to disturb federal-provincial relations. Parliament may well prefer not to act, and arguably should not be burdened with an obligation to act, simply to negate provincial laws regarding significant federal matters.

Our conclusion is that there is no easy answer to the appropriate accommodation of provincial laws to federal values. Narrowing the doctrine of interjurisdictional immunity was a rational move for all the reasons discussed above, but the practical and theoretical challenges associated with that move warrant consideration as well. These issues were not discussed by the Supreme Court in the reasons for judgment in *Canadian Western Bank* and *Lafarge*, despite the fact that the Court went out of its way — even beyond the necessities of the two cases — to reverse long-standing doctrine upon which both levels of government, as well as private federal undertakings, had come to rely. Provincial and federal regulators and private federal undertakings all now have to go back to their lawyers for advice as to which provincial laws now apply to federal undertakings. That advice is not easy to give without more guidance as to how the Court will apply the narrower definition of the vital part and the new standard of impairment in future cases. Some of the passages of the reasons are unusual for a judicial opinion, for example, the assertion that “the Court does not favour an intensive reliance on the doctrine [of interjurisdictional immunity]”,<sup>47</sup> and the assertion that the doctrine “should in general be reserved for situations

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<sup>47</sup> *Canadian Western Bank*, *supra*, note 35, at para. 47, *per* Binnie and LeBel JJ. for the majority.

covered by precedent”<sup>48</sup>. It is possible that these statements mean nothing that is not in the rest of the reasons, but they do suggest that the protected core and the notion of impairment may be interpreted in restrictive ways in future. Certainly, the law has been left in a much less settled state.

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<sup>48</sup> *Id.*, at para. 77.