

□ □ □ The Paramountcy Doctrine

The essence of the paramountcy doctrine is that federal and provincial legislation meet, regulate the same activities, and conflict. When they do, the federal legislation is paramount, prevails and renders the provincial legislation inoperative.

□ □ □ Interjurisdictional Immunity

Interjurisdictional immunity is different. The interjurisdictional immunity doctrine does not premise a meeting of legislation enacted by Parliament and a province. Rather, the interjurisdictional immunity doctrine becomes relevant where a law of one level of government adversely impacts:

- a person or thing specifically within the jurisdiction of the other order of government,

- a vital or essential part of an undertaking duly constituted by the other order of government; or

- the 'core' competence of the other order of government

This could occur, for example, where provincial legislation stipulates conditions that all businesses, including banks, must meet in order to do business in the province. Banks are specifically within federal jurisdiction (*Constitution Act, 1867*, secs. 91:15, 91:16). The provincial conditions might prevent a bank from doing business in the province. This would impact the core Parliament's banking power. This could also occur where a provincial building code stipulates conditions all buildings, including buildings in a port, must meet to be issued a building permit. Ports are federal undertakings. This might impact a vital part of the port duly constituted by Canada.

In the examples, the provincial statutes are valid because they are, in pith and substance, directed to purposes unquestionably within provincial jurisdiction: business regulation and provincial property. However, the general embrace of the statutes also impact the core of the federal banking powers at s. 91:15-16 and a vital part of a federal undertaking (the port).

Interjurisdictional immunity becomes relevant in these situations. The provincial statute remains valid, but questions are raised concerning its application to the bank and the port. This may happen without the provincial legislation conflicting with any federal legislation.

The paramountcy doctrine is not relevant since there is no conflict between federal and provincial legislation. The interjurisdictional immunity doctrine is relevant; it may render the provincial law from inapplicable to the federal bank or port.

The interjurisdictional immunity doctrine differs from the paramountcy doctrine in that interjurisdictional immunity is activated even where there is no meeting of legislation or contradiction between federal and provincial statutes. Interjurisdictional immunity only requires that the provincial legislation impact the vital part of a federal undertakings or the core of a federal power.

How Much Impact is Required?

How much impact must provincial statutes have on federal undertakings or on the core of a federal power before the provincial law is rendered inapplicable? The original approach was that the provincial law had to “sterilize” the federal undertaking. This was softened in later cases, and the question split the Supreme Court of Canada in the *Canadian Western Bank and Lafarge* case. The split was motivated by differing views about federalism, how extensive the interjurisdictional immunity doctrine should be, and how far the doctrine should be permitted to grow.

That controversy was resolved in *Quebec (A.G.) v. Canadian Owners and Pilots Assn.*, [2010], 2 S.C.R. 526, where the Supreme Court said:

[43] After a period of inconsistency, it is now settled that the test is whether the provincial law impairs the federal exercise of the core competence: *Canadian Western Bank*, per Binnie and LeBel JJ. This decision resolved a debate about whether the provincial law must “sterilize” the essential content of a federal power (the language used in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at pp. 323-24), or whether it is sufficient that the provincial law “affect” a vital part of the management and operation of the undertaking ...

[44] The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects....

[45] “Impairment” is a higher standard than “affects”. It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

The reasons why this test were established also resolved the controversy about the status of the interjurisdictional immunity doctrine in constitutional law:

The move away from the “affects” test of *Bell Canada* reflects growing resistance to the broad application of interjurisdictional immunity based on modern conceptions of cooperative federalism and a perceived need to promote efficacy over formalism. As Binnie and LeBel JJ. put it in *Canadian Western Bank*, “[t]he Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly” (para. 42). (See also Dickson C.J. in *OPSEU*, at p. 18.) To quote Binnie and LeBel JJ. in *Canadian Western Bank*:

A broad application [of interjurisdictional immunity] . . . appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. . . . It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. [para. 42]

□ □ □ **Avoiding Confusion**

It is easy to confuse the interjurisdictional immunity doctrine with paramountcy. Federal jurisdiction is sometimes implemented by statutes that intend there should be no interference by supplementary or conflicting provincial standards. In such cases the federal statute intends to express “completely, exhaustively what shall be the law governing the particular conduct or

matter to which [the federal legislature's] attention is directed;" *Ross v. Reg. of Motor Vehicles*. Provincial statutes that seek to provide supplementary rules would contradict the purpose of the federal legislation.

Any provincial statute which attempted to enter a field exhaustively regulated by such a federal statute would be rendered inoperative by the paramountcy doctrine. One might be tempted to say that the provincial statute is rendered inapplicable. That, however, would be inaccurate. This is a paramountcy situation; as a paramountcy situation, the provincial law is rendered inoperative to everything in all situations, not inapplicable to specific federal undertakings or to impact on the core of a specific federal power as would be the case in an interjurisdictional immunity situation. The rule for paramountcy is that paramount federal statutes render conflicting provincial statutes inoperative. The interjurisdictional immunity doctrine is not engaged.

▯ ▯ ▯ **Incidental or Implementing Regulation**

The interjurisdictional immunity doctrine does not render inapplicable provincial laws that are designed, or that assist to implement rights belonging to persons specifically within federal jurisdiction. This may become quite important concerning the interface that persons possessing aboriginal rights may have with the network of provincial statutes and regulations that apply to hunting, land and related matters. This issue was discussed in *R. v. Morris*, see *Constitutional Law of Canada* (9th ed. 2007), p. 872.