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**THE CURIOUS HISTORY OF
INTERJURISDICTIONAL IMMUNITY
AND ITS (LACK OF)
APPLICATION TO FEDERAL LEGISLATION**

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Interjurisdictional immunity is a principle of Canadian constitutional interpretation with a somewhat chequered history. Its historical origins, and confusion between it and the related but distinct principle of Crown immunity, have resulted in the principle having been applied almost exclusively to protect federal jurisdiction against incursion by provincial legislation. Nevertheless, when the principle is properly understood, it is apparent that provincial jurisdiction has received more or less equivalent protection against federal legislation through the application of the “pith and substance” doctrine. Interjurisdictional immunity, properly understood, is really nothing more than a particular means of applying the pith and substance doctrine.

L'exclusivité des compétences, principe relevant de l'interprétation de la Constitution canadienne, a un historique quelque peu inégal. En raison de son origine et de la confusion qui existe entre ce principe et le principe apparenté, mais distinct, de l'immunité de la Couronne, il a presque toujours été appliqué dans les cas de protection de la compétence fédérale contre l'empiètement de lois provinciales.

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Néanmoins, si on interprète correctement le principe, on s'aperçoit que les compétences provinciales ont joui d'une protection plus ou moins équivalente contre l'empiètement des lois fédérales par le truchement de la doctrine du caractère véritable. Le principe de l'exclusivité des compétences, interprété comme il se doit, n'est alors rien de plus qu'une façon particulière d'appliquer la doctrine du caractère véritable.

1. Introduction

When a Canadian court is asked to find that Parliament or a legislature has enacted legislation that is *ultra vires* as being contrary to the division of powers, the court's primary inquiry will be an attempt to identify the legislation's "pith and substance." If the "pith and substance" of the legislation is within the enacting body's jurisdiction, in accordance with the boundaries established by the *Constitution Act, 1867*, the fact that it may "affect" an area that is within the jurisdiction of the other level of government is immaterial.¹

Except when it isn't.

"The term 'interjurisdictional immunity' does not have a precise meaning."² Thus does Peter Hogg begin his discussion of one of the few doctrinal bases on which a Canadian court may decide that a law that is, in pith and substance, within the jurisdiction of the enacting legislative body is nevertheless inapplicable to a person, thing, or subject area that can be said to fall within a "core area" of another legislative body's legislative jurisdiction.

In addition to lacking a "precise meaning," the doctrine of interjurisdictional immunity has been in a state of flux in recent years. Two decisions released simultaneously by the Supreme Court of Canada in 2007³ seemed to evidence a dramatic change in direction from the Court, and a significant reluctance to apply the doctrine. Then, three years later,

¹ Peter Hogg, *Constitutional Law of Canada*, 5th ed, loose leaf (Toronto: Carswell, 2007) at 15-5 – 15-10 [Hogg (2007)].

² *Ibid* at 15-28.

³ *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3, 49 CCLI (4th)1, 8 WWR 1, 362 NR 111, 75 Alta LR (4th) 1, 281 DLR (4th) 125[*Canadian Western Bank* cited to SCR]; and *Burrardview Neighbourhood Assn v Vancouver (City)*, 2007 SCC 23, [2007] 2 SCR 86, 6 WWR 197, 34 MPLR (4th) 1, 66 BCLR (4th) 203, 362 NR 208 [*Burrardview* cited to SCR].

two more simultaneously-released decisions⁴ seemed to suggest a greater readiness to employ interjurisdictional immunity, but a more recent, and unanimous, decision appears to confirm that the doctrine is only to be relied on in very limited circumstances.⁵

One aspect of the doctrine that is particularly imprecise is the extent to which it applies to protect *provincial* legislative jurisdiction against intrusion by Parliament. There is no doubt that courts can, and will, treat as inapplicable provincial legislation that crosses the interjurisdictional immunity line. Notwithstanding repeated *obiter* and academic comments that the doctrine cuts both ways, however, examples of *federal* legislation being read down on the basis of interjurisdictional immunity are exceedingly thin on the ground.

In this paper I propose to review the history of the doctrine of interjurisdictional immunity, with a view to identifying its sources and the reasons why it has developed in such a way as to primarily favour federal jurisdiction. I will then note the confusion that courts and commentators have evinced between the doctrines of interjurisdictional immunity and Crown immunity, and the role that confusion has played in the evolution of the doctrine. Finally, I will explain how the effect of the pro-federal application of interjurisdictional immunity has obscured the fact that provincial jurisdiction has been protected in much the same way, but without applying the label of “interjurisdictional immunity.”

2. *Interjurisdictional Immunity: History and Status*

Interjurisdictional immunity is a firmly-entrenched and orthodox proposition of Canadian constitutional law, but its origins are somewhat obscure, its content has varied from time to time, and its legitimacy has often been challenged. It is said to flow from the fact that the *Constitution Act, 1867*⁶ confers on Parliament and the provincial legislatures, respectively, *exclusive* jurisdiction over certain subject matters. It was only a century after Confederation, however, that the Supreme Court of Canada articulated it in a form recognizable as the modern doctrine of interjurisdictional immunity.

⁴ *Québec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536, 75 MPLR (4th) 113, 324 DLR (4th) 692 [*COPA* cited to SCR]; and *Québec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453, 75 MPLR (4th) 1, 324 DLR (4th) 625 [*Lacombe* cited to SCR].

⁵ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services*].

⁶ (UK), 30 & 31 Vict, c 3.

The seeds of the doctrine can be seen as early as the 1899 decision of the Privy Council in *Canadian Pacific Railway v Notre Dame de Bonsecours (Parish)*.⁷ In that case Lord Watson set out the proposition that only the federal government could legislate with respect to the “structure” of a ditch forming part of a federally-incorporated railroad company’s works (interprovincial railroads being assigned to the Dominion by section 92(1)(a) of the *Constitution Act, 1867*), but the province of Quebec was free to enact a provision requiring the same ditch to be kept clear of silt and rubbish so as to prevent overflow and injury to other property.⁸

Thus was articulated the notion that, although the provinces were constitutionally competent to enact legislation that applied to entities that were assigned by the *Constitution Act, 1867* to federal jurisdiction, they were constitutionally *incompetent* to legislate with respect to certain *aspects* of those entities. Specifically, in this case, the Privy Council noted that provincial jurisdiction could not extend to “regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.”

Just four months after *Notre Dame de Bonsecours* was decided, the Privy Council relied for the first time on the “pith and substance” test, in *Union Colliery v Bryden*,⁹ to strike down a British Columbia enactment which the Privy Council held dealt with “aliens,” a matter in Parliament’s exclusive jurisdiction. Lord Watson delivered a line that has been cited numerous times in cases generally treated under the heading “interjurisdictional immunity”: “The abstinence of the Dominion Parliament from legislating, to the full limit of its powers, could not have the effect of transferring to any Provincial Legislature, the legislative power which had been assigned to the Dominion by sec. 91 of the Act of 1867.”¹⁰

⁷ 12 CRAC 145, [1899] AC 367 [*Notre Dame de Bonsecours* cited to CRAC].

⁸ *Ibid* at 152.

⁹ 12 CRAC 175, [1899] AC 580, 1 MMC 337 [*Union Colliery* cited to CRAC].

¹⁰ *Ibid* at 185. The cases in which *Union Colliery* has been cited include *John Deere Plow Co v Wharton*, [1915] 7 WWR 706, AC 330, 18 DLR 353, 29 WLR 917 [*John Deere* cited to WWR]; *Great West Saddlery Co v R*, [1921] 1 WWR 1034 at 1055, 2 AC 91, 58 DLR 1 [*Great West Saddlery* cited to WWR]; *Ontario (Attorney General) v Winner* (1954), 13 WWR (NS) 657, 3 All ER 177 (PC); *Reference re Minimum Wage Act (Saskatchewan)*, [1948] SCR 248, 91 CCC 366, 3 DLR 801 [*Reference re Minimum Wage Act* cited to SCR]; *McKay v R*, [1965] SCR 798, 53 DLR (2d) 532 [*McKay* cited to SCR]; *Four B Manufacturing Ltd v UGW*, [1980] 1 SCR 1031, 102 DLR (3d) 385, 30 NR 421; *Law Society (British Columbia) v Mangat*, 2001 SCC 67, [2001] 3 SCR, 205 DLR (4th) 577, 256 WAC 161, 276 NR 339, [2002] 2 WWR 201 [*Mangat* cited to SCR], all discussed *infra*; and *Canadian Western Bank*, *supra* note 3.

Five years later, in *Toronto (City) v Bell Telephone*, the Privy Council again pointed out that once a corporation had been incorporated by Parliament pursuant to one of the heads of jurisdiction assigned to it by the *Constitution Act, 1867*, “no provincial legislature was or is competent to interfere with its operations.”¹¹

In 1914, the Privy Council decided *John Deere Plow Co v Wharton*,¹² a case often cited as foundational with respect to the doctrine of interjurisdictional immunity. British Columbia’s *Companies Act* prohibited corporations incorporated elsewhere (including under the federal *Companies Act*) from carrying on business in British Columbia unless they first obtained a provincial licence to do so. The Privy Council held that Parliament was clearly authorized by the *Constitution Act, 1867* to enact the legislation under which the company in question had been incorporated. It went on to hold that the provinces could not constitutionally legislate so as to “deprive a Dominion company of its status and powers.”¹³

In a 1921 decision, the Privy Council drew an important distinction between provincial legislation with the effect of “destroy[ing] the status and powers conferred on a Dominion company” and provincial legislation, applicable to all companies, limiting a company’s ability to hold real estate.¹⁴ The former was *ultra vires* the province, while the latter applied to the federally-incorporated company in the same manner that it applied to any other company.

By 1928, Viscount Sumner could state that it was “no longer in doubt” and “well settled” that “in the case of a company incorporated by Dominion authority with power to carry on its affairs in the provinces generally, it is not competent to the Legislatures of those provinces so to legislate so as to impair the status and essential capacities of the company in a substantial degree.”¹⁵ The line of so-called “companies cases” had firmly established this proposition.

This principle of provincial legislative incompetence was later extended from federally-incorporated companies to federal “undertakings.” In

¹¹ *Toronto (City) v Bell Telephone Co*, 13 CRAC 361, [1905] AC 52 at 57. I note in passing that Bell Telephone Co (in its various incarnations) has played an inordinately prominent role in the development of the doctrine of interjurisdictional immunity.

¹² *Supra* note 10.

¹³ *Ibid* at 715.

¹⁴ *Great West Saddlery*, *supra* note 10.

¹⁵ *Re Sale of Shares Act & Municipal & Public Utility Board Act (Manitoba)*, [1929] 1 WWR 136 at 141, 1 DLR 369.

Reference re Minimum Wage Act (Saskatchewan),¹⁶ the question for the Supreme Court of Canada was whether provincial minimum wage legislation could apply to a person employed temporarily to assist a postmistress appointed under the federal *Post Office Act*. In holding that the provincial legislation could not apply, the Court issued five sets of reasons by which two judges based their decision on the fact that the postal service was within Parliament's exclusive legislative jurisdiction under section 91(5) of the *Constitution Act, 1867*, three based their decision on the fact that provincial legislation could not bind an employee of the federal Crown, and one seemed to adopt an amalgam of the other two approaches.¹⁷

*Ontario (Attorney General) v Winner*¹⁸ was a later, and clearer, case in which the principle established by the companies case was extended to federally-regulated undertakings. In issue was the applicability of a provincial licensing scheme that denied an inter-provincial (and international) bus line the right to pick up and drop off passengers within New Brunswick. The Privy Council held that "legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion." In support of its reasoning it cited, *inter alia*, both *Great West Saddlery* and *Reference Re Minimum Wage Act*.

A 1965 decision by the Supreme Court of Canada, *McKay v R*,¹⁹ is often referred to in the context of interjurisdictional immunity. In that decision a sharply divided Court "read down" a municipal bylaw that, on its face, would have prohibited the posting of signs supporting candidates in a federal election. The majority of the Court held that, since the province would not have had jurisdiction to regulate any aspect of the federal election process, the bylaw ought to be so construed as not to apply to federal election signage. The minority, for whom Martland J wrote, held that the bylaw's pith and substance was property and civil rights, and as

¹⁶ *Supra* note 10.

¹⁷ Estey J held that the employee in question "was employed in the Postal Service and therefore within the exclusive legislative field of the Parliament of Canada," but he also distinguished *Canadian Pacific Railway Co v Workmen's Compensation Board*, [1919] 3 WWR 167, [1920] AC 184, 48 DLR 218 (PC), and other cases in which provincial workmen's compensation legislation had been held applicable to federal undertakings, "because they deal with employees of corporations formed under Dominion statutes and not with respect to the Postal Service or employees of the Government of Canada," suggesting that what was critical to him was the employee's employment by Canada.

¹⁸ *Supra* note 10.

¹⁹ *Supra* note 10.

such it could validly “affect” federal election activities, which – and this is critical – were nowhere assigned by the *Constitution Act, 1867* exclusively to Parliament.

It is significant, in my opinion, that Martland J distinguished the *Reference re Minimum Wage Act* (to which the majority did not even refer) on the basis that: “In essence, the decision [in that case] was that provincial legislation as to wages did not apply to federal Crown servants, even though not paid directly by the Crown.”²⁰

As of 1966, then, there was no doctrine of “interjurisdictional immunity” extant. What was clear was merely that neither level of government could legislate with respect to a matter that was assigned by the *Constitution Act, 1867* to the other level of government. Bora Laskin described the situation in his 1966 text as follows:

It is a well-established doctrine of the courts that Dominion legislative powers are exclusive in the sense that “the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91...” (*Union Colliery Co. v. Bryden*, [1899] A.C. 580, at p. 588). The doctrine was enunciated in *A.-G. Can. v. A.-G. Ont.*, [1898] A.C. 700 (Fisheries case), but it applies equally to provincial powers. An appreciation of the “aspect” doctrine makes it clear that the Dominion can no more legislate in relation to a matter coming within a class of subject in section 92 than can the province legislate in relation to a matter coming within a class of subject in section 91.²¹

Also, as noted by Robin Elliot, Professor Laskin (as he then was) treated the cases involving companies and those involving undertakings “very much as discrete features of our constitutional law.”²² While Canadian constitutional law prohibited the sterilization of federally-incorporated companies, or undertakings that were subject to federal regulation, it did not in terms consider those companies or undertakings “immune” to generally applicable provincial legislation.

Later that same year, the modern interjurisdictional immunity principle was finally first articulated (although not described as such) by

²⁰ *Ibid* at 811.

²¹ Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3d ed (Toronto: Carswell, 1966) at 92.

²² Robin Elliot, “Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters – Again” (2008) 43 Sup Ct L Rev (2d) 433 at 450 [Elliot, “Interjurisdictional Immunity”]. See discussion of the two subjects in Laskin, *ibid* at 480-82 and 578-80.

the Supreme Court of Canada in *Québec (Commission du salaire minimum) v Bell Canada Co of Canada Ltd.*²³ The provincial legislation in question was minimum wage legislation. There was agreement both that the province was competent to enact such legislation and that Bell Canada (the respondent) fell within sections 92(10)(a) and (c) of the *Constitution Act, 1867* and was therefore under federal jurisdiction. The question was whether the legislation could constitutionally apply to Bell Canada. Martland J, this time writing for a unanimous seven-judge panel, held that “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 within s. 91(29).”²⁴

After distinguishing a line of cases in which provincial workmen’s compensation legislation had been held to apply to federally-regulated industries, Martland J went on to hold that legislation dealing with a subject matter that “affects a vital part of the management and operation of the undertaking to which it relates” was competent only to the federal Parliament if it relates to an undertaking falling within federal jurisdiction.²⁵

At one stroke,²⁶ the Court had dramatically transformed and expanded the existing interpretive principles. The test for applicability of provincial legislation was no longer whether it *sterilized* or *impaired* a federally-created or regulated undertaking, but whether it “affected” a “vital part of the management and operation of the undertaking.”

This new test came in for some serious academic criticism. Dale Gibson described it as “neither wise constitutional policy nor sound constitutional law.”²⁷ Paul Weiler, a few years later, cited the decision as an example of the “shifting and unpredictable character of the Supreme Court’s attitude to provincial legislation” and said the Court had “created a shadowy immunity from provincial regulation for certain businesses.”²⁸

Nevertheless, the principle laid down in *Bell Canada (1966)* was accepted as orthodox constitutional theory (although not necessarily

²³ [1966] SCR 767, 59 DLR (2d) 145 [*Bell Telephone (1966)* cited to SCR].

²⁴ *Ibid* at 772.

²⁵ *Ibid* at 774.

²⁶ And, it may be noted, in a remarkably concise (only 37 paragraphs in length) and unanimous judgment.

²⁷ Dale Gibson, “Interjurisdictional Immunity in Canadian Federalism” (1969) 47 *Can Bar Rev* 40 at 53 [Gibson, “Interjurisdictional Immunity”].

²⁸ Paul Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 *UTLJ* 307 at 340-41.

applied) in several Supreme Court decisions between 1966 and 1988 (when the next significant Supreme Court of Canada pronouncement on interjurisdictional immunity – and by far the most important case on the concept until *Canadian Western Bank* in 2007 – was handed down). These decisions include *Construction Montcalm Inc v Québec (Minimum Wage Commission)*,²⁹ *Four B Manufacturing Ltd v UGW*,³⁰ and *Northern Telecom Ltd v Communication Workers of Canada*.³¹

In the 1985 edition of his text, Hogg levied the sharpest criticism to date of the doctrine of interjurisdictional immunity. He described it as “unprincipled” and “perverse,” and suggested that it had no place in Canadian constitutional law. He considered it inconsistent with the basic pith and substance doctrine, and unnecessary from a policy standpoint because it is always open to Parliament to enact legislation to protect undertakings within federal jurisdiction from the operation of provincial laws, through the doctrine of paramountcy.³²

It was not just academics who were critical of the doctrine. Dickson J, in dissent, stated in *Putnam v Alberta (Attorney General)* that the pith and substance doctrine, a “central canon of constitutional interpretation,” runs counter to the idea that federal employees could be granted immunity from valid provincial laws of general application.³³

Dickson J went on to refer to *Bell Canada (1966)* as authority only for the limited proposition that “a federal undertaking cannot be ‘sterilized’ or ‘mutilated’ by provincial legislation.”³⁴ This proposition, of course, was consistent with the case law preceding *Bell Canada (1966)*.

In 1987, Dickson CJC, writing for himself and Lamer J, stated his concerns about interjurisdictional immunity in stronger terms, and adopted Hogg’s comments wholesale. He described interjurisdictional immunity as “not a particularly compelling doctrine,” and noted that the “dominant tide” of Canadian constitutional doctrines had been “pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.” He was not prepared to extend the application of interjurisdictional immunity into a field unrelated to the

²⁹ [1979] 1 SCR 754, 93 DLR (3d) 641, 25 NR 1.

³⁰ *Supra* note 10.

³¹ [1980] 1 SCR 115, 28 NR 107, 98 DLR (3d) 1.

³² Peter Hogg, *Canadian Constitutional Law*, 2nd ed (Toronto: Carswell, 1985) at 330-31.

³³ [1981] 2 SCR 267 at 305, 6 WWR 217, 37 NR 1, 123 DLR (3d) 257 [*Putnam* cited to SCR].

³⁴ *Ibid* at 306.

company law cases or the “federal undertakings” cases, “the two historical roots of the doctrine.”³⁵

This was the context in which the Supreme Court of Canada handed down reasons in *Bell Canada v Québec (Commission de la santé et de la sécurité du travail)*.³⁶ Beetz J, writing for all nine judges, in a judgment that had been reserved for over two years, discussed at length the origins and content of the principle of interjurisdictional immunity and responded in detail to the criticisms that had been levelled at the doctrine.³⁷ He described the principle in the following terms:

... Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)(a), (b) and (c) of the *Constitution Act, 1867*, that is, undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking This third proposition reflects, at least in part, a constitutional theory which commentators who have criticized it have called the theory of “interjurisdictional immunity.” I will return to this below.

It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal 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 of federal jurisdiction....³⁸

³⁵ *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 16, 28 Admin LR 141, 77 NR 321, 59 OR (2d) 671 (note), 41 DLR (4th) 1.

³⁶ [1988] 1 SCR 749, 85 NR 295, 15 QAC 217, 51 DLR (4th) 161 [*Bell Canada (1988)* cited to SCR]. This case was one of a trilogy, and the one in which the principles of interjurisdictional immunity were dealt with at length. The other two cases were *Alltrans Express Ltd v British Columbia*, [1988] 1 SCR 897, 21 CCEL 228, 4 WWR 385, 28 BCLR (2d) 304, and *Cie des chemins de fer nationaux du Can c Courtois*, [1988] 1 SCR 868, 21 CCEL 260, (*sub nom Canadian National Railway v Courtois*) 85 NR 260, 15 QAC 181, 51 DLR (4th) 271.

³⁷ Hogg describes Beetz J’s reasons as “more like a law review article than a judgment;” see Hogg (2007), *supra* note 1 at 15-32, n 141.

³⁸ *Bell Canada (1988)*, *supra* note 36 at 761-62.

In response to the criticisms of Hogg, Beetz J first noted that those criticisms gave Martland J's analysis in *Bell Canada (1966)* too little credit. He then pointed out that the structure of sections 91(29) and 92(10) of the *Constitution Act, 1867* creates classes of subjects, federal undertakings, over which the federal government has *exclusive* jurisdiction. To deny that this exclusive legislative power must include exclusive jurisdiction to legislate in respect of the management of those undertakings would be to "strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content."³⁹ Beetz J then stated:

Professor Hogg writes that the theory which is the basis of *Bell Canada, 1966* not only confers a power on Parliament but operates defensively to deny the power of the Legislature. In my view, and I say so with the greatest respect, this theory does not confer on Parliament any power that it does not already have, since it is an integral and vital part of its primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the Legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. This exclusivity rule is absolute and does not allow for any distinction between these two types of the statute.⁴⁰

Beetz J then dealt fairly briefly with Hogg's "policy" argument, according to which Parliament could always protect federal undertakings against provincial statutes by enacting paramount federal legislation, saying that he found "very little merit" in the argument. He pointed out that the argument was predicated on conflict and contradiction between "increasingly complex, specialized, and ... highly detailed" systems of regulation, and was likely to promote not only litigation and uncertainty but also a lack of coordination that might actually threaten the health and safety of those workers the regulations were intended to protect.⁴¹

Finally, Beetz J stated, not once but four separate times, that in order for provincial legislation to be found inapplicable, it need not be found to "impair" federal undertakings; it is sufficient if it is found to "affect a vital part of those undertakings."⁴²

As a side note, it is not without interest (and is more than a little puzzling) that Dickson CJC wrote (and Lamer J signed on to) a scathing

³⁹ *Ibid* at 839.

⁴⁰ *Ibid* at 840.

⁴¹ *Ibid* at 843.

⁴² *Ibid* at 855, 857, 859 and 860.

critique of interjurisdictional immunity, adopting Hogg's criticisms wholesale, during the time that *Bell Canada (1988)* was under reserve, and then both signed the decision of Beetz J flatly refuting those same criticisms.

It is also of interest to note that, in his defence of the interjurisdictional immunity principle and *Bell Canada (1966)*, Beetz J stated that it "has been directly or indirectly cited and followed in many decisions of this Court."⁴³ Only one of the six decisions he cited as support for that proposition, however, was a case in which provincial legislation was held to be inapplicable, and in many of them *Bell Canada (1966)* was not even cited. In the one case in which provincial legislation was found to be inapplicable, the basis for its inapplicability was not the principle set out in *Bell Canada (1966)*, but rather Crown immunity, a rather different concept (as discussed below).⁴⁴

It did not take long before the Supreme Court's commitment to the interjurisdictional immunity principle was attenuated. In *Irwin Toy Ltd v Québec (Attorney General)*,⁴⁵ provincial legislation prohibiting advertising directed at children was challenged. The Court upheld the legislation by finding that its effects on television broadcasters (who fell under federal jurisdiction under section 92(10)(a) of the *Constitution Act, 1867*) were merely *indirect*, and thus acceptable, carving out an exception to the broad *Bell Canada (1988)* principle.

Nevertheless, over the following two decades the principle of interjurisdictional immunity was treated as essentially a fixed and permanent feature of the Canadian constitutional landscape. Hogg drew in his horns and acknowledged that some degree of interjurisdictional immunity was implied by the structure of the *Constitution Act, 1867*: "Otherwise, what would be incompetent to a legislative body in a narrowly framed law would be permitted if the law were framed more broadly. That cannot be right."⁴⁶ Although the cases decided by the Supreme Court of Canada in which the doctrine was raised were not numerous, there were several.⁴⁷

⁴³ *Ibid* at 844.

⁴⁴ *Canada (Attorney General) v St Hubert Base Teachers' Assn*, [1983] 1 SCR 498, 1 DLR (4th) 105, 49 NR 138.

⁴⁵ [1989] 1 SCR 927, 58 DLR (4th) 577, 24 QAC 2, 25 CPR (3d) 417, 94 NR 167 [*Irwin Toy*]. It is interesting again to note the temporal overlap between this decision and *Bell Canada (1988)*, which was delivered while this decision was under reserve.

⁴⁶ Hogg (2007), *supra* note 1 at 15-32, fn 141.

⁴⁷ For example: *Québec (Commission de transport de la Communauté urbaine) c Commission des champs de bataille nationaux*, [1990] 2 SCR 838, 115 NR 106, 34 QAC

Even though interjurisdictional immunity was apparently an accepted doctrine for purposes of constitutional interpretation, however, there were suggestions from time to time that the Supreme Court might not be as thoroughly convinced of its efficacy as *Bell Canada (1988)* might lead one to believe. The first indication, of course, was the decision in *Irwin Toy*. Dale Gibson noted at the time that the “virtue” of the Court’s “refinement” in that case was “not self-evident,” and speculated “that the court was concerned about the undue constraints placed, by its previous rulings as to interjurisdictional immunity, upon the power of provincial legislatures to affect federal enterprises operating within their territory, and saw this new refinement as a way of loosening the constraints.”⁴⁸

Another indication of the Supreme Court’s lack of enthusiasm for interjurisdictional immunity was the 1995 decision in *R v Canadian Pacific*,⁴⁹ in which the Court dismissed in a single paragraph an argument by a federally-regulated railroad that the application to it of provincial legislation regulating the manner in which it cleared the right of way alongside its rail lines breached the interjurisdictional immunity principle. The Court held that *Notre Dame de Bonsecours*⁵⁰ was controlling on the argument, notwithstanding that it pre-dated the interjurisdictional immunity principle by almost seven decades.⁵¹

A third indication that the Supreme Court’s support for interjurisdictional immunity might be wavering was its decision in *Law Society (British Columbia) v Mangat*⁵² in 2001, in which the Court expressed a preference for the paramountcy doctrine over the doctrine of interjurisdictional immunity. It described the former as “more supple,” and because the case featured a “double aspect” the paramountcy doctrine

282, 74 DLR (4th) 23; *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, 148 DLR (4th) 193, 214 NR 1; and *Ordon Estate v Grail*, [1998] 3 SCR 437, 40 OR (3d) 639 (headnote only), (*sub nom Ordon v Grail*) 232 NR 201, 166 DLR (4th) 193 [*Ordon* cited to SCR].

⁴⁸ Dale Gibson, “Constitutional Law – Freedom of Commercial Expression Under the Charter – Legislative Jurisdiction Over Advertising – A Representative Ruling: *Attorney General of Quebec v. Irwin Toy Limited*” (1990) 69 Can Bar Rev 339 at 351, 353.

⁴⁹ [1995] 2 SCR 1028, 125 DLR (4th) 385, 99 CCC (3d) 97, 30 CRR (2d) 252.

⁵⁰ *Supra* note 7.

⁵¹ As Hogg notes: “The case is similar to the 1995 appeal, but one might wonder whether it is still good law since the vital part test was unknown in 1899, having been invented in 1966 by the Supreme Court of Canada with no prior judicial support....”; see Hogg (2007), *supra* note 1 at 15-33, fn 153.

⁵² *Supra* note 10.

would permit provincial legislation to apply in the absence of federal legislation.⁵³

Finally, in two decisions released in 2007,⁵⁴ the Supreme Court of Canada revisited at some length the doctrine of interjurisdictional immunity. After reviewing its history and application, and noting the many criticisms of it, Binnie and LeBel, JJ, for an almost unanimous Court, stated:

For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.⁵⁵

Clearly, the Court had determined that it was necessary to rein in the use of interjurisdictional immunity. The reasons it offered for doing so were essentially six in number.

First, the “dominant tide” of Canadian constitutional doctrine has been to allow for “a fair amount of interplay and indeed overlap between federal and provincial powers.”⁵⁶ Interjurisdictional immunity, if allowed to “exceed its proper (and very restricted) limit” is apt to “frustrate the application of the pith and substance analysis and of the double aspect doctrine.”⁵⁷

Second, “a broad application of the doctrine ... appears inconsistent ... with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.”⁵⁸

Third, “[e]xcessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty.”⁵⁹ This is because the doctrine requires courts to attribute to each head of power an abstract “core” of indeterminate scope that is protected against infringement by the other level of government.

⁵³ *Ibid* at paras 51-54.

⁵⁴ *Canadian Western Bank and Burrardview*, *supra* note 3.

⁵⁵ *Canadian Western Bank*, *ibid* at para 47.

⁵⁶ *Ibid* at para 36, citing Dickson J’s dissent in *OPSEU*, *supra* note 35.

⁵⁷ *Ibid* at para 38.

⁵⁸ *Ibid* at para 42.

⁵⁹ *Ibid* at para 43.

Fourth, because interjurisdictional immunity prevents the application of laws notwithstanding the absence of laws enacted by the other level of government, it increases the risk of creating “legal vacuums.”⁶⁰

Fifth, because the doctrine has most often been applied in favour of the federal government, a broad use of it “runs the risk of creating an unintentional centralizing tendency in constitutional interpretation.”⁶¹ The Court cited several critiques of this aspect of the doctrine, and noted that it is incompatible with the principle of subsidiarity, a principle that seems to be gaining in prominence at the Supreme Court.⁶²

Finally, the Court noted (as Hogg and Dickson J had earlier) that “the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation.”⁶³

The doctrine of interjurisdictional immunity that emerged from *Canadian Western Bank* has been described by Hogg and Rahat Godil as follows:

[I]nterjurisdictional immunity [will] 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.’” If the core competence or vital part was merely “affected” by a provincial law (without any adverse consequence), no immunity would apply.⁶⁴

In addition to raising the threshold for the application of the doctrine (from “affecting” to “impairing”), the Court clearly signalled that interjurisdictional immunity was henceforth to be invoked sparingly. The doctrine was said to be “of limited utility,” and its use was to be reserved for “situations already covered by precedent.”⁶⁵

⁶⁰ *Ibid* at para 44, citing *Mangat*, *supra* note 10.

⁶¹ *Ibid* at para 45.

⁶² See e.g. the discussion in *Québec (Procureur général) v Canada (Procureur général)*, 2010 SCC 61, [2010] 3 SCR 457 at para 183 *per* Deschamps and Lebel JJ; and *Lacombe*, *supra* note 4 at para 109 *per* Deschamps J.

⁶³ *Canadian Western Bank*, *supra* note 3 at para 46.

⁶⁴ Peter Hogg and Rahat Godil, “Narrowing Interjurisdictional Immunity” (2008) 42 *Sup Ct L Rev* (2d) 623 at 632-33.

⁶⁵ *Canadian Western Bank*, *supra* note 3 at para 77.

The decisions in *Canadian Western Bank* and *Burrardview* have been described as “very welcome brakes on a speeding train.”⁶⁶

Three years after *Canadian Western Bank*, the Court decided *Québec (Attorney General) v Canadian Owners and Pilots Association*,⁶⁷ a decision in which the majority applied the doctrine of interjurisdictional immunity in circumstances which at least some commentators found surprising.⁶⁸ In that case, the Court held invalid provincial legislation that prevented the construction of an aerodrome, relying on the existence of precedent determining that the location of aerodromes lay at the core of the federal jurisdiction over aeronautics. LeBel and Deschamps JJ, in dissent, protested vigorously that the majority’s approach was “antithetical” to the views expressed by the majority in *Canadian Western Bank*.⁶⁹

In a companion case,⁷⁰ the majority struck down a portion of a municipal bylaw that would have prohibited construction of an aerodrome on a lake as dealing, in pith and substance, with aeronautics; they did not consider it necessary to decide whether the bylaw would have been inoperable as a result of interjurisdictional immunity.

Nevertheless, the Court reaffirmed in *COPA* the description of interjurisdictional immunity set out in *Canadian Western Bank* and the various tests that must be satisfied before it can be applied. The dissonance between this reaffirmation of the *Canadian Western Bank* principles and the actual application of the interjurisdictional immunity doctrine to the facts of *COPA* leads one to wonder in future the *Canadian Western Bank* “brakes” will have the effect that was initially expected.

More recently, however, in *Canada (Attorney General) v PHS Community Services Society*,⁷¹ the Court unanimously re-emphasized its

⁶⁶ Elizabeth Edinger, “Back to the Future With Interjurisdictional Immunity: *Canadian Western Bank v. Alberta*; *British Columbia v. Lafarge Canada Inc.*” (2008) 66:4 *The Advocate* 553.

⁶⁷ *COPA*, *supra* note 4.

⁶⁸ Richard Haigh, for example, wrote that the Court had “abandoned” the concept of interjurisdictional immunity “and then, just under three years later, spectacularly [brought] back the same concept as if nothing ever happened”; see “*Québec (Attorney General) v Canadian Owners and Pilots Association*: Why the SCC Makes Me Feel Like a Leafs Fan” (28 October 2010) online: *The Court* <<http://www.thecourt.ca/2010/10/28/quebec-attorney-general-v-canadian-owners-and-pilots-association-why-the-scc-makes-me-feel-like-a-leafs-fan/>>.

⁶⁹ *Lacombe*, *supra* note 4 at para 116 *per* Deschamps J, adopted by LeBel J at para 76 of *COPA* and para 71 of *Lacombe*.

⁷⁰ *Lacombe*, *ibid.*

⁷¹ *Supra* note 5.

determination to confine interjurisdictional immunity within very narrow boundaries. It reiterated the reasons for doing so that it had set out in *Canadian Western Bank*, and concluded:

In summary, the doctrine of interjurisdictional immunity is narrow. Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism. To apply it here would disturb settled competencies and introduce uncertainties for new ones. Quite simply, the doctrine is neither necessary nor helpful in the resolution of the contest here between the federal government and the provincial government.⁷²

3. *Reciprocity of the Doctrine*

Having described the history and content of interjurisdictional immunity, the next task is to analyze the extent to which the doctrine is reciprocal – that is to say, the extent to which it protects both federal *and* provincial heads of power against incursion by the other level of government.

As has been noted already, the doctrine has tended to be invoked in favour of federal jurisdiction, and against provincial legislation. This was noted in *Canadian Western Bank*,⁷³ and some commentators have gone so far as to treat the doctrine as *only* being applicable against provincial legislation.⁷⁴ Hogg has argued that the doctrine “ought to be reciprocal,”⁷⁵ and that its “logic ... would make it applicable to both federal and provincial laws,”⁷⁶ but he has also noted that “in fact it has only been used against provincial laws.”⁷⁷ Nevertheless, the Supreme Court itself in *Canadian Western Bank* stated clearly that the doctrine is – at least in theory – “reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment.”⁷⁸ In *PHS Community Services*, the Court

⁷² *Ibid* at para 70.

⁷³ *Supra*, note 3 at para 45.

⁷⁴ See e.g. Patrick Monahan, *Essentials of Canadian Law: Constitutional Law*, 2nd ed (Toronto: Irwin Law, 2002) at 123-27; Bruce Ryder, “The End of Umpire? Federalism and Judicial Restraint” (2006) 34 Sup Ct L Rev 345 at 352; Jean Leclair, “The Supreme Court of Canada’s Understanding of Federalism” (2003) 28 Queen’s LJ 411 at 418-19.

⁷⁵ Hogg (2007), *supra* note 1 at 15-38.3.

⁷⁶ One is tempted to recall Lord Halsbury’s admonition in *Quinn v Leatham*, [1901] AC 495 at 506 that “every lawyer must acknowledge that the law is not always logical at all.”

⁷⁷ Hogg and Godil, *supra* note 64 at 625.

⁷⁸ *Canadian Western Bank*, *supra* note 3 at para 35.

confirmed that the doctrine is not “in principle ... confined to federal powers.”⁷⁹

Why has interjurisdictional immunity *only* been applied against provincial legislation, if logic and the Supreme Court say that it is equally applicable against federal legislation?

Robin Elliot offers three reasons for this state of affairs.⁸⁰ First, he says, the dominant view for decades, “the view championed by Peter Hogg, is that the doctrine *only* works in favour of the federal order of government.” This would presumably deter many counsel, and their clients, from attempting to argue a different view.

His second reason (which he considers more important), is that federal statutes are typically drafted so as only to *apply* to those undertakings that fall to be regulated federally, whereas provincial legislation tends to be much broader in scope, and not so qualified, because of the all-encompassing nature of such heads of provincial jurisdiction as “property and civil rights” and “matters of a merely local or private nature.”⁸¹

Finally, he suggests that the *Constitution Act, 1867* does not grant to provincial legislatures jurisdiction over discrete groups of people to the same extent that it grants such jurisdiction to Parliament. He cites the RCMP, the military, and Indians as examples; he could easily have included those engaged in the business of the post office, railways and banks, amongst others.

In my opinion, these are all valid reasons. I would suggest, however, that more underlies the first one than merely the fact that this was the “dominant view.” As I see it, the federalist skewing of the doctrine resulted in part from the way in which the doctrine of interjurisdictional immunity – as a discrete doctrine – arose in the first place. This was partly a result of the inter-relationship between Elliot’s third reason – Parliament’s jurisdiction over discrete groups – and a certain lack of clarity amongst courts and commentators about the exact nature of interjurisdictional immunity.

⁷⁹ *Supra* note 5 at para 65.

⁸⁰ Elliot, “Interjurisdictional Immunity,” *supra* note 22 at 487-88.

⁸¹ I would add a related observation. Many federal heads of power are “carved out of” broadly worded provincial heads of power, so that it is entirely predictable that a provincial enactment founded on such a broad head of power will be apt to “trench” on a federal exception, whereas a comparable situation involving federal legislation is much more difficult to envision.

It is apparent that there has been, from time to time, confusion between the principle of *Crown* immunity from legislation and the principle now known as interjurisdictional immunity. This is exemplified by, or has perhaps been perpetuated by, the fact that the first reference to “interjurisdictional immunity” was in an article by Dale Gibson in 1969 which dealt primarily with “the extent to which the laws of one government are legally binding on the other.”⁸² Gibson treated the phenomenon now known as interjurisdictional immunity as a “closely related problem,” but without acknowledging or suggesting that it was a distinct principle.

Similar confusion has been discernible from time to time since. Bruce Ryder, for example, suggests that the Supreme Court “has declined to apply the interjurisdictional immunity doctrine in a reciprocal manner to protect provincial heads of power from federal incursion,”⁸³ but the examples he cites⁸⁴ are all cases discussing *Crown* immunity – that is to say, the immunity enjoyed by the Crown in right of a province from federal legislation absent an express or implied Parliamentary intention to bind it – and not interjurisdictional immunity at all.

Given the confused and confusing decision in *Reference Re Minimum Wage Act*,⁸⁵ amongst other decisions, it is clear that it is not only academic commentators who have occasionally had difficulty distinguishing the two concepts.

Furthermore, until Hogg, writing in 1985, labelled *Bell Canada (1966)* and its progeny as cases dealing with “interjurisdictional immunity,” it is arguable that no such doctrine actually existed. Elliot wrote in 1988 that Hogg had not explained the origin of the term, and that its use in recent cases was probably attributable to Hogg himself.⁸⁶

⁸² Gibson, “Interjurisdictional Immunity,” *supra* note 27 at 40.

⁸³ Ryder, *supra* note 74 at 352 fn 30.

⁸⁴ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 2 WWR 193, 132 NR 321, 88 DLR (4th) 1, 3 Admin LR (2d) 1, 48 FTR 160; *Society of Ontario Hydro Professional & Administrative Employees v Ontario Hydro*, [1993] 3 SCR 327, OLRB Rep 1071 #2, 158 NR 161, 66 OAC 241, 107 DLR (4th) 457; and *Alberta Government Telephones v Canadian Radio-Television & Telecommunications Commission*, [1989] 2 SCR 225, 68 Alta LR (2d) 1, 5 WWR 385, 61 DLR (4th) 193, 26 CPR (3d) 289. Jean Leclair cites two of the same cases in support of his statement that interjurisdictional immunity “does not apply in reverse to protect provincial competencies;” see Leclair, *supra* note 74 at 419.

⁸⁵ *Supra* note 10.

⁸⁶ Robin Elliot, “Constitutional Law – Division of Powers – Interjurisdictional Immunity, Reading Down and Pith and Substance: *Ontario Public Service Employees*

The failure to distinguish clearly between interjurisdictional immunity and Crown immunity has occasionally, in my opinion, caused confusion about the nature of the interjurisdictional immunity principle.

Elliot went on, in his 1988 article, to describe another kind of confusion, or lack of clarity, arising from the application of the doctrine. He suggested that it is misleading to use the term “interjurisdictional immunity” to describe the *rationale* for holding provincial legislation inapplicable in certain contexts. Rather, the term can only accurately be used to describe the *effect* of holding the legislation inapplicable. Using it in the former sense suggests that federal instrumentalities have an immunity that is somehow analogous to the immunity enjoyed by the various manifestations of the Crown. This, he pointed out, can cause “confusion and mistakes in analysis.”⁸⁷

John Furey has similarly identified the relationship between two distinct concepts extant after *Bell Canada (1988)*. He suggests that the first is the idea that valid provincial legislation cannot constitutionally deal with a subject matter assigned exclusively to the federal Parliament: the doctrine of interjurisdictional immunity. The second, related, concept relates to whether provincial legislation affects a vital or essential part of a federally regulated undertaking, person or thing: rather than *being* the interjurisdictional immunity doctrine, this is merely the *test* that the court applies to determine whether the rule has been violated.⁸⁸

The significance of all of this is that interjurisdictional immunity, properly understood, is really nothing more than a particular means of applying the “pith and substance” doctrine. The heavy gloss that has been applied to the decision in *Bell Canada (1966)*, and even more so since *Bell Canada (1988)*, is not relevant to the doctrine *per se*, but rather to the *test* applied to determine whether the legislation in question has crossed the line.

According to this understanding of things, provincial legislatures do indeed have the same protection against incursion by Parliament that Parliament has against them. The difference in application, referable in large part to the nature of many federal heads of power, lies in the *test* applied by the Supreme Court.

Union v Attorney-General for Ontario” (1988) 67 Can Bar Rev 523 at 525 fn 9 [Elliot, “Constitutional Law”].

⁸⁷ *Ibid* at 526 fn 9.

⁸⁸ John G Furey, “Interjurisdictional Immunity: The Pendulum Has Swung” (2008) 42 Sup Ct L Rev (2d) 597 at 601.

The unanimous decision of the Supreme Court in *Derrickson v Derrickson*, cited in *Canadian Western Bank* as an example of an interjurisdictional immunity case,⁸⁹ stated the principle applicable to a decision to read down provincial legislation (without reference to the term “interjurisdictional immunity”) as follows:

When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction.⁹⁰

There is no meaningful difference between this and the doctrine that the Court has applied when reading down federal legislation to keep it within the bounds of federal jurisdiction.

An examination of some of the relevant case law makes this apparent.

In *Canada (Attorney General) v Law Society (British Columbia)*,⁹¹ the unanimous Supreme Court held that the federal *Combines Investigation Act* could not constitutionally prohibit conduct that had been authorized by a provincial legislature acting within its constitutional jurisdiction. It relied for this principle on a line of “regulated industries” cases, in which federal legislation prohibiting unfair competition was read down so as not to apply to activities that were authorized by valid provincial legislation. The earliest of the cases relied on, *R v Chuck*,⁹² was a decision in which MacDonald JA for the majority of the British Columbia Court of Appeal went so far as to hold that if the federal legislation in issue (section 498 of the *Criminal Code*) did purport to apply to such activities, it would be *ultra vires* Parliament.

The *Law Society* decision was referred to in *Canadian Western Bank*⁹³ as one in which federal legislation had been read down “without too much doctrinal discussion.” Another case referred to in that context was *R v Dominion Stores Ltd.*,⁹⁴ in which the majority of the Supreme Court held

⁸⁹ *Canadian Western Bank*, *supra* note 3 at paras 40, 61.

⁹⁰ [1986] 1 SCR 285 at 296, 1 BCLR (2d) 273, 50 RFL (2d) 337, 3WWR 193, 65 NR 278, 2 CNLR 45, 26 DLR(4th) 175.

⁹¹ [1982] 2 SCR 307, 37 BCLR 145, 5 WWR 289, 19 BLR 234, 43 NR 451, 137 DLR (3d) 1, 66 CPR (2d) 1 [*Law Society*].

⁹² [1929] 1 WWR 394, 40 BCR 512, 51 CCC 260, 1 DLR 576 (BCCA).

⁹³ *Supra* note 3 at para 35.

⁹⁴ [1980] 1 SCR 844, 30 NR 399, (*sub nom Dominion Stores Ltd v R*) 50 CCC (2d) 277, 106 DLR (3d) 581, 50 CCC (2d) 277 [*Dominion Stores* cited to SCR].

that the *Canada Agricultural Products Standards Act* was inapplicable to purely intraprovincial transactions, and to the extent it purported to be so applicable it was *ultra vires* Parliament. Interestingly, the Court relied on the 1948 decision in *Reference re Minimum Wage Act*⁹⁵ as stating the applicable principles. Estey J, writing for the majority (which included Martland J), held that the provision in issue might well be valid to the extent that it was integrated with the regulation of interprovincial and international trade, but that it had no validity in relation to purely intraprovincial transactions; in that respect it was *ultra vires* Parliament.⁹⁶

A few months later Estey J, again writing for a majority of the Court that included Martland J, held certain sections of the *Food and Drugs Act* to be *ultra vires* Parliament as an invasion of provincial jurisdiction under sections 92(13) and (16) of the *Constitution Act, 1867*.⁹⁷

Furey points out⁹⁸ that in *PSAC v R*⁹⁹ the Supreme Court of Canada was asked to state a constitutional question asking whether section 10(1) of the *Royal Canadian Mounted Police Act* was constitutionally applicable to provincial and municipal civilian employees providing support services to the RCMP. Instead of doing so, the Court, in brief reasons, held that section 10 “applies to the civilian staff appointed and employed by the RCMP Commissioner and that it does not apply to the civilian staff appointed or employed by a municipality under an agreement entered into by the Solicitor General pursuant to s. 20 of the Act.”¹⁰⁰ Furey surmises 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.”¹⁰¹

Notwithstanding that the Court declined to embark on the inquiry, the *result* it achieved by reading down the legislation was identical to the result that would have been achieved by finding the requested constitutional inapplicability.

There have also been some lower court decisions in which federal legislation has been read down so as to protect provincial jurisdiction. In *Singbeil v Hansen*,¹⁰² the British Columbia Court of Appeal read down

⁹⁵ *Supra* note 16.

⁹⁶ *Dominion Stores*, *supra* note 94 at 865.

⁹⁷ *Labatt Breweries v Canada (Attorney General)*, [1980] 1 SCR 914, 9 BLR 181, 30 NR 496.

⁹⁸ Furey, *supra* note 88 at 610-12.

⁹⁹ 2006 SCC 29, [2006] 1 SCR 1027, 349 NR 385, 267 DLR (4th) 577.

¹⁰⁰ *Ibid* at para 2.

¹⁰¹ Furey, *supra* note 88 at 612.

¹⁰² [1985] 5 WWR 237, 63 BCLR 332, 19 DLR (4th) 48 (BCCA) [*Singbeil*].

section 205 of the *Canada Shipping Act* so as not to apply to seamen employed by the British Columbia ferry service. Lambert JA, who wrote one of three concurring judgments, found the provision constitutionally inapplicable to the seamen because the federal Parliament had no jurisdiction to legislate in relation to labour relations with respect to provincial undertakings.

All three of the judges in *Singbeil* referred to the *Reference re Industrial Disputes Investigation Act*,¹⁰³ a 1955 decision from the Supreme Court of Canada that is often cited in the interjurisdictional immunity context. That decision followed a reference to the Court asking whether the federal *Industrial Relations and Disputes Investigation Act* could constitutionally apply to stevedores employed in the loading and unloading of ships in various eastern Canadian ports. Each of the nine judges wrote broadly concurring reasons, making a *ratio* more than usually difficult to extract, but the headnote states the principle of the decision as follows:

Sections 1-53 of the *Industrial Relations and Disputes Investigation Act* are *intra vires* the Parliament of Canada. The jurisdiction of Parliament to legislate with respect to labour and labour relations includes those situations in which labour and labour relations are: an integral part of or necessarily incidental to the headings enumerated under s. 91; in respect of Dominion government employees; in respect of works and undertakings under ss. 91(29) and 92(10); and in respect of works, undertakings or businesses in Canada but outside of any one province. This authority cannot be construed to exclude provincial jurisdiction over matters, such as inland shipping, that are not always of federal concern. The Act applies to employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament, and *it would therefore be inoperative if applied beyond this limited sphere*; but the Act is not thereby made *ultra vires*.¹⁰⁴

The *Stevedoring Reference* makes it clear that the legislation in question was *intra vires only* to the extent that it did not infringe on provincial jurisdiction; beyond that limited sphere, it would be “inoperative.”¹⁰⁵ The Act was therefore “read down” to preserve its constitutionality, just as provincial legislation is read down in cases of interjurisdictional immunity.

Another, more recent, lower court decision in which federal legislation has been read down to avoid infringing on provincial jurisdiction is *Early*

¹⁰³ [1955] SCR 529, 3 DLR 721 [*Stevedoring Reference*].

¹⁰⁴ *Ibid* at 721 DLR [emphasis added].

¹⁰⁵ This is the terminology used by the Court. Although “operability” is typically the language of paramountcy, rather than interjurisdictional immunity, it is clear that the concept applied in this case was equivalent to interjurisdictional immunity.

Recovered Resources Inc v British Columbia.¹⁰⁶ Russell J upheld the challenged provincial legislation, and held that to the extent the federal legislation in question purported to apply to the facts of the case, it was “not valid legislation in relation to navigation and shipping and *ultra vires* the Parliament of Canada.”¹⁰⁷

The only decision to date in which “interjurisdictional immunity” has been *expressly* relied on to read down federal legislation is *PHS Community Services Society v Canada (Attorney General)*.¹⁰⁸ Huddart JA, writing for herself and Rowles JA, found that the *Controlled Drugs and Substances Act* had to be read down so as not to apply to a “safe injection site” authorized under provincial legislation, as to do otherwise would be to permit the federal government to infringe on exclusive provincial jurisdiction over health.

There were some problems with the application of interjurisdictional immunity by the Court of Appeal in this case.¹⁰⁹ Huddart JA, for example, expressly declined to read down the legislation based on the kind of “robust” application of the pith and substance doctrine encouraged by *Canadian Western Bank*¹¹⁰ and, in my opinion, appropriate in such circumstances. The Supreme Court, on the appeal from this decision, declined to apply interjurisdictional immunity, finding that the doctrine was neither “necessary nor helpful.”¹¹¹ While, as noted above, the Court allowed that it was at least theoretically possible that provincial jurisdiction could benefit from the doctrine, it found that it was not appropriate in this case, for three reasons.

First, the proposed “core” of protected provincial jurisdiction had never been recognized in the jurisprudence. Second, and more importantly for the Court, provincial jurisdiction over health is “broad and extensive,” and as such its core is “vast,” since there is undoubted federal jurisdiction to legislate with respect to certain health-related matters, it would simply be impossible to define with any precision what fell inside and outside the

¹⁰⁶ 2005 FC 995, [2006] 1 FCR 187.

¹⁰⁷ *Ibid* at para 149.

¹⁰⁸ 2010 BCCA 15, (2010), 314 DLR (4th) 209, 2 WWR 575, 207 CRR (2d) 232, 100 BCLR (4th) 269 (BCCA).

¹⁰⁹ Some are identified by David Quayat, “Supervised Injection Sites: Threat to Canadian Federalism?” post on *The Court*, online: <<http://www.thecourt.ca/2010/02/08/supervised-injection-sites-threat-to-canadian-federalism/>>.

¹¹⁰ *Supra* note 3.

¹¹¹ *Supra* note 5 at para 70.

protected core. Finally, applying the doctrine to provincial jurisdiction over health care had the potential to create legal vacuums.¹¹²

Nevertheless, it is tolerably clear that the *practical* protection extended to provincial legislation against federal encroachment by the “reading down” doctrine is comparable in nature and scope to that extended to federal legislation by the doctrine of interjurisdictional immunity. As Elliot points out,¹¹³ the “pith and substance” analysis does not dictate *what* is to be analyzed, merely *how*, so that the “law” in issue can be focused very narrowly. This is the analytical device that permits the court to read down a specific provision, or a specific *aspect* of a provision, instead of finding it either bad in its entirety or, alternatively, valid as having merely incidental effects. Thus when the majority in *McKay* were looking for the “pith and substance” of the impugned bylaw, they in effect only looked for the pith and substance of *that aspect of the bylaw that impacted on federal election signs*, and that was the only aspect of the bylaw that improperly invaded the realm of federal jurisdiction.¹¹⁴ This was, in effect, what differentiated the majority and the dissent in that case.

Similarly, in *Ordon*, Iacobucci and Major JJ for the Court stated that the “principal question” in a case involving exclusive federal jurisdiction is whether the provincial statute in question “trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power.” They went on to say that where the statute does trench in its application to specific factual contexts, it “must be read down so as not to apply to those situations,” a principle “known perhaps most commonly as the doctrine of ‘interjurisdictional immunity’”¹¹⁵

Elliot identified the similarity between the “reading down” doctrine and interjurisdictional immunity more than twenty years ago. He pointed out that “[t]he two doctrines seem simply to be different ways of describing the same phenomenon,” and that both involve the court limiting the focus of its analysis “to some only of the applications of the legislation in question.”¹¹⁶

¹¹² *Ibid* at paras 66-69. The Court may have been somewhat disingenuous in saying, as it did at para 60, that the doctrine of interjurisdictional immunity “has been applied to circumscribed areas of activity referred to in the cases as undertakings” and “has never been applied to a broad and amorphous area of jurisdiction,” when in *Ordon*, *supra* note 47, it was applied to the area of “maritime law.”

¹¹³ Elliot, “Constitutional Law,” *supra* note 86.

¹¹⁴ *McKay*, *supra* note 10.

¹¹⁵ *Ordon*, *supra* note 47 at 496 [emphasis added].

¹¹⁶ Elliot, *supra* note 86 at 536-37.

If one heeds the advice of the Supreme Court of Canada in *Canadian Western Bank* to “look at what the courts do as distinguished from what they say,”¹¹⁷ it is apparent that, even though the doctrine of interjurisdictional immunity *per se* is not normally invoked to protect provincial jurisdiction against federal incursion, provincial jurisdiction has nevertheless been protected through appropriate application of the “pith and substance” principle and the “reading down” doctrine.

4. Conclusion

The doctrine of interjurisdictional immunity has become an accepted feature of the landscape of Canadian constitutional law. It would appear, however, that it achieved that status as the result of a lack of clarity about the principles underlying it, and the basis for it. It has been applied almost exclusively in favour of federal jurisdiction and against provincial legislation, but that fact does not mean that provincial legislation is, in actuality, more vulnerable than federal legislation. In fact, provincial legislation has been granted largely identical protection, but without reference to the rubric of “interjurisdictional immunity.”

¹¹⁷ *Supra*, note 3 at para 52.