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Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters - Again

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Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters — Again

Robin Elliot*

I. INTRODUCTION

The doctrine of interjurisdictional immunity holds that valid, generally worded legislation enacted by one order of government cannot constitutionally be applied in contexts that can be said to fall within a core area of the other order of government's legislative jurisdiction.[1] This doctrine has had a chequered history in Canadian constitutional law, but it appeared in the past couple of decades to have established itself as an accepted and relatively clearly defined feature of the law governing the division of legislative jurisdiction between Parliament and the provincial legislatures. There was little if any reason, therefore, to expect that the Supreme Court of Canada would feel the need to embark upon a significant reassessment of the doctrine when it rendered its

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* Professor of Law, University of British Columbia. The author is grateful to Joel Bakan, Bill Black, Richard Butler, Susan Chapman, Wade Wright and Margot Young for their many helpful comments on earlier drafts of this paper. He is also grateful to his two research assistants, Mike Berger and Keith Evans, for their able assistance. Any errors the paper is found to contain are, of course, the sole responsibility of the author.

1 This formulation of the doctrine borrows significantly from the reasons for judgment of Beetz J. in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail du Québec)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at 833 (S.C.C.), generally understood to be the leading authority on the nature and scope of the doctrine until the decisions in the two cases reviewed in this paper were rendered. This formulation also assumes that the doctrine can be used to protect both provincial and federal areas of jurisdiction. As will be seen, it has been the view of some scholars that the doctrine can only be used to protect areas of federal jurisdiction. I should also note that the doctrine of interjurisdictional immunity as I have formulated it here is distinct from the common law doctrine of Crown immunity. This paper does not deal with the latter doctrine. For a discussion of it, including its interjurisdictional dimension, see P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), c. 10.8 and 10.9.

recent decisions in *Canadian Western Bank v. Alberta*[2] and *British Columbia (Attorney General) v. Lafarge Canada Inc.*,[3] two cases in which the doctrine had been invoked by federally regulated undertakings — banks in the former, a port authority in the latter —wanting to avoid the application of valid provincial legislation. That, however, is precisely what a six-person majority of the Court chose to do in these cases,[4] and it is fair to say that the doctrine of interjurisdictional immunity that has emerged from that reassessment is a different doctrine than the one that existed prior to it. The legal status of the doctrine[5] has — again — been attenuated and its content[6] has — again — been changed.

These two decisions are therefore of considerable significance to the evolving law of Canadian federalism, and warrant careful scrutiny.[7] One of the purposes of this paper is to provide that scrutiny. Another of its purposes is to provide a detailed overview of the origins and evolution of the doctrine of interjurisdictional immunity. As originally conceived, that overview was intended simply to give readers a sense of the broader jurisprudential context within which the Supreme Court of Canada was working when it rendered its decisions in these two cases. An appreciation of that broader context is necessary, in my view, in order to properly understand both the reassessment of the doctrine by the majority in *CWB* and *Lafarge* and my critical analysis of that reassessment. After re-reading some of the early cases in which the seeds of the doctrine are said to have been planted, I realized that that overview would also come to serve other objectives as well. One is to challenge the accepted wisdom about the doctrine's origins, and the other is to provide a better understanding of

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

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

4 The six members of the Court who comprised this majority were McLachlin C.J.C. and Binnie, LeBel, Fish, Abella and Charron JJ. Justices Binnie and LeBel co-authored their reasons for judgment. Justice Bastarache wrote separately in both cases, concurring in the results but for very different reasons. In particular, he dissented from the views expressed by the majority in their reassessment of the doctrine of interjurisdictional immunity.

5 By legal status, I mean the standing of the doctrine in the hierarchy of tools used by the courts to resolve division of powers disputes.

6 By content, I mean the legal rules and/or tests that the courts are required to apply when called upon to consider the doctrine in the context of a particular case.

7 Several other scholars have already published commentaries on these two cases. See, *e.g.*, L. Edinger, "Back to the Future with Interjurisdictional Immunity: *Canadian Western Bank v. Alberta* and *British Columbia v. Lafarge Canada Inc.*" (2008) 66 The Advocate 553; P.W. Hogg & R. Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 S.C.L.R. (2d) 623 and J.G. Furey, "Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 S.C.L.R. (2d) 597. All of these commentators provide a more positive assessment of the decisions rendered in these two cases than the one I provide in this article, albeit to varying degrees.

how it is that particular features of the doctrine of interjurisdictional immunity came into being, and the extent to which those features can be said to have a firm grounding in the jurisprudence. Of particular importance in the latter regard is the test that is said to have taken hold in the early years in cases involving federally regulated undertakings. That overview — now much longer than it was originally intended to be — forms the subject matter of Part II of the paper. Part III summarizes both the Court's reassessment of the doctrine of interjurisdictional immunity in *CWB* and *Lafarge*. Part IV offers some critical thoughts on the Court's reassessment of the doctrine.

The general conclusions reached in this paper can be summarized as follows: (1) While the doctrine of interjurisdictional immunity is said to have originated in a series of cases decided in the early 1900s dealing with federally incorporated companies and federally regulated undertakings, a close examination of those cases reveals that most of them were not in fact cases in which the doctrine as it is now understood was either called for or applied; (2) Even though the doctrine cannot therefore be said to have the lengthy pedigree that it is commonly believed to have, there are, as the majority in *CWB* and *Lafarge* acknowledge, both textual and principled reasons to retain it as a feature of the law of Canadian federalism; (3) Those textual and principled reasons for retaining it require, as the majority in *CWB* and *Lafarge* also acknowledge, that the doctrine be used to protect the core areas of both provincial and federal heads of power from encroachment by generally worded, valid legislation enacted by the other order of government; (4) The focus of the legal inquiry when the doctrine is invoked should not be, as the majority in *CWB* and *Lafarge* suggest, on the degree of impact of the impugned legislation on a particular entity and/or the activities in which that entity is engaged, but rather on whether the application of that legislation in the particular context in question encroaches on a core area of a head of power assigned to the other order of government; and (5) There is no justification for the preference shown by the majority in *CWB* and *Lafarge* for the doctrine of federal paramountcy over the doctrine of interjurisdictional immunity as a tool for resolving federalism issues in those cases in which there are no clear precedents for the use of the latter doctrine.

II. THE HISTORY OF THE DOCTRINE OF INTERJURISDICTIONAL IMMUNITY

The main purpose of this overview, as noted above, is to provide a sense of the broader jurisprudential context within which the Supreme Court of Canada was working when it rendered its judgments in the *CWB* and *Lafarge* cases. This overview also affords an opportunity to challenge the generally accepted belief about the doctrine's origins, and to understand why, as a result of that accepted belief, the inquiry in which the courts have engaged when the doctrine is invoked in certain contexts has tended to take the form it has. Because this is an area of the law in which academic commentary has proven to be influential, this overview includes discussion of both the relevant jurisprudence and that commentary.

1. The Early Years: At the Margins, If There at All

The origins of the doctrine of interjurisdictional immunity are generally said to lie in a few cases decided in the early 20th century in which federally incorporated companies[8] and federally regulated undertakings[9] succeeded in attempts to avoid the application of provincial enactments that, in their view, threatened the viability of their business activities. This understanding of the doctrine's roots is reflected in a number of Supreme Court of Canada judgments, including *CWB*, [10] as well as in some of the academic commentary,[11] and can fairly be said

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[8] This term refers to companies that have been incorporated under legislation enacted by Parliament pursuant to the latter's power to legislate in relation to the incorporations of companies with other than provincial objects. That power arises by implication from s. 92(11) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, which grants the provincial legislatures jurisdiction over "the incorporation of companies with provincial objects", and is understood to reside in Parliament's authority to legislate for the "Peace, Order, and Good Government of Canada" (hereinafter "POGG") found in the opening paragraph of s. 91.

[9] This term refers to business undertakings the commercial activities of which Parliament has been given legislative jurisdiction to regulate. That jurisdiction can arise under any one of a number of heads of power in ss. 91 and 92 of the *Constitution Act, 1867*, including s. 92(10)(a) and (b), ss. 91(10), (12), (13), (15), (16) and POGG. Examples of such undertakings are interprovincial bus and truck lines, radio and television broadcasters, banks, airlines, shipping companies and companies involved in the production of nuclear energy.

[10] *Supra*, note 2, at paras. 39-40.

[11] See, *e.g.*, P.W. Hogg, *Constitutional Law of Canada*, *supra*, note 1, c. 15.8(b) and (c) and my previous contribution to the literature in this area, a case comment on *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.), "Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance" (1988) 67 Can. Bar Rev. 523.

now to form part of the accepted wisdom about the doctrine. As I hope to show in the first part of this overview, there is good reason to doubt the accuracy of this account of the doctrine's origins. A careful reading of the judgments rendered in the cases that are customarily cited in support of it suggests that the decisions in most of those cases were based, not on the kind of thinking that is now found in the doctrine of interjurisdictional immunity, as the account implies, but on the kind of thinking that is reflected in what we have come to call the doctrine of federal paramountcy.

(a) The Federally Incorporated Companies Cases

The case that is most often cited in support of the doctrine's initial use in the context of federally incorporated companies is *John Deere Plow Co. v. Wharton*.[12] The provincial legislation at issue in that case was the *Companies Act*[13] of British Columbia, which required all companies not incorporated in that province to obtain a licence from the Registrar of Companies before beginning to do business there. Under the terms of that statute,[14] failure to obtain such a licence meant *inter alia* that contracts entered into within British Columbia would not be enforceable in the province's courts, which effectively meant that the company would be unable to do business there. John Deere Plow Co., a federally incorporated company, had had its application for a licence rejected on the basis that another company with that same name was already registered in the province.[15] Given the consequences of that rejection for the company, John Deere Plow Co. decided to challenge the constitutionality of the provincial government's imposition of its licence requirement on federally incorporated companies. That challenge was based primarily on the fact that the federal legislation governing the incorporation of companies with other than provincial objects — a combination of the federal *Companies Act*[16] and the federal *Interpretation Act*[17] — granted such companies the rights throughout the country "to sue and be sued, [and] to contract in their corporate name, ...

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12 [1915] A.C. 330 (P.C.).
13 R.S.B.C. 1911, c. 39.
14 *Id.*, s. 18.
15 *Supra*, note 12, at 335.
16 R.S.C. 1906, c. 79.
17 R.S.C., 1906, c. 1.

for the purposes for which the corporation is created",[18] the very rights that the provincial legislation had purported to take away.

In the result, the Privy Council decided that John Deere Plow Co.'s challenge should succeed. The rationale for that decision, it must be said, is less than entirely clear. Some of the language used by Lord Haldane suggests that the decision was based on a finding that, by including federally incorporated companies within the scope of the licence requirement, the provincial legislature had overreached and invaded an area over which only Parliament had authority to legislate. Hence, he suggests at one point that the essential powers of a federally incorporated company — including its right to do business in every province (and territory) in the country — constitute "a matter which was not entrusted under s. 92 to the provincial legislatures".[19] However, on several occasions, Lord Haldane uses language that suggests that the decision was based on a finding of conflict between the impugned provincial legislation and the federal legislation pursuant to which the company had been incorporated.[20] He frames the issue to be resolved in terms of "whether the Province can interfere with the status and corporate capacity of a Dominion company *in so far as that status and corporate capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion*".[21] His conclusion is expressed in terms of the impugned provisions being "directed to interfering with the status of Dominion companies, and *to preventing them from exercising the powers conferred on them by the Parliament of Canada*".[22] And he uses the term "inoperative" to describe the actual holding he makes in relation to the provincial legislation.[23]

More important to the precedential significance of this case than the lack of clarity in Lord Haldane's reasoning, however, is the fact that the provincial legislation at issue explicitly included in the list of the kinds of companies to which the licence requirement applied "any extra-provincial company incorporated under the laws of ... the Dominion".[24] *John Deere*

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18 *Id.*, s. 30.

19 *Supra*, note 12, at 343-44.

20 I am not the first to remark on this feature of Lord Haldane's reasoning. Jacob Ziegel suggested many years ago in J.S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967), at 165-67 that this — and the other decisions in this line of cases — were based on the application of the paramountcy doctrine.

21 *Supra*, note 12, at 341 (emphasis added).

22 *Id.*, at 343 (emphasis added).

23 *Id.*, at 341.

24 *Supra*, note 13, s. 2.

Plow was therefore not a case in which a provincial government was seeking to apply to a federally incorporated company valid, generally worded provincial legislation. It was not the kind of case, in other words, for which the doctrine of interjurisdictional immunity has been thought to be necessary. It was, in fact, a case in which a provincial legislature had made a conscious decision that a particular statutory requirement should apply to federally incorporated companies and had so legislated in very clear and unambiguous terms. It was therefore a case in which, as we now think of division of powers cases in this country, the real question should have been neither one of applicability (governed by the doctrine of interjurisdictional immunity) nor one of operability (governed by the doctrine of federal paramountcy), but one of validity (governed in that particular instance by the necessarily incidental doctrine).[25]

It would appear from cases decided in the following couple of decades in which *John Deere Plow* was referred to that that case came to be understood, not as having created, or even as manifesting, a general doctrine of interjurisdictional immunity, but as having laid down the narrow, stand-alone proposition that provincial legislatures cannot legislate in such a way as to sterilize, or impair to a substantial degree, the essential powers and capacities of a federally incorporated company. That proposition was understood in those later cases to be applicable regardless of the form taken by the provincial legislation at issue. In other words, it did not matter whether that legislation was generally worded or, like the legislation at issue in *John Deere Plow*, specifically directed at federally incorporated companies; the proposition applied in either case.

It soon became apparent, however, that the courts, and particularly the Privy Council, saw that proposition as having very limited scope. In fact, apart from another case involving the kind of legislation that had been in issue in *John Deere Plow* itself,[26] the Privy Council was only prepared to

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[25] In theory, it is open to a party to challenge the applicability of a provision that has been upheld on the basis of the necessarily incidental doctrine. In practice, however, such a challenge will only have a chance of succeeding if that provision is generally worded. In the circumstances presented by *John Deere Plow*, the provision in question was not generally worded: it was directed specifically and solely at federally incorporated companies.

[26] *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, [1921] 2 All E.R. 605 (P.C.). That case raised the same issue as *John Deere Plow* in the context of provincial statutes enacted by three different provincial legislatures, those of Ontario, Manitoba and Saskatchewan. It is worth noting that the legislation of Ontario and Manitoba, like the B.C. legislation at issue in *John Deere Plow*, specifically referred to companies incorporated under federal legislation. The Saskatchewan statute was general in scope; however, it appeared to grant federally incorporated companies an automatic right to registration.

apply it to the advantage of federally incorporated companies in one other context. In *Manitoba (Attorney General) v. Canada (Attorney General)*,[27] decided in 1929, the Privy Council held that Manitoba legislation that had the effect of prohibiting all companies from raising capital in that province unless they first obtained a licence from a provincially established board was *ultra vires* the provincial legislature when applied to federally incorporated companies.[28] In all of the other contexts in which the proposition was subsequently invoked — for example, the application of provincial mortmain legislation to federally incorporated companies[29] — the Privy Council held that the fact that a company had been incorporated federally provided it with no special rights in relation to the provincial legislation at issue. On the contrary, the general principle endorsed by the Privy Council in these cases was that such companies were subject to the same provincial rules and regulations governing their business activities as companies incorporated in other jurisdictions.[30] In none of these subsequent cases, it should be noted, did the Privy Council see fit to clarify the rationale for the proposition for which *John Deere Plow* had been taken to stand. In all of them, it simply took the proposition as a given and applied it to the new circumstances in which it had been invoked.

In sum, then, none of the early cases dealing with federally incorporated companies can be said to provide support for the existence of a doctrine of interjurisdictional immunity of the kind we now have. While it is true that some of the claimant companies succeeded in avoiding the application of the impugned provincial legislation, in none of the cases in which they did so was that legislation generally worded. Moreover, the reasoning given in support of the proposition to which the first and most important of these cases, *John Deere Plow*, gave rise, and which was thereafter applied in such cases, was primarily based, not on the kind of thinking that underlies that doctrine, but on the kind of thinking that underlies the federal paramountcy doctrine.

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27 [1929] A.C. 260 (P.C.).

28 The Manitoba legislation at issue, the *Sale of Shares Act*, S.M. 1924, c. 175 and the *Municipal and Public Utility Board Act*, S.M. 1925, c. 33, did not refer specifically to companies incorporated under federal legislation, but used the language of "every company" or "any company" (see ss. 4-13 of the former and ss. 162-65 of the latter). This was a case, therefore, in which the question was one of applicability rather than, as in *John Deere Plow*, validity.

29 *Great West Saddlery Co. v. The King*, *supra*, note 26, at 100.

30 *Id.*

(b) The Federally Regulated Undertakings Cases

Toronto (City) v. Bell Telephone Co.,[31] decided by the Privy Council in 1905, is the case customarily cited in support of the origins of a doctrine of interjurisdictional immunity in the context of federally regulated undertakings. However, like the provincial legislation at issue in *John Deere Plow*, the Ontario legislation at issue in that case,[32] which required Bell Telephone Co. to obtain the consent of municipal level govern-ments before installing its telephone poles, cables and wires within the geographical confines of particular municipalities, was not generally worded. On the contrary, it dealt solely with Bell Telephone Co. The case was therefore not one in which a claim by the company for immunity from otherwise valid, generally worded provincial legislation was either called for or made. This was not, in other words, a case in which there was any need for a doctrine of interjurisdictional immunity. Not surprisingly, there is nothing in the brief reasons authored by Lord Macnaughton to suggest that he saw the need for any such doctrine. In fact, those reasons suggest that, like Lord Haldane in *John Deere Plow*, he saw the flaw in the provincial legislation as being the fact that it purported to deprive a federally regulated undertaking of rights given to it by federal legislation. Hence, he held that, "no provincial legislature was or is competent to interfere with [the company's] operations, *as authorized by the Parliament of Canada*".[33] That is the language of federal paramountcy, not interjurisdictional immunity.

Bell Telephone is not the only case from this period in which a successful claim was made against provincial legislation by a federally regulated undertaking in which the decision was arguably based, not on a nascent doctrine of interjurisdictional immunity, but on the federal paramountcy doctrine. In a series of cases decided by the appellate courts of Ontario and Alberta between 1907 and 1922,[34] provincial mechanics lien legislation was consistently held to be inapplicable to such undertakings because of the possibility such legislation raised of property that was owned by them, and was integral to their continuing

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31 [1905] A.C. 52 (P.C.).

32 *An Act to confer certain powers upon the Bell Telephone Company of Canada*, S.O. 45 Vict., c. 71, s. 2.

33 *Supra*, note 31, at 57.

34 *Crawford v. Tilden*, [1907] O.J. No. 177, 14 O.L.R. 572 (Ont. C.A.); *Johnson & Carey Co. v. Canadian National Railway Co.*, [1918] O.J. No. 47, 44 O.L.R. 533 (Ont. C.A.) and *Western Canada Hardware Co. v. Farrelly Bros. Ltd.*, [1922] A.J. No. 73, 3 W.W.R. 1017 (Alta. C.A.).

economic viability, having to be sold. However, the reasoning used in the first of these cases, *Crawford v. Tilden*,[35] which was taken in the later cases to be the governing authority, was based on a finding that the mechanics lien legislation would be "in direct conflict with the federal legislation providing for the building and maintenance of the [railway]".[36] It was not the fact that Parliament had been given exclusive jurisdiction over such undertakings that was significant, but the fact that that jurisdiction had been exercised and in a particular way.

The paramountcy doctrine can also be used to explain the result in a much later case that is often cited as an example of the doctrine of inter-jurisdictional immunity, *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*[37] That case also involved the applicability of mechanics lien legislation to a federally regulated undertaking, in this instance a company authorized by federal legislation to construct and operate an inter-provincial pipeline. Justice Rand, who wrote for four members of the seven-member panel, explained his holding that that legislation could not be applied to such an undertaking in the following terms:

> [T]he creation of a public service corporation commits a public franchise only to those named and ... a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purposes of the statute and incompetent under the general law. ... These considerations, *a fortiori*, become controlling when the question arises as between Provincial and Dominion jurisdiction. The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism.[38]

While the concluding sentence of this passage is obviously consistent with an application of the doctrine of interjurisdictional immunity, it is clear from the first sentence that it is the fact that application of the provincial mechanics lien legislation to the pipeline would be inconsistent with the purposes of the federal legislation that granted the federal undertaking its "franchise" that led Rand J. to reach the conclusion he did. Again, that is the kind of thinking that we associate with the paramountcy doctrine.

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35 *Id.*

36 *Id.*, at 577.

37 [1954] S.C.J. No. 14, [1954] S.C.R. 207 (S.C.C.).

38 *Id.*, at 215-16.

There are, however, two cases from this early period that arguably can be said to reflect the kind of thinking we associate with the doctrine of interjurisdictional immunity in the realm of federally regulated undertakings. The first, which interestingly predates *Bell Telephone*, is *C.P.R. Co. v. Corporation of the Parish of Notre Dame de Bonsecours*.[39] The question in that case was whether or not it was lawful for a municipal government to enforce against the federally regulated Canadian Pacific Railway a generally worded ordinance requiring owners of property within municipal boundaries to keep any ditches they had on their land from overflowing and causing damage to the lands owned by adjoining property owners. The Privy Council held that it was lawful, on the basis that, while Parliament had exclusive jurisdiction over the management of the company and "the construction, repair and alteration of [CPR's] railway",[40] including any ditches it might dig alongside its tracks, it was not unconstitutional for provincial and municipal governments to apply generally worded legislation of the kind that had been enacted here to a federally regulated undertaking. Had that legislation gone further than it did, and, for example, given municipal authorities the power to require property owners to reconstruct defective ditches, the Privy Council made clear, the result would almost certainly have been different: the invocation of such a power against the C.P.R. would have been held to constitute an encroachment on an area of exclusive federal jurisdiction.[41] The implication of that reasoning appeared to be that even valid, generally worded provincial legislation cannot constitutionally be applied to federally regulated undertakings if such application would entail that degree of encroachment.

The other case is *Ontario (Attorney General) v. Winner*,[42] decided by the Privy Council over half a century later in 1954. At issue in that case was whether it was open to the Motor Carrier Board of New Brunswick, acting on the basis of generally worded powers granted to it by the provincial statute regulating bus services in that province, to issue to a bus company based in Maine a licence that limited the company's service to transporting passengers across New Brunswick from Maine to Nova Scotia and from Nova Scotia to Maine, and hence prohibited the company from either picking up or dropping off passengers in New

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39 [1899] A.C. 367 (P.C.).

40 *Id.*, at 372.

41 *Id.*, at 373.

42 [1954] A.C. 541, [1954] 2 All E.R. 177 (P.C.) [hereinafter "*Winner*"].

Brunswick. The Privy Council held that it was not open to the Board to issue such a licence to Mr. Winner's undertaking; in fact, the Privy Council held that the Board had no authority to regulate the company's business, which it considered to be a section 92(10)(a) undertaking, at all.

The reasoning given in support of that holding followed two related but different tracks. The first track was based on the proposition for which *John Deere Plow* had been taken to stand, and entailed the extension of that proposition from the realm of federally incorporated companies into the realm of federally regulated undertakings. Invoking *Great West Saddlery*[43] and *Lymburn v. Mayland*,[44] Lord Porter said that "[provincial] legislation will be invalid if a Dominion company is sterilized in all its functions and activities or its status and essential capacities are impaired in a substantial degree".[45] He then went on to hold — without commenting on the fact that he was about to extend the reach of the proposition into a new realm — that "the Act or the licence or both combined do have such an effect on Mr. Winner's undertaking".[46] The other track was based on the grant to Parliament of exclusive legislative jurisdiction over section 92(10)(a) undertakings, and the Privy Council's unwillingness to allow a provincial government to encroach on that jurisdiction. This track is the more prominent of the two, and is reflected in a number of passages in Lord Porter's judgment, including one in which he said simply that "the action of the province was an incursion into the field reserved by the *British North America Act* to the Dominion".[47]

The distinction between these two tracks may be subtle, but it is important, both conceptually and doctrinally. What distinguishes them is the fact that they seek to protect different interests. The first track seeks to protect the interest of the particular entity to which the impugned legislation is being applied in being able to function as a viable economic entity. That this track should seek to protect the particular entity's interest is not surprising, given its origins. Those origins, it will be recalled, lay in a case, *John Deere Plow*, in which the issue was perceived to be whether or not the impugned provincial legislation took

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43 *Supra*, note 26.

44 [1932] A.C. 318, [1932] All E.R. Rep. 291 (P.C.).

45 *Supra*, note 42, at 578 A.C. This principle originates, as we have seen, in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.).

46 *Id.*

47 *Id.*, at 580.

away powers — or rights — that had been granted to an entity — there, a federally incorporated company — by Parliament. The second track, by contrast, seeks to protect the interest of the federal order of government in having the exclusivity of its grant of legislative jurisdiction respected. This track reflects the kind of thinking that was in evidence in *Notre Dame de Bonsecours*, which case, it should be noted, was cited by Lord Porter in this part of his reasons.[48]

It is worth noting that *Winner* appears to be the only case from this early period in which the proposition from *John Deere Plow* was seen to have any relevance in the context of a claim for immunity from provincial legislation by a federally regulated undertaking. That fact, coupled with the additional fact that that proposition formed the basis of part only of the Privy Council's reasoning in *Winner*, and the less significant part at that, calls into question the proposition, asserted by many,[49] that the "sterilizing or impairing the activities" test constituted in the early years the established test for the courts to apply in cases in which claims for immunity were made by federally regulated undertakings. That proposition, like the proposition that the origins of the doctrine of interjurisdictional immunity lie in cases like *John Deere Plow* and *Bell Telephone*, has in fact come to form part of the accepted wisdom about the doctrine, but like that other proposition, in my view, it too must be said to be of highly dubious validity.

Another feature of Lord Porter's judgment in *Winner* deserves mention. That is the fact that he left open the question of whether it was the generally worded legislation or the licence itself that was the real cause for constitutional concern in that case. Hence, when he came to summarize his reasoning, he said: "In coming to this conclusion, their Lordships refrain from deciding whether the Act or the regulations, or both, are beyond the powers of the province. ... In either case the province, either through the Act itself or through the licence issued in pursuance of regulations made under the Act, has exceeded its jurisdiction."[50] The fact that Lord Porter was reluctant to resolve this question is, I think, telling. Had the kind of thinking that underlies the doctrine of interjurisdictional immunity as we now know it come to be

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48 *Id.*, at 579-80.

49 See, *e.g.*, D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 Can. Bar Rev. 40 [hereinafter "Gibson, 'Interjurisdictional Immunity'"]; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), c. 15.8; *CWB*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.).

50 *Supra*, note 42, at 580.

accepted when *Winner* fell to be decided, he would have had little difficulty conceptualizing the issue the case raised in terms of whether the licensing regime established by the valid, generally worded provincial statute could constitutionally be applied by the Board to a federally regulated undertaking, and, given the manner in which the case was ultimately resolved, he would have held that it could not be. There would have been no need for him to trouble himself with the question of whether it was the statute or the licence that he should be worried about. The fact that he did worry about that question indicates that the kind of thinking that underlies the doctrine had not yet clearly established itself by this time. All of that said, there is reason to believe that it was the licence and supporting regulations that were seen by the Privy Council to be the real flaw in that case. At one point in his analysis, Lord Porter says that the "pith and substance" of the impugned action on the part of the Board was "interference with an undertaking connecting province with province".[51] That is clearly an implausible characterization to give to the entire statute; it only makes sense if it is understood to apply to the restrictions on Mr. Winner's undertaking imposed by the licence. If that is an accurate reading of Lord Porter's reasons, the support that *Winner* provides to the doctrine of interjurisdictional immunity must be said to be somewhat attenuated. It could be argued that the Privy Council did not hold that the provincial statute could not be applied to a federally regulated undertaking, but simply held *ultra vires* what it took to be a form of subordinate legislation.

In sum, then, only two of the early cases from this category that are commonly cited in support of the doctrine can in truth be said to provide such support, and in neither of those cases can the support be said to be unequivocal. Moreover, there is only minimal support in one of them for the "sterilizing or impairing the activities" test that is now said to have been the established test to apply in cases in this category.

(c) Indians and Lands Reserved for the Indians

There is some evidence of the kind of thinking we now associate with the doctrine of interjurisdictional immunity in an early case involving an attempt by the Crown to prosecute an Indian hunting on an Indian reserve under provincial wildlife protection legislation. In *R. v. Jim*,[52] decided in

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51 *Id.*

52 [1915] B.C.J. No. 90, 26 C.C.C. 236 (B.C.S.C.).

1915, Hunter C.J.B.C. held that the provincial legislation — which was generally worded and which he appeared to accept was perfectly valid — could not be applied in such circumstances, and that the accused was therefore entitled to an acquittal. In his view, the regulation of hunting on Indian reserves fell within federal legislative jurisdiction under section 91(24), and the failure of Parliament to legislate on that subject did not mean that the provincial legislatures had authority to do so. No mention was made by the judge of any of the federally incorporated companies or federally regulated undertakings cases.[53]

(d) The Canadian Military

Two members of the Canadian military tried during this early period to avoid being prosecuted under the provisions of valid, generally worded provincial legislation, one successfully. In *R. v. Anderson*,[54] decided in 1930, the Manitoba Court of Appeal held that generally worded provincial legislation requiring people who drive a motor vehicle to have a valid driver's licence could not be applied to a commissioned officer of the RCAF, at least when he was driving his car in the course of performing his military duties. While neither of the two sets of reasons given in support of that holding was entirely clear as to the rationale for it, the fact that Parliament had been granted exclusive jurisdiction by section 91(7) over "Militia, Military and Naval Service, and Defence" certainly played an important role. In the other case, *R. v. Smith*,[55] decided in 1942, a claim made by a military officer that provincial legislation designed to protect wild game and fish could not be enforced against him when he was hunting out of season and without a licence on a military reserve was rejected by the Ontario Court of Appeal. The Court held that, because the legislation was clearly valid and not in any way "concerned with land", application of it in such circumstances could not be said to adversely affect any proprietary interest of the federal Crown in the land in question.[56] Nor, the Court added, did that legislation interfere in any way with Parliament's power to legislate under section

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53 The only case Hunter C.J.B.C. relied upon was *Madden v. Nelson & Fort Sheppard Ry. Co.*, [1899] J.C.J. No. 3, [1899] A.C. 626 (P.C.), which he took to be authority for the proposition that a failure on Parliament's part to legislate to the full extent of its jurisdiction did not extend the reach of provincial legislative jurisdiction.

54 [1930] M.J. No. 6, 54 C.C.C. 321 (Man. C.A.).

55 [1942] O.J. No. 196, [1942] O.W.N. 387 (Ont. C.A.).

56 *Id.*, at 388.

91(7), particularly in light of the fact that the accused was not on military service at the time he committed the alleged offence.[57]

The reasoning in these two cases, and particularly in *Anderson*, does reflect the kind of thinking that we now associate with the doctrine of interjurisdictional immunity. Interestingly, however, no reference was made in either case to any of the earlier decisions involving federally incorporated companies or federally regulated undertakings. Neither case was seen, in other words, to present an issue that either counsel or the judges understood to have been raised before in other contexts. And there is nothing in either of them to suggest that the focus of the inquiry in such cases should be on the impact that the provincial legislation in question would have on the military officer seeking immunity. On the contrary, the focus of the inquiry was on the nature and degree of any possible encroachment on an area of exclusive federal legislative jurisdiction.

(e) The Post Office

Another entity to seek this kind of immunity during this period was the federal Postal Service, over which Parliament is given exclusive jurisdiction by section 91(5) of the *Constitution Act, 1867*. That grant of exclusive jurisdiction provided the basis for the holding by the Supreme Court of Canada in 1948 in *Reference re Minimum Wage Act (Sask.)*[58] that valid, generally worded provincial minimum wage legislation could not constitutionally be applied to employees of that Postal Service.[59] The reach of that exclusive jurisdiction was understood by the Court to extend to the "fixing of the wages" of such employees.[60] In an interesting adaptation of the pith and substance doctrine reminiscent of the above-noted passage from Lord Porter's judgment in the *Winner* case, Taschereau J. (writing for himself) described the fixing of wages as "a matter in pith and substance 'Postal Service Legislation'".[61] On the face

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57 *Id.*

58 [1948] S.C.J. No. 16, [1948] S.C.R. 248 (S.C.C.). This was the holding of four of the six judges who sat on that case. The other two judges, Rand and Locke JJ., also concluded that the provincial legislation was inapplicable to such employees, but relied instead on straightforward statutory interpretation grounds.

59 Interestingly, none of the judges referred to the Postal Service as a federally regulated undertaking; they all appeared to view it as a *sui generis* kind of federal entity.

60 *Supra*, note 58, at 257.

61 *Id.*

of it, this case therefore looks to be a clear example of the doctrine of interjurisdictional immunity in action. That said, the fact that the federal Crown was implicated in this case, if not directly as employer, then at least indirectly, as the entity ultimately responsible for the running of the Postal Service, played a role in the minds of some of the judges, and likely made it easier for them to reach the conclusion that they did. Again, notably, no reference was made by any of the judges in this case to any of the earlier cases involving federally incorporated companies or even federally regulated undertakings. Nor was any reference made by any of them to the cases involving military personnel.

(f) Summary of the Early Cases

It is fair on the basis of this record to say that for most of the first 90 years of Canada's existence, what we now term the doctrine of interjurisdictional immunity, if it existed at all, tended to operate very much at the margins of Canadian constitutional law. The two cases that are said to provide early support for its existence in relation to federally incorporated companies and federally regulated undertakings — *John Deere Plow* and *Bell Telephone* — do not, in fact, provide that support. In fact, properly understood, none of the cases dealing with federally incorporated companies from this period can be said to do so. And while there are a couple of cases from this period that can be said to provide support for the doctrine's existence in relation to federally regulated undertakings, one — *Notre Dame de Bonsecours* — does so by implication only and the other — *Winner* — provides somewhat ambiguous support. To the extent that the three cases dealing with Indians and lands reserved for the Indians and the military can be said to provide support, they were all decisions of the lower courts. And the Supreme Court's decision in *Reference re Minimum Wage Act (Sask.)* was arguably influenced by the involvement of the federal Crown.

It can also be said that it was exceedingly rare during this period for courts to draw a connection between the bodies of jurisprudence relating to claims for immunity within the different spheres in which they were being made. The *Winner* case constitutes the exception that proves the rule in this regard, and, as we have seen, the Privy Council's use of the proposition that had emerged from the federally incorporated companies line of cases cannot be said to have been central to its reasoning. Nor, significantly, did the constitutional scholars writing in the latter part of that period make that kind of connection. For example, the body of

jurisprudence relating to federally incorporated companies and that relating to federally regulated undertakings were treated in Professor Laskin's casebook, *Canadian Constitutional Law*,[62] very much as discrete features of our constitutional law. Hence, the former was dealt with in his chapter on companies[63] and the latter was dealt with in his chapter on transportation and communication.[64] Neither discussion referred to the other.

Finally, there is very little support in this record for the notion that the appropriate test to use when a claim for immunity from generally worded provincial legislation is made is one that focuses on the impact on the entity or person seeking that immunity of applying that legislation. That focus may have been present in the Court's approach to the early cases involving federally incorporated companies, but, as we have seen, those cases rarely involved claims for immunity from generally worded provincial legislation. In most of the cases in which claims for immunity from such legislation were made, such as those involving Indians and lands reserved for the Indians and the military, the focus of the Court's analysis was on the need to protect grants of exclusive federal legislative jurisdiction from provincial encroachment.

At best, therefore, all that can be said about these early cases is that there is evidence of a similar kind of thinking in several of them, a kind of thinking that suggested that valid, generally worded provincial legislation could not be allowed to apply in a way that would result in that legislation encroaching into an area of exclusive federal legislative jurisdiction. It cannot be said that they provide a firm and unequivocal basis for the doctrine of interjurisdictional immunity as we now know it.

2. A More Central Role: *McKay* and *Bell No. 1*

Two decisions of the Supreme Court of Canada from the mid-1960s served to give the kind of thinking that now underlies the doctrine of interjurisdictional immunity much greater prominence, at least in the eyes of the academic community. The first, *R. v. McKay*,[65] saw the Court hold a valid, generally worded municipal by-law regulating the erection of signs on residential property to be constitutionally inapplicable to

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62 Bora Laskin, *Canadian Constitutional Law* (Toronto: Carswell, 1969).

63 *Id.*, c. 8.

64 *Id.*, c. 6.

65 [1965] S.C.J. No. 51, [1965] S.C.R 798 (S.C.C.).

lawn signs put up during the course of a federal election campaign. This decision was significant for three reasons. One was that it revealed a willingness on the part of the Supreme Court to apply in the context of a new and very different area of federal legislative jurisdiction — federal elections — the kind of thinking found in cases like *Notre Dame de Bonsecours*, *Anderson*, *Reference re Minimum Wage Act (Sask.)* and *Winner*. What made this area different was the fact that it was not defined in terms of particular entities or persons that can be said to fall within a sphere of exclusive federal legislative jurisdiction, like federally regulated undertakings, members of the Canadian military or the Postal Service. Instead, it was defined by a process or activity that fell within exclusive federal jurisdiction. The Court's willingness to apply that kind of thinking in such a new and different area suggested that it could potentially be applied to the benefit of any area of federal legislative jurisdiction.

The second reason was a function of the analytical process that the majority judges went through to reach their conclusion that the by-law in question could not constitutionally be applied to federal election signs. That process entailed (a) imagining that the Court had before it a challenge to the validity of a municipal by-law that, rather than generally prohibiting lawn signs, explicitly prohibited the erection of federal election signs on residential property, (b) deciding that such a by-law would encroach on federal legislative jurisdiction over federal elections and therefore be held to be invalid and (c) deducing that the municipality could therefore not be permitted to apply the generally worded by-law at issue to federal election signs.[66] That reasoning did not require the McKays to demonstrate that the application to them of the impugned legislation would have had a dire effect on them, or more particularly, on their ability to participate in federal elections as members of the electorate, a demonstration that they might well have been unable to make given the myriad of other ways in which they could have participated apart from the erecting of a residential election sign. Instead, it effectively called for a standard pith and substance analysis to be performed in relation to the municipal legislation, not as enacted, but as hypothetically recast in a way that made it apply solely to the erection of federal election signs.[67] That reasoning process

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66 *Id.*, at 804-807.

67 This same reasoning, it should be noted, was suggested by Taschereau J. in *Reference re Minimum Wage Act (Sask.)*, *supra*, note 58. It was also hinted at in Lord Porter's reasons for judgment in *Winner*, *supra*, note 42. Significantly, however, neither of these earlier judgments was referred to by Cartwright C.J.C., the author of the majority reasons in *McKay*, *supra*, note 65.

was very clearly grounded in a concern about Parliament's interest in retaining exclusive jurisdiction over federal elections, rather than in a concern about the McKays' interest in being able to participate in federal election campaigns. It also made it easier for the McKays to obtain the immunity they sought than a test that focused on the legislation's impact on them in their capacity as electors.

The third reason to view *McKay* as an important decision is the fact that the Supreme Court was divided on the question of whether a claim for immunity of the kind advanced by the McKays should even be considered legally viable. Four members of the Court, writing through Martland J., were strongly of the view that the McKays were not entitled to the immunity from the municipal by-law that the majority granted them. For these judges, "[t]he essential feature of the by-law in question here is that it is of general application and, admittedly, valid".[68] In their view, once it had been decided that the impugned provincial legislation possessed that "essential feature", that was the end of the matter[69] — the claim for immunity was without merit. In effect, these judges were challenging the very viability of the kind of thinking that underlay the majority decision in that case, and that we now associate with the doctrine of interjurisdictional immunity. For Martland J. and his colleagues, it was the pith and substance of the legislation that mattered, not the pith and substance — or, more generally, the constitutionality — of a particular application of that legislation. That such an approach might result in provincial legislation encroaching on an area of federal legislative jurisdiction did not appear to trouble them. In their view, it was always open to Parliament to protect its turf by legislating in relation to federal elections in a manner inconsistent with the provincial legislation and then rely on the federal paramountcy doctrine to override the latter. As we will see, this disagreement — a disagreement at the level of principle — comes to play a significant role not only in the later jurisprudence, including *CWB* and *Lafarge*, but also in the academic commentary that the doctrine has generated.

The second of these two important decisions was *Québec (Commission du Salaire Minimum) v. Bell Telephone Co. of Canada ("Bell No. 1")*.[70] In this case, a unanimous Supreme Court held that

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68 *McKay*, *id.*, at 812.

69 At least insofar as the *applicability* of the legislation was concerned. Had Parliament enacted federal legislation governing the erection of signs during a federal election campaign, the *operability* of the municipal by-law might have been at issue.

70 [1966] S.C.J. No. 51, [1966] S.C.R. 767 (S.C.C.).

valid, generally worded provincial minimum wage legislation was inapplicable to a federally regulated undertaking. Unlike *McKay*, *Bell Telephone* did not require the Court to extend the reach of the "doctrine of interjuris-dictional immunity" into a wholly new area. Like *McKay*, however, the decision was significant because of the reasoning that the Court used to reach the conclusion it did. Instead of asking the question called for by the test suggested by Lord Porter in the first part of his analysis in *Winner* — whether or not the application to Bell Telephone Co. of the provincial legislation at issue would have the effect of sterilizing or at least seriously impairing the company's business operations — Martland J., writing for the Court, appeared to ask a very different question — whether or not the application of that legislation to the company would "affect a vital part of [its] management and operation".[71] On the basis that the wages paid to employees constituted a vital part of any company's management and operation, he held that that test was satisfied and granted the immunity claimed. In support of this approach, Martland J. said that if Parliament had been given jurisdiction over certain kinds of undertakings, as it had, that jurisdiction had to include the power to regulate labour relations within such undertakings in general and wages in particular. And if that jurisdiction was exclusive, as it was, that meant that provincial legislatures could *not* regulate such matters, and that was so regardless of whether the provincial legislation was directed solely at federally regulated undertakings or was generally worded.[72]

The fact that this new approach appeared to make it easier for claimants than the one used in *Winner* did not appear to trouble the Court. In fact, Martland J. did not even acknowledge that the Court might be changing the test. It is interesting to speculate as to why he did not do so. One possible explanation — one which I believe has a good deal of merit — is that he did not consider that there was an established test for cases of the kind he was dealing with, and therefore there was nothing to change. The test suggested by Lord Porter was, it will be recalled, one of two alternative bases upon which he granted Mr. Winner's company the immunity it sought from the provincial statute at issue in that case, and the less important basis at that.

Another interesting feature of Martland J.'s judgment in *Bell No. 1* is that he made no reference whatsoever to the Court's decision in *McKay*.

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71 *Id.*, at 774.

72 *Id.*, at 777.

Interjurisdictional immunity in the context of federal elections — which, of course, Martland J. in his dissent had refused to grant in *McKay* — was apparently of no relevance to the Court when it was asked to consider a claim for immunity in the context of federally regulated undertakings. The highly compartmentalized approach to the doctrine reflected in Professor Laskin's casebook was still very much intact.

The decisions in these two cases came in for harsh criticism from three prominent constitutional scholars. Dale Gibson, in an article written in 1969,[73] complained that the Court in *Bell No. 1* "appears to have created a new principle of immunity", one that was vague in content, unwise as a matter of constitutional policy and unsound as a matter of constitutional law.[74] The vagueness of the new principle, he said, inhered in the language of "essential" or "vital part", which gave "wide discretion" to the courts called upon to apply it.[75] The principle was said to be unwise as a matter of constitutional policy because it gave federally regulated undertakings "a privileged and confusing status for no good reason", and, moreover, a status that "is most unfair to the ordinary citizen dealing with these organizations".[76] And it was unsound as a matter of constitutional law because, he said, it was inconsistent with the "long established principle of Canadian constitutional law ... that no law is regarded as being in relation to a particular head of power simply because it *affects* that area; the constitutional validity of a statute is judged instead on the basis of its dominant character — its '*pith and substance*'".[77] In his view, the Supreme Court's decision in *Bell No. 1* was irreconcilable with the Court's subsequent decision in *Carnation Co. v. Quebec (Agricultural Marketing Board)*,[78] in which it upheld the validity of orders made by a provincially established board fixing the price of milk sold to a company that marketed that milk interprovincially following processing. Those orders, he contended, "unquestionably affected an 'essential part' of an interprovincial business enterprise which was within federal jurisdiction by reason of Parliament's power over 'Trade and Commerce'".[79]

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73 Gibson, "Interjurisdictional Immunity", *supra*, note 49.

74 *Id.*, at 53.

75 *Id.*

76 *Id.*, at 54.

77 *Id.*, at 54-55 (emphasis in original).

78 [1968] S.C.J. No. 11, [1968] S.C.R. 238 (S.C.C.).

79 Gibson, "Interjurisdictional Immunity", *supra*, note 49, at 55.

It is worth noting that the focus of Gibson's article was not on what we have come to call the doctrine of interjurisdictional immunity.[80] It was, rather, on the question of whether and to what extent the laws of one government in Canada can be said to be binding on the other governments — in other words, the law relating to Crown immunity within the Canadian federation. The reason he included a discussion of *Bell No. 1* was that, in his view, federally regulated undertakings, as well as federally incorporated companies and employees of the federal Crown, have a status analogous to that of the federal Crown — a status to which he gave the label "federal instrumentalities".[81] His reading of the pre-*Bell No. 1* jurisprudence relating to the applicability of valid provincial legislation to such "instrumentalities" was that "they were subject to the general statutes of the provinces in which they operated, unless ... the effect of applying the statute would be to impair [their] status or essential capacities".[82] In his view, that kind of immunity from provincial legislation was entirely appropriate. As he put it, "... even statutes within provincial jurisdiction cannot be allowed to prevent the existence or frustrate the operations of the federal Crown and other federal enterprises whose existence and operations are impliedly guaranteed by the constitution".[83] What was not appropriate, for the reasons outlined above, was the broader immunity suggested by *Bell No. 1*.

Four years after Professor Gibson wrote his article, Paul Weiler included *Bell No. 1* in a long list of federalism decisions rendered by the Supreme Court of Canada with which he found fault.[84] It exemplified what he termed "the shifting and unpredictable character of the Supreme Court's attitude to provincial legislation",[85] and he shared Gibson's view that the new principle it established was both vague in scope and difficult to reconcile with cases like *Carnation* in which the Court had relied on the pith and substance doctrine.[86] He also found it troubling that a company should be able to escape liability for paying provincially established minimum wages to its employees when the law imposing

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80 That is true even though the term "interjurisdictional immunity" is used in the title of the article. *Id.*

81 *Id.*, at 52.

82 *Id.*

83 *Id.*, at 54.

84 Paul Weiler, "The Supreme Court of Canada and the Law of Federalism" (1973) 23 U.T.L.J. 307.

85 *Id.*, at 340.

86 *Id.*, at 341-42.

that minimum wage level had been in place for a number of years and the federal government had shown neither any interest in legislating in that field nor any concern that undertakings within its jurisdiction should have to pay those wages.[87]

Peter Hogg, in the second edition of his textbook, *Constitutional Law of Canada*, which appeared in 1985,[88] was harshly critical of both *Bell No. 1* and *McKay*. His critique was the most far-reaching of all. He characterized the theory on which they were based as "unprincipled", "unnecessary" and "perverse".[89] That theory, which he defined in terms of "federal heads of power not only confer[ring] power on the federal Parliament, but also operat[ing] 'defensively' to deny power to the provincial legislatures", was unprincipled, he said, because it was "inconsistent with the basic pith and substance doctrine — that a law 'in relation to' a provincial matter may validly 'affect' a federal matter".[90] The theory was unnecessary because if Parliament wanted to immunize entities falling within its legislative jurisdiction from provincial legislation, it could do so "by enacting appropriate laws which will be paramount over conflicting provincial laws".[91] And it was perverse because, on his reading of the jurisprudence, the theory appeared to operate only in favour of the federal order of government, which (for the reason just given) had no need of it, and not in favour of the provincial order, which (being on the short end of the paramountcy doctrine) arguably did need it.[92] In his view, the law of Canadian federalism would be better off without even the limited form of immunity offered to federally incorporated companies and federally regulated undertakings by the old "impair the essential powers and status" and "sterilize the operations" tests.

While legal academics might not have approved of *McKay* and *Bell No. 1*, counsel acting for clients whose circumstances were such that they had a connection with an area of federal legislative jurisdiction, and whose interests would be served if they were able to avoid the application to them of generally worded, valid provincial legislation, clearly found those decisions very much to their liking. Claims for

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87 *Id.*, at 340-41.

88 P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985).

89 *Id.*, at 331-32.

90 *Id.* Interestingly, Hogg makes no reference to Martland J.'s dissent in *McKay*, *supra*, note 65, which, as we have seen, was based very much on this line of reasoning.

91 *Id.*

92 *Id.*

interjurisdictional immunity became more frequent. Of the cases that reached the Supreme Court of Canada, one involved a claim by a federally incorporated company,[93] and the analysis was based on the "sterilize the essential powers and capacity" test that emerged from *John Deere Plow*. That claim was unsuccessful. Three of the other cases involved claims by federally regulated undertakings.[94] Interestingly, in none of these three cases did the members of the Court who wrote reasons have recourse to the "affect a vital part" approach articulated in *Bell No. 1*. One of the cases — the one in which the claim was successful — was held to be governed by the decision in *Winner*, and in the other two the claimant was held not in fact to be a federally regulated undertaking. The Supreme Court rejected two of these claims and accepted one.[95] The remaining claims were made by people or entities with a connection to federal heads of power like sections 91(5) ("Postal service"),[96] 91(8) ("The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada"),[97] 91(24) ("Indians and Lands Reserved for the Indians"),[98] 91(27) ("Criminal Law")[99] and "Peace Order and Good Government" (the source of federal jurisdiction *inter alia* over the RCMP).[100] The majority of this latter set of claims turned out to be successful.

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93 *Canadian Indemnity Co. v. British Columbia (Attorney General)*, [1976] S.C.J. No. 83, [1977] 2 S.C.R. 504 (S.C.C.).

94 *Ontario (Registrar of Motor Vehicles) v. Canadian American Transfer Ltd.*, [1972] S.C.J. No. 61, [1972] S.C.R. 811 (S.C.C.); *Quebec (Attorney General) v. Kellogg's Co. of Canada*, [1978] S.C.J. No. 5, [1978] 2 S.C.R. 211 (S.C.C.) and *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)*, [1978] S.C.J. No. 110, [1979] 1 S.C.R. 754 (S.C.C.).

95 The case in which the claim was successful was *Canadian American Transfer Ltd.*, *id.*, in which an interprovincial transport company was granted immunity from generally worded provincial transport regulations.

96 *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1973] S.C.J. No. 140, [1975] 1 S.C.R. 178 (S.C.C.).

97 *Canada (Attorney General) v. St.-Hubert Base Teachers' Assn.*, [1983] S.C.J. No. 36, [1983] 1 S.C.R. 498 (S.C.C.).

98 *Cardinal v. Alberta (Attorney General)*, [1975] S.C.J. No. 104, [1974] S.C.R. 695 (S.C.C.); *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, [1975] S.C.J. No. 101, [1976] 2 S.C.R. 751 (S.C.C.); *Four B Manufacturing v. United Garment Workers of America*, [1979] S.C.J. No. 138, [1980] 1 S.C.R. 1031 (S.C.C.); *Derrickson v. Derrickson*, [1986] S.C.J. No. 16, [1986] 1 S.C.R. 285 (S.C.C.); and *Paul v. Paul*, [1986] S.C.J. No. 19, [1986] 1 S.C.R. 306 (S.C.C.). It should be noted that claims for immunity based on s. 91(24) are complicated by the presence of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5. For a discussion of the role of s. 88 in such cases, see P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), c. 28.3.

99 *Scowby v. Glendinning*, [1986] S.C.J. No. 57, [1986] 2 S.C.R. 226 (S.C.C.).

100 *Quebec (Attorney General) v. Canada (Attorney General)*, [1978] S.C.J. No. 84, [1979] 1 S.C.R. 218 (S.C.C.) [hereinafter "*Keable*"]; and *Alberta (Attorney General) v. Putnam*, [1981] S.C.J. No. 85, [1981] 2 S.C.R. 267 (S.C.C.).

In the one case involving section 91(5), *Letter Carriers Union of Canada v. C.U.P.W.*, the Court held that work performed by drivers employed by the Post Office was "an integral part of the effective operation of the Post Office", and that labour relations between those drivers and the Post Office therefore fell within Parliament's exclusive jurisdiction under that head of power and could not be governed by provincial labour relations legislation. In *St. Hubert*, the only case involving section 91(8), the Court granted teachers on a military base the same immunity from provincial labour relations legislation on the basis of Parliament's exclusive jurisdiction thereunder. In doing so, the Court declined to make a distinction between employees on that base on the basis of the kind of functions they performed.[101] There were five cases in which the claim for immunity was based on section 91(24). The Court's analysis in these cases focused on whether the provincial legislation in question encroached on Parliament's exclusive jurisdiction under that head of power, with the content of that jurisdiction being defined with reference to the concept of "Indianness". In each of these cases, the ultimate question was whether or not "Indianness" would be affected if the impugned provincial legislation were applied in the contexts in question. If it would be, the provincial legislation had to be held inapplicable; if it would not be, the provincial legislation could apply. In two of the cases,[102] the Court held that it would be (although in one of those, *Cardinal*, the Court went on to hold that the provincial legislation was nevertheless applicable because of a provision of the *British North America Act, 1930*);[103] in the other case,[104] the Court held that it would not be. In the section 91(27) case, *Scowby v. Glendinning*, provisions of a provincial human rights statute directed at the arrest and detention of persons suspected of having committed an offence were held not to be applicable to the enforcement of federal criminal law because to apply them in that context would permit the provincial legislature to encroach

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101 *Supra*, note 97, at 507-508.

102 *Cardinal v. Alberta (Attorney General)* and *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, both *supra*, note 98.

103 20-21 Geo. V, c. 26 (U.K.). The Alberta Natural Resources Agreement of 1929 between the governments of Alberta and Canada transferred to Alberta the interest of the Crown in all Crown lands, mines and minerals within the boundaries of the province. Under s. 12 of the Agreement, Canada agreed that the laws of Alberta respecting game would apply to Indians within the province, with exceptions for the hunting of food. The Agreement was given the force of law by s. 1 of the *British North America Act, 1930* (since renamed the *Constitution Act, 1930*).

104 *Four B Manufacturing v. United Garment Workers*, *supra*, note 98.

on Parliament's exclusive jurisdiction over criminal procedure.[105] In *Keable*, the first of the two cases involving the RCMP, the Court held that a provincially established commission of inquiry was not permitted to investigate the management of the RCMP within that province as responsibility for the management of the force rested exclusively with the federal order of government.[106] Similar reasoning was used in the other case, *Putnam*, to prevent the Province of Alberta from using its provincially created police complaints process to discipline RCMP officers performing law enforcement functions in that province pursuant to contract.[107] The reasoning in these cases was generally grounded in a desire on the Court's part to protect from provincial invasion exclusive areas of federal legislative jurisdiction, but there are references to the various entities and what makes them particularly federal in nature.

In resolving these cases, the Court exhibited no sensitivity to the criticisms that had been levelled at its reasoning in *McKay* and *Bell No. 1* by Professors Gibson, Weiler and Hogg. In fact, it made no mention of those criticisms. In substance if not in name, and in spite of the concerns raised about it by leading constitutional scholars, the doctrine of interjurisdictional immunity appeared to have taken firm root in the law of Canadian federalism as we approached the end of the 20th century.

3. *O.P.S.E.U.* and *Bell No. 2*: A Return to the Margins — And Back Again

In 1987 Dickson C.J.C. authored a set of reasons in which the status of the doctrine of interjurisdictional immunity was called into serious question. Writing for himself and Lamer J. in an *obiter* passage in his concurring judgment in *O.P.S.E.U.*,[108] he described it as "not a

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105 *Supra*, note 99, at 240-41.

106 *Supra*, note 100, at 242.

107 *Supra*, note 100, at 276-78. Justice Dickson, who dissented in this case, did so on the basis that application of the provincial legislation would not impact on the management of the RCMP.

108 *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.). At issue in the case was the validity of provisions in an Ontario statute that prohibited civil servants in that province from engaging in a variety of political activities within both the provincial and federal arenas. The challenge was made on the basis of a number of grounds, one of which was that a provincial legislature cannot legislate in relation to activities within the federal political sphere. The Court unanimously dismissed the challenge.

particularly compelling doctrine".[109] Relying heavily on Peter Hogg's analysis of the doctrine two years earlier, he then went on to subject it to harsh criticism. He said there were "two strong reasons to doubt its value".[110] One, which he labelled "doctrinal", was that it was inconsistent with the pith and substance doctrine, and the other, labelled "policy", that it was unnecessary, because of Parliament's overriding power to protect its jurisdictional turf if it so desired.[111] These concerns, he said, suggested that the doctrine should be applied with caution, and in a way that left as "dominant" amongst the various doctrines of the law of Canadian federalism the pith and substance and double aspect doctrines, and reflected the Court's "very restrained approach to concurrency and paramountcy issues".[112] Chief Justice Dickson also made it clear that he considered *McKay* to have been wrongly decided, and suggested that it should be overruled.[113] This critique of the doctrine amounted to a strong endorsement of what Bruce Ryder has called "modern federalism", pursuant to which the courts exercise a great deal of restraint in reviewing the constitutionality of legislation on federalism grounds, and allow for considerable overlap between the federal and provincial spheres of jurisdiction.[114] It also suggested that, if Dickson C.J.C. had his way, the doctrine of interjurisdictional immunity, assuming it was going to survive at all, was going to be given very limited scope.[115]

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109 *Id.*, at 17.

110 *Id.*

111 *Id.*, at 18.

112 *Id.*

113 *Id.*, at 21-22.

114 Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 309, at 309.

115 My concern that this might be the effect of *O.P.S.E.U.* led me to write a case comment in which I argued that the critique levelled against the doctrine by Professor Hogg, and adopted by Dickson C.J.C., was ill founded (see R. Elliot, "Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance" (1988) 67 Can. Bar Rev. 523). I also argued in that case comment that the appropriate test to be used in cases in which the doctrine was properly invoked was whether or not the pith and substance of the impugned application of the legislation at issue fell within provincial or federal legislative jurisdiction. (Such a test, it will be recalled, was suggested by Lord Porter in *Ontario (Attorney General) v. Winner*, [1954] A.C. 541, [1954] 3 All E.R. 177 (P.C.) and by Taschereau J. in *Reference re Minimum Wage Act (Sask.)*, [1948] S.C.J. No. 16, [1948] S.C.R. 248 (S.C.C.), although I did not refer to either of those judgments in support of my contention.) I now no longer consider that to be the appropriate test. That is primarily because I do not believe that such a test responds adequately to the reason for having the doctrine (which is to protect the "core" areas of legislative jurisdiction of one order of government from encroachment by the other). It is also because I am now of the view that particular applications of a statute do not lend themselves at all easily to a pith and substance analysis. The test for which I am now advocating is explained *infra*, in Part IV, 2(*b*) of this paper.

Justice Beetz, who wrote for himself and three other members of the Court in *O.P.S.E.U.*, did not endorse Dickson C.J.C.'s critique of the doctrine. Neither, however, did he distance himself from it. The possibility existed, therefore, that other members of the Court, including himself, shared Dickson C.J.C.'s concerns, and would align themselves with him if and when called upon to do so in a later case. However, only 11 months later, in 1988, that possibility appeared to quickly evaporate. In that year, the Supreme Court rendered judgment in three cases in which claims for immunity from valid, generally worded provincial legislation regulating health and safety in the workplace had been advanced by federally regulated undertakings. In all three, the Court unanimously held that immunity should be granted. In one of them, *Quebec (Commission de la santé et de la sécurité du travail du Québec v. Bell Canada ("Bell No. 2")*,[116] Beetz J., who authored the Court's opinion in all three of the cases, decided to respond in a very direct manner to the criticisms of the doctrine of interjurisdictional immunity that had been levelled by Professors Gibson, Weiler and Hogg. Because the criticisms had "much in common", and he found those made by Hogg to be not only more recent but also more detailed, he opted to focus on them.[117] By so doing, he also, of course, indirectly but necessarily provided a response to the reasons for judgment of Dickson C.J.C. in *O.P.S.E.U.*, in which Hogg's views had been explicitly endorsed. (Remarkably, both Dickson C.J.C. and Lamer J. signed on to Beetz J.'s reasons for judgment in *Bell No. 2*.)

Justice Beetz's reply to the complaint that the doctrine of interjurisdictional immunity was inconsistent with the pith and substance doctrine was that that complaint ignored the fact that, according to the language of sections 91 and 92, Parliament had been given *exclusive* jurisdiction over certain areas. In his view, that textual feature of the *Constitution Act, 1867* required the courts first, to give each of those areas "a basic, minimum and unassailable content",[118] and second, to ensure that the provincial legislatures were not permitted to encroach on that content. In the case of Parliament's exclusive jurisdiction over federal undertakings, that "basic, minimum and unassailable content"

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116 [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.) [hereinafter "*Bell No. 2*"]. The other two cases were *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] S.C.J. No. 38, [1988] 1 S.C.R. 897 (S.C.C.) and *Canadian National Railway Co. v. Courtois*, [1988] S.C.J. No. 37, [1988] 1 S.C.R. 868 (S.C.C.).

117 *Bell No. 2*, *id.*, at 838.

118 *Id.*, at 839.

had to include not only the management of, but also working conditions and labour relations within, such undertakings.[119] And in protecting that content from provincial legislation, he said, it mattered not whether that legislation was of general or specific application. As he put it, "The exclusivity rule is absolute and does not allow for any distinction to be drawn between these two types of statute."[120]

Justice Beetz was equally dismissive of the "policy" argument, "according to which", as he put it, "it would always be open to Parliament to protect federal undertakings against provincial statutes by an exercise of its so-called ancillary power and the application of the paramountcy of federal legislation".[121] That argument, he said, had "very little merit ..., both in general terms and when invoked in the particular field of occupational health and safety. It is an argument which relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and, perhaps inevitably, highly detailed."[122] Such an approach he foresaw as being "a source of uncertainty and endless disputes", and potentially even "threaten[ing] the very occupational health and safety which are sought to be protected".[123]

Bell No. 2 was important not only because it saw the Court answer the critics of the doctrine of interjurisdictional immunity and thereby resurrect the doctrine as a legitimate and important feature of the law of Canadian federalism. It was also important because it represented the first real attempt by the Court to connect the disparate strands of jurisprudence in which recognition had been given to the notion of interjurisdictional immunity and define the doctrine's content in general terms. That definition, which Beetz J. referred to as "a more general rule", appeared twice in his reasons. The longer version was formulated in the following terms: "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

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119 *Id.*
120 *Id.*, at 840.
121 *Id.*, at 843.
122 *Id.*
123 *Id.*

provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction".[124] It is clear from his response to the doctrine's critics that the phrase "in what makes them specifically of federal jurisdiction" was intended by Beetz J. to refer to what he there termed the "basic, minimum and unassailable content" of the federal head of power in question.

Justice Beetz is understood by some to have done more in *Bell No. 2* than respond to the doctrine's critics and attempt to synthesize the various strands of interjurisdictional immunity jurisprudence in the form of a general rule or principle. He is also taken to have endorsed the "affect a vital part" test for federally regulated undertakings that Martland J. had articulated in *Bell No. 1*.[125] That reading of his judgment is based on a passage in which Beetz J. says that, because Parliament has exclusive jurisdiction over such undertakings, "[that jurisdiction] pre-empts that of the [provincial] 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".[126] It is worth noting, however, that that passage is preceded closely by another in which Beetz J. refers to Parliament's jurisdiction over wages and other working conditions in federally regulated undertakings as "an integral and vital part of its primary legislative authority over [such] undertakings".[127] It is not unreasonable to assume that, when Beetz J. invoked the "affect a vital part" test, he did so because it captured that other use and understanding of the term "vital part". In other words, it is because a "vital part" of a federally regulated undertaking constitutes a "vital part" of Parliament's exclusive jurisdiction over such an undertaking that he considers that test to be appropriate. It is Parliament's exclusive jurisdiction that he is seeking to protect, not the federally regulated undertaking.[128]

The ringing endorsement of the doctrine's viability given by Beetz J. in *Bell No. 2*, along with his careful formulation of the "general rule" for

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[124] *Id.*, at 762.

[125] See, *e.g.*, the reasons for judgment of Binnie and LeBel JJ. in *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 33 (S.C.C.).

[126] *Bell No. 2*, *supra*, note 116, at 840.

[127] *Id.*

[128] In a similar vein, John Furey argues in his comment on *CWB* and *Lafarge* ("Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 S.C.L.R. (2d) 597) that, after *Bell No. 2*, the "vital part" test should be understood to have become the measure of whether or not the application to a federally regulated undertaking of a generally worded provincial statute violated the general rule or principle that he had articulated in that case. In other words, that test constituted a particularization of that rule or principle in the context of federally regulated undertakings.

which the doctrine was said to stand, meant that, at least from the standpoint of the legal profession and lower court judges, the doctrine of interjurisdictional immunity was on reasonably firm footing as we moved into the last decade of the 20th century. Any fears raised by Chief Justice Dickson's critique in *O.P.S.E.U.* that the doctrine might have been on its way out had been dispelled. Importantly, Beetz J.'s judgment in that case led Professor Hogg to acknowledge in subsequent editions of his text that "some degree of interjurisdictional immunity is entailed by the Constitution of Canada's dual lists of exclusive powers. Otherwise," Hogg reasoned, "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."[129]

4. The 1990s and 2000s: Stability at Last?

In the 18 years between *Bell No. 2* and the *Canadian Western Bank* and *Lafarge* cases, the Supreme Court of Canada was not called upon to apply the doctrine of interjurisdictional immunity with any great frequency. However, when it was asked to do so, it treated the doctrine as an accepted feature of the law of Canadian federalism and, with two exceptions, applied it in a relatively straightforward manner.[130]

The first exception was *Irwin Toy Ltd. v. Quebec (Attorney General)*,[131] a case in which the question was whether valid, generally worded provincial legislation prohibiting the advertising of products to children could constitutionally be applied to broadcasting undertakings. To answer that question, the Court drew a distinction between provincial legislation that by its terms could be said to apply *directly* to federally regulated undertakings and provincial legislation that applied only *indirectly* to such undertakings.[132] In the former context, the Court said, the "affect a vital part" test from *Bell No. 1* was to be used, while in the latter, the "sterilize or impair the operations" test was to be used.[133]

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[129] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2007), c. 15.8(c), n. 141.

[130] See, *e.g.*, *Canada (National Battlefields Commission) v. C.T.C.U.Q.*, [1990] S.C.J. No. 90, [1990] 2 S.C.R. 838 (S.C.C.) (immunity granted); *R. v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 6, [1995] 2 S.C.R. 1028 (S.C.C.) (immunity denied); *Air Canada v. Ontario (Liquor Control Board)*, [1997] S.C.J. No. 66, [1997] 2 S.C.R. 581 (S.C.C.) (immunity denied); and *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.) (immunity granted).

[131] [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

[132] *Id.*, at 957.

[133] *Id.*, at 955.

Because the prohibition at issue in that case by its terms applied to companies seeking to advertise to children, and only indirectly to potential advertising media, the appropriate test was the "sterilize or impair the operations" test. And that test, the Court held, was not met, because denying broadcasting undertakings the right to advertise products to children, while possibly having a negative effect on their balance sheets, would not prevent them from carrying on business. The claim for immunity was therefore denied.

The distinction drawn by the Court in *Irwin Toy* was quickly criticized by Dale Gibson.[134] He found it wanting on a number of grounds: it failed to give effect to the "long-recognized principle" that the constitutionality of governmental action is a function of both its purpose and its effect;[135] it was inconsistent with the equally well established principle that governments "are not permitted to achieve indirectly what they cannot do directly";[136] and the fact that the Court failed to provide any explanation for it. He speculated that the Court might have been seeking to loosen some of the constraints on the applicability of provincial legislation to federally regulated undertakings that the Court's earlier judgment in *Bell No. 1* and its progeny had imposed. In his view, the Court would have done well to "simply [do] away with all interjurisdictional immunity of federal undertakings from provincial laws which do not threaten to impair them".[137] Peter Hogg has been equally critical of the distinction in more recent editions of his text. While, as noted above, he is now willing to accept that some degree of interjurisdictional immunity is entailed by the principle of exclusivity embodied in sections 91 and 92, he is strongly of the opinion that the scope of that immunity should be very limited. That said, it is his view that for the courts to grant protection to a core area of federal jurisdiction when provincial legislation invades that core directly, but not when it invades that core indirectly, "makes little sense".[138]

The second exception was *Law Society of British Columbia v. Mangat*,[139] decided by the Court in 2001. At issue in that case was whether or not a prohibition against non-lawyers engaging in the practice of law

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134 Comment (1990) 69 Can. Bar Rev. 339, at 351-53.

135 *Id.*, at 352.

136 *Id.*, at 352-53.

137 *Id.*, at 353.

138 P.W. Hogg, *Constitutional Law of Canada*, *supra*, note 129, at 386.

139 [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.) [hereinafter "*Mangat*"].

found in the *Legal Profession Act*[140] of British Columbia could constitutionally be applied to a non-lawyer acting as counsel for fee-paying clients in that province before the federally established Immigration and Refugee Board. That non-lawyer had invoked both the doctrine of interjurisdictional immunity and the doctrine of federal paramountcy in his defence to injunctive proceedings brought by the provincial law society. In the result, he succeeded on the basis of the latter doctrine, in reliance on provisions of the federal *Immigration Act*[141] that authorized non-lawyers to represent clients before that body for a fee. What is significant about this case for our purposes is that Gonthier J., on behalf of a unanimous court, decided that it was preferable to rely on the "more supple"[142] paramountcy doctrine rather than the doctrine of interjurisdictional immunity, and, in fact, never addressed the argument based on the latter. He did this in part because he was concerned that interjurisdictional immunity, if applied in that case, might result in "[the exclusion of] provincial legislation, even if Parliament did not legislate in the area",[143] and in part out of a desire to avoid "a bifurcation of the regulation and control of the legal profession in Canada",[144] a subject matter that he had earlier held had a clear double aspect,[145] and was therefore of legitimate interest to both orders of government.

While there is nothing in Gonthier J.'s reasons in *Mangat* to suggest that he or any of his colleagues had any interest in revisiting the issue of the viability of the doctrine of interjurisdictional immunity, those reasons did raise questions about the extent to which the Court was prepared to apply it in those cases in which it was invoked alongside the paramountcy doctrine. As we will see, this feature of Gonthier J.'s reasoning was relied upon by the majority in *CWB* and *Lafarge* in support of their reassessment of the doctrine's content and role.

These two cases to one side, the Court's track record in recent years suggested that it was quite comfortable with the doctrine of interjurisdictional immunity. That high degree of comfort was evident in *Ordon Estate v. Grail*,[146] decided in 1998. The question in that case was whether or not valid, generally worded provincial legislation governing civil causes

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140 S.B.C. 1987, c. 25, s. 26.

141 R.S.C. 1985, c. I-2, ss. 30 and 69(1).

142 *Mangat, supra*, note 139, at para. 54.

143 *Id.*, at para. 52.

144 *Id.*

145 *Id.*, at para. 23.

146 [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

of action could constitutionally be applied to a maritime negligence action. Justices Iacobucci and Major, writing for a unanimous court, held that it could not. To permit such legislation to apply to such an action, they said, would result in "an intrusion [by the provincial legislature] upon the unassailable core of federal maritime law".[147] Significantly, they had no difficulty adding yet another new sphere of federal jurisdiction — here, maritime law — to the list of those receiving protection from provincial legislation at the hands of the doctrine of interjurisdictional immunity. In fact, they explicitly asserted that the doctrine was one of general application, that is, a doctrine that could be applied to protect any sphere of federal legislative jurisdiction.[148]

The most recent case in which the Court had occasion to apply the doctrine of interjurisdictional immunity prior to *CWB* and *Lafarge* is *Paul v. British Columbia (Forest Appeals Commission)*.[149] That case was decided in 2003, and while it resulted in the claim of immunity being dismissed, no mention was made of the decision in *Mangat* and there was nothing in the Court's reasoning to suggest that the Court had any misgivings about the doctrine itself. On the contrary, the Court appeared to consider it to be every bit as well entrenched as the other doctrines that form the backbone of the law of Canadian federalism.

An important indicator of the extent to which the doctrine of interjurisdictional immunity had come to be accepted within the law of Canadian federalism following *Bell No. 2* is the fact that, in spite of his continuing concerns about the doctrine's reach, Professor Hogg has spoken in recent editions of his text of "three different ways" of attacking the constitutionality of legislation on federalism grounds, one of which is to question the applicability of the legislation (the others being to question the validity and operability of the legislation).[150] Each of these different kinds of attack is said to be governed by its own doctrine, or set of doctrines, and in the case of applicability attacks, the governing doctrine is that of interjurisdictional immunity. Moreover, and in spite of the decision in *Mangat*, Hogg's listing of these kinds of attack ranks the applicability attack after the validity attack and before the operability attack. He does not explain this ordering, but it seems likely that it reflects the relative seriousness of the consequences of a successful attack on each of these

147 *Id.*, at para. 85.

148 *Id.*, at paras. 81-83.

149 [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.).

150 P.W. Hogg, *Constitutional Law of Canada*, *supra*, note 129, c. 15.8(a).

bases: a successful validity attack results in the legislation in question being declared of no force or effect; a successful applicability attack results in the legislation being left intact as drafted, but read down so as to be inapplicable in the context in question; and a successful operability attack results in the legislation being declared inoperative for as long as the conflict in question continues to exist.

Chequered though the history of the doctrine has been, the decisions in *Ordon Grail* and *Paul* appeared to suggest that the Supreme Court of Canada had put behind it the doubts about the doctrine's viability voiced by Dickson C.J.C. in the *O.P.S.E.U.* case, and had come to see it as not only a viable but a necessary feature of the law of Canadian federalism. That the Court would engage in yet another fundamental reassessment of the doctrine in two recent cases, and again raise doubts about its status, therefore seemed unlikely.

5. Does the Doctrine Operate Both Ways?

There is one final matter that needs to be dealt with in this overview, and that is the question of whether the doctrine has been understood by the courts to operate in favour of the federal order of government alone, or in favour of both orders of government. It will have been noted by careful readers that all of the cases discussed to this point have involved claims for immunity being made in relation to provincial legislation. It will also be recalled that Professor Hogg's original 1985 critique of the doctrine included the claim that it was "perverse".[151] He made that claim because, on his reading of the jurisprudence, the doctrine *only* operated in favour of the federal order of government, which, given the doctrine of federal paramountcy, did not require its assistance, and not in favour of the provincial order, which, because it was always on the losing side in a paramountcy case, did. The question of whether the doctrine operates in favour of both orders of government was not one that the Supreme Court saw fit to address in explicit terms. However, as I have argued elsewhere,[152] it is my view that Hogg's reading of the jurisprudence prior to 1985 was incorrect, and that there were a number of cases in which federal legislation had been read down in order to protect from encroachment an area assigned exclusively to the provincial legislatures,

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[151] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985), at 332.

[152] R. Elliot, "Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance" (1988) 67 Can. Bar Rev. 523.

and can therefore be said to reflect the kind of thinking that underlies the use of doctrine of interjurisdictional immunity to protect areas of exclusive federal jurisdiction. There is no need to go through those cases again here. However, it is worth noting that, since that article was published, the Court has rendered a number of decisions that add force to the thesis that the doctrine operates both ways. One is *Clark v. Canadian National Railway Co.*,[153] in which the Court interpreted a limitation period in the federal *Railway Act*[154] to be applicable only to civil causes of action created by the Act itself in order to protect from federal incursion what the Court saw as exclusive provincial jurisdiction over the barring of common law tort actions. And more recently, in *Isen v. Simms*,[155] the Court read down a provision of the *Canada Shipping Act*[156] that limited the quantum of damage awards in tort actions involving ships in order to protect what it saw as exclusive provincial jurisdiction over liability in such actions.

III. *CANADIAN WESTERN BANK* AND *LAFARGE CANADA*: THE DOCTRINE REASSESSED

The claim of interjurisdictional immunity in *CWB* was made by a number of federally chartered banks, and was to the effect that they should be entitled to carry on their recently authorized insurance activities in the Province of Alberta without having to comply with provincial legislation regulating such activities in that province.[157] That claim was based on the assertion that those activities, when carried on by banks, constituted part of the "core" of Parliament's jurisdiction over banking under section 91(15) of the *Constitution Act, 1867*. In *Lafarge*, the claim of immunity was made by the Vancouver Port Authority (hereinafter the "VPA"), which wanted to be free to authorize the construction of an integrated ship

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153 [1988] S.C.J. No. 90, [1988] 2 S.C.R. 680 (S.C.C.).

154 R.S.C. 1970, c. R-2, s. 342(1).

155 [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349 (S.C.C.).

156 R.S.C. 1985, c. S-9, s. 577 [now repealed].

157 *CWB* was not, in fact, a case to which the doctrine of interjurisdictional immunity should have been applied. The provincial legislation there at issue, the *Insurance Act*, R.S.A. 2000, c. I-3, while valid, was not generally worded. The definition of "deposit-taking institution" provided by s. 1 of the Act specifically refers to banks in the list of entities to which the Act applies. The question that should have been asked was whether the inclusion of banks in that list was valid, with that question being resolved on the basis of the necessarily incidental doctrine (the appropriate doctrine for situations in which part only of a statute is being challenged). If, having applied that doctrine, the Court had held that the inclusion of banks was valid, then it would necessarily follow that banks would have to comply with the provisions of the Act. The case raised no applicability issue.

offloading/concrete batching facility on lands owned by it in the City of Vancouver without the construction of that facility also having to be approved by the City in accordance with the requirements of its zoning and development by-law. That claim was based on two alternative lines of argument. The first was that the lands owned by the VPA amounted to federally owned "public property" under section 91(1A) of the *Constitution Act, 1867* and the second was that the VPA was a federal undertaking under s. 91(10), which grants Parliament exclusive jurisdiction over "navigation and shipping". The authorization of this new facility, the VPA argued, fell within the "core" of federal jurisdiction under either or both of these heads of power.

In the result, neither the banks in *CWB* nor the VPA in *Lafarge* succeeded in obtaining the immunity they sought. In the former, all seven judges who sat[158] were of the view that the core of federal jurisdiction over banking in section 91(15) did not include the power to regulate the insurance activities in which the banks had been authorized to engage.[159] In the latter, the seven judges who sat[160] held that the lands in question did not constitute "public property" within the meaning of section 91(1A), and six of them held that the authority to control the kind of development proposed by Lafarge Canada Inc. on lands owned by the VPA did not lie at the core of federal jurisdiction under section 91(10).[161] In neither case, therefore, was it necessary to read the provincial legislation down in order to protect an area of exclusive federal legislative jurisdiction.

Had the Court left its reasoning at that, these cases would, of course, be of little consequence. They would simply serve as two more examples of failed attempts to have the doctrine of interjurisdictional immunity

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158 The *coram* in *CWB*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) consisted of McLachlin C.J.C. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. Justice Bastarache wrote separately.

159 Having reached that conclusion, the Court went on to consider whether or not the doctrine of federal paramountcy applied in the circumstances, and concluded that it did not. The outcome of the case was therefore that the banks had to comply with the provisions of the provincial legislation.

160 The *coram* in *Lafarge*, [2007] S.C.J. No. 23, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.) was the same as that in *CWB* except that Deschamps J. sat instead of McLachlin C.J.C.

161 Having reached that conclusion, the majority judges again went on to consider the paramountcy doctrine. In this case, they concluded that that doctrine did apply, and that the municipal legislation therefore could not operate in the circumstances in question. Justice Bastarache dissented in relation to the majority's holding that the doctrine of interjurisdictional immunity did not apply. In his view, that doctrine did apply, with the result that the municipal legislation could not constitutionally be applied to the kind of development in question. There was therefore no need for him to consider the paramountcy doctrine.

applied in novel circumstances to federally regulated undertakings. However, for reasons that were not explained and therefore remain unclear, Binnie and LeBel JJ., who wrote for the six members of the Court that ruled against Lafarge Canada Inc.'s claim for immunity on the basis of section 91(10), decided to opine, in *obiter dicta* and at considerable length, on a range of issues relating to the doctrine, and to do so, curiously, not in *Lafarge*, where there was a difference of opinion within the Court, but in *CWB*.

This reassessment of the doctrine, it should be noted, follows a brief discussion of "the principle of federalism", said by Binnie and LeBel JJ. to have been "a 'fundamental guiding principle' of our constitutional order since the time of Confederation ...".[162] A number of general themes are reflected in this discussion. One is the familiar characterization of federalism as a mechanism for balancing regional diversity with national unity.[163] Another is the equally familiar invocation of the "living tree" metaphor in relation to the role of the courts in interpreting the provisions of our Constitution.[164] The others are less familiar. These include (a) the proposition that "[e]ach head of power was assigned to the level of government best placed to exercise the power";[165] (b) characterizing as "fundamental objectives of federalism" both "[the promotion of] democratic participation by reserving meaningful powers to the local or regional level"[166] and "[the fostering of] co-operation among governments and legislatures for the common good";[167] (c) the assertion that "a certain degree of predictability with regard to the division of powers ... is essential" if these objectives are to be realized;[168] and (d) the proposition that the doctrines that the courts have developed in their role as "final arbiters of the division of powers" — primary amongst which, it becomes clear later on in their reasons, are the pith and substance doctrine, the doctrine of interjurisdictional immunity and the federal paramountcy doctrine — not only "permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in

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162 *Supra*, note 158, at para. 21.
163 *Id.*, at para. 22.
164 *Id.*, at para. 24.
165 *Id.*, at para. 22.
166 *Id.*
167 *Id.*
168 *Id.*

the operation of the division of powers", but also "must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and ... must facilitate, not undermine what this Court has called 'co-operative federalism'".[169]

This discussion of the "principle of federalism" warrants critical scrutiny in its own right, not least because Binnie and LeBel JJ. provide very little support, jurisprudential or otherwise, for the many propositions they assert in it, and some of those propositions, it must be said, are contestable.[170] However, it is not my purpose here to scrutinize this part of their judgment, except to the extent that it is relied upon by them in support of their reassessment of the doctrine of interjurisdictional immunity, and then only in the context of my scrutiny of that reassessment. As will become apparent, Binnie and LeBel JJ. rely more indirectly than directly on this discussion in support of their analysis. It does, however, form an important part of the backdrop to that analysis.

I turn now to the views expressed by Binnie and LeBel JJ. in relation specifically to the doctrine of interjurisdictional immunity, and the reasons given in support thereof. These views can usefully be summarized as follows:

1. There Is Good Reason to Have a Doctrine of Interjurisdictional Immunity

Justices Binnie and LeBel begin their commentary on the doctrine of interjurisdictional immunity with the assertion that "its existence is supported both textually and by the principles of federalism".[171] The textual support to which they refer is the same as that given by Martland and Beetz JJ. in *Bell No. 1* and *Bell No. 2* — the fact that sections 91 and 92 speak in terms of "exclusive" jurisdiction over "matters coming within [certain] classes of subjects" being granted to both Parliament and the provincial

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169 *Id.*, at para. 24.

170 I would include here *inter alia* the contentions that the division of powers in ss. 91 and 92 was based on functional efficiency considerations and that the fostering of co-operation between the two orders of government was one of the objectives of Canadian federalism.

171 *Id.*, at para. 33. Justice Bastarache, in his analysis of the doctrine in *Lafarge* (*supra*, note 160, at paras. 96-111) agrees that the doctrine's existence is supported by the constitutional text (*id.*, at para. 96). He also argues that the doctrine addresses "a practical need" — without it, he argues, the courts would not know when it is appropriate to hold that a valid provincial statute cannot constitutionally be applied in a particular context (*id.*, at para. 101). This argument is clearly premised on the assumption that such a holding will be appropriate in some circumstances, an assumption that many of the doctrine's critics do not accept. That assumption, it should be noted, forms a critically important feature of Bastarache J.'s approach to the doctrine.

legislatures.[172] They do not spell out the "principles of federalism" they have in mind. They do, however, mention, and with apparent approval, "a continuing concern about risk of erosion of provincial as well as federal competences", and the desirability of avoiding "when possible, situations of concurrency of powers".[173]

2. The Doctrine Operates to Protect Both Federal and Provincial Legislative Jurisdiction

Justices Binnie and LeBel are quite explicit in acknowledging that the reasons they give for the existence of the doctrine — the text of our Constitution and the principles of federalism — require that it operate to protect core areas of provincial jurisdiction from overreaching generally worded federal legislation as well as to protect core areas of federal jurisdiction from overreaching generally worded provincial legislation.[174] They also acknowledge that there is support in the jurisprudence for this understanding of the doctrine's reach, although they note that, when courts have limited the reach of federal legislation in order to protect provincial jurisdiction, they have done so "without too much doctrinal discussion".[175] They also note that "[i]n general, ... the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation".[176]

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172 *Id.*, at para. 34.

173 *Id.*

174 *Id.*, at paras. 33, 34 and 35. Justice Bastarache does not address this issue in his analysis of the doctrine.

175 *Id.*, at para. 35. It is worth noting that the cases cited as examples are *Canada (Attorney General) v. Law Society of British Columbia*, [1982] S.C.J. No. 70, [1982] 2 S.C.R. 307 (S.C.C.); *R. v. Dominion Stores*, [1979] S.C.J. No. 131, [1980] 1 S.C.R. 844 (S.C.C.) and *Labatt Brewing Co. v. Canada (Attorney General)*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914 (S.C.C.). Of these cases, only the first was an applicability case. The other two were validity cases, and therefore should not have been cited. For other cases in which federal legislation has been read down in order to protect the exclusivity of provincial jurisdiction, see R. Elliot, *supra*, note 152 and the text accompanying notes 153-56, *supra*.

176 *CWB*, *supra*, note 158, at para. 35. Justice Bastarache acknowledges this critique of the doctrine, but says that it "was fully addressed and essentially disarmed by Beetz J. in *Bell [No. 2]*": *Lafarge*, *supra*, at para. 100, and does not therefore respond to it himself.

3. The Doctrine Is Inconsistent with the "Dominant Tide" of Constitutional Interpretation

Recalling the critical assessment of the doctrine of interjurisdictional immunity made by Dickson C.J.C. in the *O.P.S.E.U.* case, Binnie and LeBel JJ. assert that the "dominant tide" of this country's federalism jurisprudence, which has featured heavy reliance on the pith and substance and double aspect doctrines, has reflected "the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government".[177] That concern, they suggest, is grounded in judicial respect for the democratic process and the conviction that the legislation at issue in federalism cases has been "enacted in furtherance of the public interest".[178] They also speak of "the importance of co-operation among government actors to ensure that federalism operates flexibly".[179] Because the doctrine of interjurisdictional immunity operates to frustrate the goals of giving effect to legislation enacted by both levels of government and facilitating the flexible operation of Canadian federalism, they, like Dickson C.J.C., characterize it as being inconsistent with that "dominant tide".[180]

Justices Binnie and LeBel trace the development of the doctrine of interjurisdictional immunity, which, they say, "was originally developed in a very special context, namely, to protect federally incorporated companies from provincial legislation affecting the essence of the power conferred on them as a result of their incorporation",[181] citing *John Deere Plow v. Wharton* and *Great West Saddlery Co. v. The King*. Interestingly, they suggest that the decisions in these cases might have been based on the fact that "it would have seemed natural to the Privy Council to extend the Crown's immunity to the entities it incorporated".[182] They then note that the doctrine "was subsequently applied to protect 'essential' parts of federal 'undertakings'",[183] citing *Bell Telephone* and *Winner*, the special status of Aboriginal peoples and their reserve lands, and certain "activities", like federal elections, falling within exclusive federal

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177 *Id.*, at para. 37 (emphasis in orginal).

178 *Id.* Paul Weiler's article, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307 is cited in support here.

179 *Id.*, at para. 42.

180 *Id.*, at para. 37.

181 *Id.*, at para. 39.

182 *Id.*

183 *Id.*, at para. 40.

jurisdiction.[184] They make no comment on the first two of these extensions, but raise a cautionary note in respect of the last. They contend that, "[w]hile the text and logic of our federal structure justifies [*sic*] the application of interjurisdictional immunity to certain federal 'activities,' ... a broad application of the doctrine to 'activities' creates practical problems of application much greater than in the case of works or undertakings, things or persons."[185] The reason they give in support of this assertion is that the "limits [of these federal works, undertakings, things and persons] are more readily defined" than those of federal activities.[186]

4. Because the Doctrine Is Inconsistent with the "Dominant Tide" of Constitutional Interpretation, and for Other Reasons, It Should be Applied with Caution

The conviction that the doctrine of interjurisdictional immunity conflicts with the general thrust of Canadian federalism jurisprudence and is therefore problematic leads Binnie and LeBel JJ. to argue that courts should avoid "[e]xcessive reliance" on it.[187] Their argument is not, however, based on that conviction alone. Four quite specific reasons are given in further support. The first is that, because application of the doctrine requires the courts to define the core of particular heads of power in sections 91 and 92, and because that core will be of uncertain scope, at least until it emerges "by means of judicial interpretations triggered serendipitously on a case-by-case basis", the doctrine risks creating "serious uncertainty".[188] Justices Binnie and LeBel recognize

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184 *Id.*, at paras. 40 and 41.

185 *Id.*, at para. 42. Justice Bastarache criticizes this feature of the majority's reasons, primarily on the basis that "[t]he immunity doctrine is about jurisdiction; what matters is whether or not a provincial law affects the core of a *federal head of legislative power*, regardless of whether or how that federal power is exercised or will be exercised, if at all, with respect to a particular project or activity" (*Lafarge*, *supra*, note 160, at para. 109, emphasis in original).

186 *CWB*, *id.*

187 *Id.*, at para. 43. What is meant by the term "excessive reliance" is nowhere explained. However, the implication of the rest of their analysis is that the term is not to be taken to mean dramatically enhancing or extending the role of the doctrine, but simply continuing to apply it in accordance with the understanding of the doctrine reflected in the existing jurisprudence.

188 *Id.* Justice Bastarache does not respond directly to this critique of the doctrine. He does, however, make it clear that, in his view, defining the "core" of a particular head of power should be done "on a case-by-case basis" (*Lafarge*, *supra*, note 160, at para. 127), which suggests that he is not troubled by the critique. It should be noted that Bastarache J. does acknowledge as "quite serious and merit[ing] some consideration" criticisms of the doctrine based on "the complexity of the test for immunity and the need for consistency and predictability in its application" (*Lafarge*, *id.*, at para. 101). His response to those criticisms is to clarify the test, which he purports to do by

that this uncertainty could be avoided if courts were willing to develop what they refer to as "abstract definitions" of the cores of particular heads of power, but say that such an approach would be inconsistent with "the tradition of Canadian constitutional interpretation, which favours an incremental approach".[189]

The second reason given is that the doctrine "increases the risk of creating 'legal vacuums'".[190] By this they mean that, if the doctrine is successfully invoked, and the order of government whose jurisdiction has been protected from encroachment has not legislated in the area in question, that area will not be governed by any law. And these "legal vacuums" are said to be "not desirable".[191] Justice Gonthier's reasons for judgment in *Mangat* are referenced in this context.

Thirdly, they point to the fact that the doctrine has tended in practice to operate in favour of federal jurisdiction and at the expense of provincial legislation, and hence to "[run] the risk of creating an unintentional centralizing tendency in constitutional interpretation".[192] This asymmetry is also said to be both "incompatible with the flexibility and co-ordination required by contemporary Canadian federalism"[193] and unfortunate as a matter of policy, given that most of the legislation enacted in Canada to protect workers, consumers and the environment comes from the provincial legislatures. Moreover, it "undermin[es] the principles of subsidiarity", which reflect a strong preference for legislation being enacted at a local rather than national level.[194]

Finally, Binnie and LeBel JJ. rely on the argument first advanced by Professor Hogg that the doctrine is unnecessary, because it is always open to Parliament to enact its own legislation in areas it considers important to control and then rely on the doctrine of federal paramountcy

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suggesting that "the full or plenary exercise (or potential exercise) of the federal legislative authority in question would need to be 'attacked,' 'hindered' or 'restrained' before immunity could attach. The key, to return to the language used by Beetz J. in *Bell [No. 2]*, ... is whether the provincial law 'bears upon' a federal matter or subject in what makes it 'specifically of federal jurisdiction'..." (*Lafarge*, *id.*, at para. 108).

189 *CWB*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.).

190 *Id.*, at para. 44. Justice Bastarache does not respond to this criticism of the doctrine. He does say at one point, however, that legislative gaps created by the granting of immunity in some circumstances are "consistent with the principle of 'exclusivity' ..." *Lafarge*, [2007] S.C.J. No. 23, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 111 (S.C.C.), which suggests that he is untroubled by it.

191 *CWB*, *id.*

192 *Id.*, at para. 45. Justice Bastarache acknowledges this concern (*Lafarge*, *supra*, note 190, at para. 99), but does not respond to it.

193 *Id.*

194 *Id.*

to eliminate any provincial legislation that has been enacted in those areas.[195]

5. The Test for Application of the Doctrine Needs to Be Revised to Make It More Difficult to Invoke Successfully

The more cautious approach to the doctrine advocated by Binnie and LeBel JJ. translates into two changes in the law governing the manner in which it is to be applied. One relates to the test for determining whether or not the impugned application of the legislation at issue sufficiently impinges on the jurisdiction of the other order of government to warrant a grant of immunity. That test is no longer to be framed in terms of whether or not the impugned application of the legislation "'affect[s]' that which makes a federal subject or object of rights specifically of federal jurisdiction".[196] Instead, they say, "It is when the adverse impact of a law adopted by one level of government increases in severity from 'affecting' to 'impairing' (without necessarily 'sterilizing' or 'paralyzing') that the 'core' competence of the other level of government ... is placed in jeopardy, and not before."[197] And Binnie and LeBel JJ. make it clear that, unlike "affects", "impairs" entails a finding of "adverse consequence".[198] While they do not spell out what exactly it is that has to be "impaired", the clear implication is that it is the interests or rights of the entity or person claiming the immunity.

In short, Binnie and LeBel JJ. hold, we are to revert to the test that the accepted wisdom — which they take to be correct[199] — tells us was in place prior to the decisions in *Bell No. 1* and *Bell No. 2*. That old test, they contend, "better reflected our federal scheme".[200] They do not explain clearly why they came to that view, but they imply that it is because that test is more consistent with the double aspect doctrine,

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[195] *Id.*, at para. 46. Justice Bastarache responds to this criticism of the doctrine by pointing out that the interjurisdictional immunity and paramountcy doctrines serve different purposes, and "[p]reserving the application of the immunity doctrine in certain contexts demonstrates the full extent and breadth of different types of constitutional legal inquiries" (*Lafarge*, *supra*, note 190, at para. 104). This response is evidence of the importance he attaches generally to being able to hold legislation inapplicable in certain circumstances.

[196] *Id.*, at para. 48. As noted *supra*, in note 184, Bastarache J. thought it appropriate to clarify the test; he did not agree with the change for which the majority argued.

[197] *Id.*

[198] *Id.*

[199] *Id.*, at para. 40. Justice Bastarache also accepts the correctness of the accepted wisdom in this regard: *Lafarge*, *supra*, note 190, at para. 97.

[200] *CWB*, *id.*, at para. 48.

which tolerates the legislation of one order of government having "incidental effects" on the jurisdiction of the other.

Before leaving this point, Binnie and LeBel JJ. refer to the distinction that was drawn in *Irwin Toy* between direct and indirect applications of provincial legislation to federal undertakings, and the assignment of the "affects" test to deal with the former and the "impairs" test to deal with the latter. That decision, they say, "signalled a measure of dissatisfaction with the 'affects' test without doing anything about it. At this point, we should complete the reassessment begun in *Irwin Toy* and hold that, in the absence of impairment, interjurisdictional immunity does not apply."[201]

While they saw fit to make this change to the test, it is important to note that Binnie and LeBel JJ. saw no reason to change the understanding of "core" that emerged from Beetz J.'s judgment in *Bell No. 2*. That understanding, it will be recalled, was in terms of the "basic, minimum and unassailable content" of the head of power said to be threatened by the impugned application. We can only conclude that they were satisfied that that understanding of the term was sufficiently narrow to warrant retaining it for the purposes of the new approach for which they advocate. To emphasize its narrow scope, they define "minimum" to mean "the minimum content necessary to make the power effective for the purpose for which it was conferred".[202] In the context of claims for immunity made by federally regulated undertakings — the kind of claim with which they were concerned in both *CWB* and *Lafarge* — Binnie and LeBel JJ. make it clear that they understand the "basic, minimum and unassailable content" to include the "essential and vital elements" of those undertakings, which they define to mean those elements "absolutely indispensable or necessary" to their functioning.[203] This narrow understanding of that "core" (and, they imply, other "cores") is supported, they suggest, by a review of many of the prior cases in which claims for immunity had been made by federally regulated undertakings and others.[204]

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201 *Id.*, at para. 49. Justice Bastarache preferred to deal with "the matter of indirect effects described in *Irwin Toy*; it raises a number of difficulties in its own right that are better left to another day" (*Lafarge*, *supra*, note 190, at para. 108).

202 *CWB*, *id.*, at para. 50.

203 *Id.*, at para. 51.

204 *Id.*, at paras. 52-56.

6. The Doctrine of Interjurisdictional Immunity Should Only Be Used after Considering the Doctrine of Federal Paramountcy in Areas in which the Former Doctrine Has Not Already Established Itself

This second and arguably more important change in the approach to be taken to the doctrine of interjurisdictional immunity relates to the circumstances in which the doctrine can and cannot continue to be applied before considering the doctrine of federal paramountcy. This change is made by Binnie and LeBel JJ. at the end of their commentary in *CWB* on the various doctrines the Court was required to consider in that case (which included, in addition to interjurisdictional immunity, the pith and substance and paramountcy doctrines). Under the heading, "Order of Application of the Constitutional Doctrines", they assert that the doctrine of interjurisdictional immunity "should in general be reserved for situations already covered by precedent".[205] This means, they say, that

> in practice, ... it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.[206]

This change is based on their view that, as a rule, the federal paramountcy doctrine provides a better basis upon which to resolve disputes about the applicability of provincial legislation in contexts that arguably fall within federal legislative jurisdiction, and they again cite Gonthier J.'s judgment in *Mangat* in support. The appeal to them of the paramountcy doctrine lies primarily in the fact that, unlike interjurisdictional immunity, it does not raise the spectre of legislative gaps being created in contexts in which Parliament has not exercised to the full extent the legislative jurisdiction it has been given over those contexts.

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205 *Id.*, at para. 77.

206 *Id.* Justice Bastarache disagrees with this change. He believes strongly in the need to deal with the issue of an impugned law's applicability (on the basis of the doctrine of interjurisdictional immunity) before dealing with the issue of that impugned law's operability (on the basis of the federal paramountcy doctrine). *Lafarge*, *supra*, note 190, at para. 112.

In their reasons for judgment in *Lafarge*, Binnie and LeBel JJ. use language that implies that, not only should the courts no longer apply the doctrine of interjurisdictional immunity before the doctrine of federal paramountcy in some circumstances, they should no longer apply the former doctrine *at all* in other circumstances. The passage in question, which is found very near the beginning of their reasons in that case, reads as follows:

> ... the doctrine [of interjurisdictional immunity] should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land-use planning controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.[207]

While that language is certainly open to being interpreted as laying down a new rule of the kind suggested,[208] I do not believe that Binnie and LeBel JJ. intended to create such a rule. There is nothing in their reasons for judgment in *Lafarge* that suggests that Binnie and LeBel JJ. wished to contradict or even cast doubt on anything they said in *CWB*. On the contrary, they explicitly invoke their reasoning in that case on more than one occasion in *Lafarge*, including at the beginning of the paragraph in which this very passage is found. They also go on to apply the doctrine of interjurisdictional immunity in *Lafarge*, in spite of what they say in this passage, and they do so before they consider the paramountcy doctrine.[209] Had they intended to prescribe a new rule, it is hardly to be expected that they would have violated it in the very case in which they laid it down. Finally, such a rule would constitute a change of major proportions to the law in this area, one that it is highly unlikely the Court would bring about without explicitly acknowledging that it was being made. No such acknowledgment is provided here.

The truth of the matter is that it will almost always, if not always, be true in cases in which the doctrine of interjurisdictional immunity is invoked that they will "present a double aspect".[210] The fact that the

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[207] *Lafarge*, *id.*, at para. 4.

[208] See *P.H.S. Community Services Society v. Canada (Attorney General)*, [2008] B.C.J. No. 951, 2008 BCSC 661 (B.C.S.C.).

[209] As in *CWB*, this is because the claim for immunity was again being made by a federally regulated undertaking, and hence in an area already "covered by precedent".

[210] This same point is made by J.G. Furey in his comment on *CWB* and *Lafarge*, "Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 S.C.L.R. (2d) 597.

provincial legislation is valid (this has to be either assumed or determined by the courts before the claim for immunity will be considered)[211] guarantees the presence of one or more provincial aspects, and the federal aspect will be provided by the federal head of power that forms the basis of the claim.[212] To preclude consideration of the doctrine of interjurisdictional immunity in any case that "presents a double aspect" would therefore effectively be to eliminate the doctrine. In my view, the better interpretation of this passage from *Lafarge* is that Binnie and LeBel JJ. were simply saying that they did not consider that case to be one in which the claim for immunity should be granted. That is, when they said that the doctrine "should not be used", they meant "should not be used to benefit this claimant".

IV. THE REASSESSMENT ASSESSED

Is the reassessment of the doctrine of interjurisdictional immunity undertaken by Binnie and LeBel JJ. in *CWB* and *Lafarge* convincing? In my view, the correct answer to that question is a mixed one. There are some features of the reassessment that we should applaud, and others that we should decry. To be applauded are the reaffirmation of the doctrine's legitimacy and the recognition that, as a matter of principle, the doctrine should operate to protect core areas of provincial as well as federal jurisdiction. To be decried are the concern that the doctrine is problematic because of its inconsistency with "the dominant tide of constitutional interpretation" pursuant to which we have ended up with a high degree of functional concurrency between federal and provincial jurisdiction, and the revisions to the doctrine that flow from that concern.

1. The Positives

I have argued elsewhere[213] that the doctrine of interjurisdictional immunity is an entirely legitimate feature of the law of Canadian federalism, and that it should be — and has been — understood to apply to protect core areas of both federal and provincial jurisdiction, and there

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[211] The Court is clear in *CWB*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 76 (S.C.C.) that the question of validity always precedes the question of applicability.

[212] This assumes that the doctrine is invoked against provincial rather than federal legislation.

[213] R. Elliot, "Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance" (1988) 67 Can. Bar Rev. 523.

is no reason to repeat those arguments here. Suffice it to say that they bear a very close resemblance to the arguments that Binnie and LeBel JJ. make in support of these same two propositions in *CWB* and that we can therefore assume have been accepted by the Supreme Court of Canada, at least as currently constituted.[214] The one qualification I would make is that, as I explained above, having re-read carefully the older cases that are said to explain the origins of the doctrine, I am now of the view that most of those cases do not in fact support its existence, and that the doctrine's pedigree is therefore a good deal shorter than the accepted wisdom suggests. To the extent that I relied on the accepted wisdom about the doctrine's origins in support of my arguments for its existence, I must now abandon that source of support. In my view, the legitimacy of the doctrine therefore rests on the arguments from constitutional text and principle upon which Binnie and LeBel JJ. rely.

2. The Negatives

(a) The Alleged Problematic Nature of the Doctrine

In my view, the weakness in the argument that the doctrine of interjurisdictional immunity is problematic because of its inconsistency with "the dominant tide" of our federalism jurisprudence lies not so much in its two premises — that the "dominant tide" of our jurisprudence favours a high degree of functional concurrency and that the doctrine of interjurisdictional immunity is inconsistent with that "dominant tide". It lies, rather, in the characterization of that inconsistency as problematic.

That said, the first of those two premises should not be taken to be a given. It is true that, on the whole, the Supreme Court of Canada has tended to favour functional concurrency over the classical "watertight compartments" approach championed by the Judicial Committee of the Privy Council.[215] However, as Bruce Ryder has pointed out, that tendency has been much more pronounced in the realm of social regulation than in the realm of economic regulation.[216] While one can

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214 *CWB*, *supra*, note 211, at paras. 33-35.

215 The term was used by Lord Atkin in the *Labour Conventions Reference*, [1937] A.C. 326, at 354 (P.C.).

216 Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 309, at 309-14 [hereinafter "Ryder"].

certainly find examples of modern federalism in the latter realm,[217] there are more than enough examples of the classical approach to support the contention that the classical and not the modern represents the "dominant tide" of our federalism jurisprudence in the economic realm — *Manitoba (Attorney General) v. Manitoba Egg and Poultry Assn.*,[218] *Burns Food Ltd. v. Manitoba (Attorney General)*,[219] *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*,[220] *Central Canada Potash Co. v. Saskatchewan*,[221] *Labatt Brewing Co. v. Canada*[222] and *R. v. Dominion Stores*[223] come readily to mind in this regard. There is reason to doubt, therefore, that when the courts apply the doctrine of interjurisdictional immunity in the economic realm — as in the cases in which it is invoked by federally regulated undertakings — they are not in fact swimming against the "dominant tide". On the contrary, one could say that they are swimming with it.

In my view, even if one accepts on faith the first of these premises, the inconsistency between the doctrine of interjurisdictional immunity and the "dominant tide" of our recent federalism jurisprudence is not only not problematic, it is the doctrine's great strength. In fact, it can be said to be the doctrine's very *raison d'être*. Left unchecked, the "dominant tide" of our modern federalism jurisprudence would make a mockery of the carefully constructed division of legislative authority embodied in sections 91 and 92 of the *Constitution Act, 1867* into two lists of "exclusive" spheres of jurisdiction. It would also result in a world in which, in an even broader range of areas than is the case now, people would be faced with overlapping and sometimes inconsistent federal and provincial legislation. As Hogg and Godil point out in their commentary on *CWB* and *Lafarge*, a high degree of overlap can create significant practical problems for federally regulated undertakings operating in

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217 See, for example, *Caloil Inc. v. Canada (Attorney General)*, [1970] S.C.J. No. 91, [1971] S.C.R. 543 (S.C.C.); *General Motors of Canada v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.); *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494 (S.C.C.); and *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 (S.C.C.).

218 [1971] S.C.J. No. 63, [1971] S.C.R. 689 (S.C.C.).

219 [1973] S.C.J. No. 151, [1975] 1 S.C.R. 494 (S.C.C.).

220 [1977] S.C.J. No. 124, [1978] 2 S.C.R. 545 (S.C.C.).

221 [1978] S.C.J. No. 72, [1979] 1 S.C.R. 42 (S.C.C.).

222 [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914 (S.C.C.).

223 [1979] S.C.J. No. 131, [1980] 1 S.C.R. 844 (S.C.C.).

more than one province.[224] Moreover, as they also point out, when the provincial legislation to which such undertakings are made subject is general in scope, there is reason to fear that "[p]rovincial 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".[225] Finally, when coupled with the doctrine of federal paramountcy, particularly in its recently reconceived form, the "dominant tide" would pose a significant threat to provincial autonomy.[226] In my view, the doctrine of interjurisdictional immunity functions as a necessary corrective to that "dominant tide". As Binnie and LeBel JJ. themselves acknowledge, it operates to ensure that each head of power in sections 91 and 92 retains for the order of government to which it was exclusively assigned "the minimum content necessary to make [that head of] power effective for the purpose for which it was conferred".[227]

Do the four additional reasons given by Binnie and LeBel JJ. for treating with caution the doctrine of interjurisdictional immunity add force to their position? I would argue not. The concern that a willingness on the part of the courts to apply the doctrine in novel contexts would lead to uncertainty undoubtedly has some validity. But a concern about uncertainty is surely an exceedingly weak reason not to apply a constitutional doctrine in novel contexts, particularly when that doctrine has been held — in the same judgment — to have a firm grounding in both the text of the Constitution and the broader principles which that text can be said to reflect. Moreover, as Binnie and LeBel JJ. acknowledge, developing an understanding of the scope and meaning of provisions of our Constitution through "judicial interpretations triggered serendipitously on a case-by-case basis", has been a standard feature of judicial review in this country, particularly in the federalism area, from its earliest days. As they themselves remind us, in *Citizens Insurance Co. v. Parsons*,[228] decided in 1881, Sir Montague Smith said on behalf of

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[224] P.W. Hogg & R. Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 S.C.L.R. (2d) 623, at 636.

[225] *Id.*

[226] See Ryder, *supra*, note 216 and R. Elliot, "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 S.C.L.R. (2d) 629 [hereinafter "Elliot, 'Safeguarding Provincial Autonomy'"].

[227] *CWB*, *supra*, note 211, at para. 50.

[228] (1881), 7 A.C. 96, [1881-1885] All E.R. Rep. 1179 (P.C.).

the Judicial Committee of the Privy Council that, "[i]n performing [the] difficult duty [of defining the content of the various heads of power in sections 91 and 92 of the then *British North America Act, 1867*], it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question at hand".[229] And that admonition is one that, by and large, the Privy Council and the Supreme Court of Canada respected, in spite of the uncertainty to which it inevitably gave rise.[230] Why the Court should now suddenly decide that it is so problematic as to deter them from applying the interjurisdictional immunity doctrine in novel contexts, is not explained.[231] Finally, if a concern about uncertainty in the law is reason enough to deter the courts from applying established doctrine in novel contexts in this area of constitutional law, it should presumably be reason enough to do so in others in which the governing doctrine is less than entirely clear — which, it must be said, would leave very few, if any, such areas in which constitutional doctrine could be applied in novel contexts. Consider, for example, the Court's approaches to section 7 and section 1 of the *Canadian Charter of Rights and Freedoms*,[232] which emphasize the importance of highly contextualized analysis, and which, with all due respect to the Court, make confident predictions impossible.

The concern about potential "legal vacuums" fares no better. If application of the doctrine of interjurisdictional immunity results on occasion in there being no legislation in a particular area either at all or for a period of time, it is because the courts have decided that general

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[229] *Id.*, at 109. It is true that Sir Montague Smith was talking about defining the general scope and meaning of the heads of power in ss. 91 and 92 rather than the content of the core of particular heads of power, but that is surely a distinction without a difference.

[230] Ironically, one of the cases in which that admonition was not respected was *Citizens Insurance Co. v. Parsons*, *id.*, itself. Sir Montague Smith went on in that case to suggest that s. 91(2) should be understood to be limited to the regulation of international and interprovincial trade and (perhaps) the general regulation of trade affecting the whole dominion — an interpretation that head of power continues to bear to this day.

[231] It is worth noting here that in both *CWB* and *Lafarge*, Binnie and LeBel JJ. had to confront the issue of whether or not, in the circumstances, application of the impugned provincial legislation would invade a core area of the federal jurisdiction in question (banking in the former and navigation and shipping in the latter). In both cases, they decided that it would not, and in neither did the inquiry appear to cause them any real difficulty. Why they think that such an inquiry would cause significant problems in the context of other areas of federal (and provincial) jurisdiction is not explained.

[232] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

and otherwise valid legislation enacted by one order of government cannot constitutionally be applied in a particular context. That decision will have been based on the courts' view that, on their reading of our Constitution, jurisdiction over that particular context rests exclusively with the other order of government. It is therefore up to that other order of government, and that other order of government alone, to decide whether or not legislation in that context is required and/or appropriate and, if so, what form that legislation should take. The "legal vacuum" is, in other words, a consequence of our having adopted constitutional arrangements under which "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".[233] And again, if the potential for "legal vacuums" is a serious concern in this area of constitutional law, one is compelled to ask why it is not also a serious concern in other areas. Striking down an entire statute on federalism grounds creates a much larger "legal vacuum" than holding that an otherwise valid statute cannot be applied in a particular — and usually narrowly defined — context, and yet there has never been a suggestion that that is a reason not to give effect to the division of powers in sections 91 and 92. And, in any event, can we be sure that the legislation in question will always be preferable to a "legal vacuum"? Even if we can be, is it the role of our judges to be making that kind of judgment? Finally, if the Court is strongly of the view that a "legal vacuum" in a particular context is truly a serious problem, can it not do what it has done with some frequency in other areas of constitutional law in recent years and suspend the implementation of its remedy — here, a declaration of inapplicability — for a period of time to permit the other order of government to enact new legislation to cover that context if that other order thinks it appropriate as a matter of public policy to do so?[234]

The third reason given by Binnie and LeBel JJ. for endorsing a cautious approach to the application of the doctrine of interjurisdictional immunity is that the doctrine has tended to operate in favour of the federal order of government and at the expense of the provincial. This asymmetry is said to create "an unintentional centralizing tendency in constitutional interpretation", and to be inconsistent with both "the flexibility and co-

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[233] *Constitution Act, 1982*, s. 52(1).

[234] The suspended declaration of invalidity was first used by the Court as a remedy in *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.). It has since been used in a number of Charter cases. For a discussion of these cases, see P.W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2007), c. 40.1(d).

ordination required by contemporary Canadian federalism"[235] and "the principles of subsidiarity".[236] That this asymmetry in the jurisprudence exists cannot be doubted. It must be noted, however, that even after the doctrine had received Beetz J.'s ringing endorsement in *Bell No. 2*, the number of instances in which the doctrine was invoked successfully against provincial legislation was relatively small — 10 over the course of 18 years.[237] That hardly supports the thesis that the doctrine constitutes a significant threat to Canadian federalism. Moreover, before one characterizes the asymmetry as a concern and uses it as a reason to change the manner in which the doctrine is to be applied, it surely makes sense to ask why that asymmetry exists. I can proffer three reasons. One is that for several decades, the dominant view, and certainly the view championed by Peter Hogg,[238] is that the doctrine *only* works in favour of the federal order of government. It is not unreasonable to suggest that that dominant view has deterred at least some lawyers from seeking immunity for their clients from general and otherwise valid federal legislation on the basis that, to apply that legislation in a particular context would constitute an encroachment into a core area of provincial legislative jurisdiction.[239] The second, and more important, is that, unlike provincial statutes regulating such matters as labour relations, working conditions and human rights within the workplace — the kinds of provincial statutes to which the doctrine has been applied with some frequency — federal statutes in those

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235 *CWB*, *supra*, note 211, at para. 45.

236 *Id.*

237 The cases in which successful claims have been made are (from the Supreme Court of Canada) *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.); and *Canada (National Battlefields Commission) v. C.T.C.U.Q.*, [1990] S.C.J. No. 90, [1990] 2 S.C.R. 838 (S.C.C.); (from other appellate courts) *R. v. Lewis*, [1997] O.J. No. 5075, 155 D.L.R. (4th) 442 (Ont. C.A.); *Mississauga (City) v. Greater Toronto Airports Authority*, [2000] O.J. No. 4086, 50 O.R. (3d) 641 (Ont. C.A.), leave to appeal denied, [2001] S.C.C.A. No. 83 (S.C.C.); *R. v. Kupchanko*, [2002] B.C.J. No. 148, 209 D.L.R. (4th) 658 (B.C.C.A.); and *Canada Mortgage and Housing Corp. v. Iness*, [2004] O.J. No. 771, 70 O.R. (3d) 148 (Ont. C.A.), leave to appeal denied [2004] S.C.C.A. No. 167 (S.C.C.A.); and (from superior trial courts) *Morin v. Canada*, [2000] F.C.J. No. 1074, [2000] 4 C.N.L.R. 218 (F.C.T.D.); *Regional District of Comox-Strathcona v. Hansen*, [2005] B.C.J. No. 365, [2005] 7 W.W.R. 249 (B.C.S.C.); *R. v. Clean Harbors Canada Inc.*, [2006] O.J. No. 4269, 2006 ONCJ 396 (Ont. C.J.); and *Telus Communications Co. v. Toronto (City)*, [2007] O.J. No. 790, 84 O.R. (3d) 656 (Ont. S.C.J.). Most of these cases — six in all — involved claims by federally regulated undertakings. Only one — *Ordon Estate v. Grail* — resulted in the extension of the doctrine into a new area of federal legislative jurisdiction.

238 See text accompanying notes 152-156.

239 Now that the Supreme Court has explicitly acknowledged that the doctrine operates in both directions, we can, I think, expect to see it being used to protect provincial legislative jurisdiction. For a recent example of that occurring, see *P.H.S. Community Services Society v. Canada (Attorney General)*, [2008] B.C.J. No. 951, 2008 BCSC 661 (B.C.S.C.).

spheres are explicitly limited in scope to those undertakings that, *qua* businesses, fall to be regulated federally.[240] There is no need, therefore, to rely on the doctrine of interjurisdictional immunity to prevent such federal legislation from applying where it constitutionally cannot; the statutes themselves take care of that concern. Given the number of interjurisdictional immunity cases in which federally regulated undertakings have succeeded in obtaining immunity from provincial legislation, this difference in legislative drafting practices has to be considered of some significance. The third reason is that the provincial legislatures have not been given exclusive jurisdiction over particular groups of people — like Indians, members of the armed forces and the RCMP — to the same degree as Parliament. To the extent that the "centralizing tendency" of the doctrine is a function of the fact that it has been applied in favour of such groups of people, as it clearly has been, I would argue that that tendency is attributable more to the manner in which the drafters of the *Constitution Act, 1867* chose to divide up legislative power between the two orders of government than to the doctrine itself.

Finally, even if the asymmetry in the jurisprudence cannot be explained away on these or other grounds, it is difficult to see why the doctrine's inconsistency with "flexibility and co-ordination" and "the principles of subsidiarity" should be of such concern. The doctrine operates to protect — and *only* to protect — the core of each of the heads of power in sections 91 and 92, what Binnie and LeBel JJ. elsewhere in their judgment describe as "[their] basic, minimum and unassailable content" and "the minimum content necessary to make the power effective for the purpose for which it was conferred".[241] If those terms are to be given any real meaning, I would argue that, not only should it not trouble us that the courts would have seen fit to develop a doctrine designed to ensure that exclusive jurisdiction over those "minimum contents" rests in the hands of the order of government to which it was exclusively assigned, it should trouble us if they had not.

It must also be said that the "flexibility" which Binnie and LeBel JJ. appear to value so highly — and by which they must be taken to mean a high degree of overlap between federal and provincial legislation — is far from an unalloyed blessing.[242] Moreover, it is difficult to see why the

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[240] See, for example, the *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 4-5 and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2.

[241] *CWB*, *supra*, note 211, at para. 50.

[242] See text accompanying notes 224-227, *supra*.

"co-ordination" which they also appear to value so highly is necessarily furthered by that high degree of overlap. If both orders of government can legislate in the same area, they can presumably do so whether or not they first obtain the consent of the other order to the legislation they intend to enact. While it might make for more coherent policy development and better intergovernmental relations for the two orders of government to co-operate in such circumstances, there is nothing that compels them to do so. It is only when jurisdiction over a social or economic problem is divided between the two orders — as, for example, in the cases of the production and marketing of agricultural products[243] and the operations of truck and bus lines[244] — that there is any need to co-operate. One could plausibly argue, therefore, that if the courts think it important to encourage co-operation between the two orders of government, they should work to reduce rather than enhance the degree of overlap between federal and provincial jurisdiction. And while it may be true as a matter of constitutional policy that devolving legislative authority to the lowest possible level of government in many areas has a good deal of merit, there is a point at which that principle has to give way to the express demands of the constitutional text and the doctrine to which that text has given rise. Furthermore, while the "principle of subsidiarity" has been referred to with approval in a recent judgment of the Supreme Court of Canada, it can hardly be said to be a principle that has been firmly established within our constitutional jurisprudence.[245]

The fourth and final reason given by Binnie and LeBel JJ. in support of their call for caution is that the doctrine of interjurisdictional immunity is unnecessary. If the federal government is troubled by the fact that provincial legislation is being applied in a context that falls within the core of a federal head of power, they argue, it can have Parliament enact legislation addressed to that context and rely on the doctrine of federal paramountcy to oust the provincial legislation. There is therefore no need for the courts to step in. It is evident that, if this line

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[243] See *Reference re Natural Products Marketing Act*, [1937] A.C. 377 and *Reference re Agricultural Products Marketing Act, 1970 (Canada)*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.).

[244] See *Ontario (Attorney General) v. Winner*, [1954] A.C. 541, [1954] 3 All E.R. 177 (P.C.) and *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.).

[245] The only other case in which the principle of subsidiarity has been even mentioned by the Court is *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241, at para. 3 (S.C.C.), *per* L'Heureux-Dubé J., writing for four members of a seven-member panel.

of argument has any merit, it only provides support for a cautious application of the doctrine in the service of protecting *federal* legislative jurisdiction. It clearly makes no sense to tell a provincial government that, if it is troubled by the fact that federal legislation is being applied in a context that falls within the core of a provincial head of power, it can have the province's legislature enact legislation directed to that context and rely on the paramountcy doctrine to oust the federal legislation. That is not the only problem with this line of argument. Another is that it assumes that, if Parliament has enacted federal legislation to govern the context in question, the courts will always be willing to find that the provincial legislation that is being applied to that context conflicts with the federal in such a way as to trigger the application of the paramountcy doctrine and result in the provincial being held inoperative. While it is true that the Supreme Court of Canada has relaxed the requirements for establishing a conflict in recent years,[246] it can hardly be assumed that those requirements would be held to have been met each and every time Parliament decided to enter the field. Finally, this reason, like the others, ignores the important fact that Binnie and LeBel JJ. have accepted that the doctrine of interjurisdictional immunity has a firm basis in both the text of our Constitution and the principles of federalism. If it has such a basis, then it should be applied as and when its application is called for.

(b) The Formal Changes to the Doctrine

Given my lack of enthusiasm for the arguments given by Binnie and LeBel JJ. in support of their view that the doctrine of interjurisdictional immunity is problematic and therefore should be applied with caution, it is hardly surprising that I am also unenthusiastic about the changes they make to the doctrine's content on the basis of those arguments. But I will deal now with each of those changes on its own merits.

The first, it will be recalled, is that application of the doctrine requires that the challenger demonstrate that the impugned legislation not merely "affect" but "impair" — a standard that falls short, they say, of "paralyze" or "sterilize" — "that which makes a federal subject or object of rights specifically of federal jurisdiction".[247] My difficulty with this test is not with the change from "affect" to "impair". It is that I do not believe that a test that is formulated in terms of the impact of the

246 See Elliot, "Safeguarding Provincial Autonomy", *supra*, note 226.

247 See text accompanying notes 196-198, *supra*.

impugned legislation on a particular entity, or that entity's rights, accurately reflects what should be the concern when the doctrine of interjurisdictional immunity is invoked. That kind of test implies that the concern is the impact of the impugned legislation on "a federal subject or object of rights". That the test as it has come down to us should reflect that concern may not be surprising, given the belief that the doctrine's origins lie in cases like *John Deere Plow* and *Bell Telephone*. As we have seen, the reasoning provided by the Privy Council in support of their holdings in those cases that the provincial legislation at issue could not constitutionally be applied to a federally incorporated and a federally regulated undertaking respectively was formulated in terms of the impact on those entities of applying the legislation to them. In the former, it was held that provincial legislatures cannot legislate in such a way as to sterilize, or impair to a substantial degree, the essential powers and capacities of a federally incorporated company granted to it by federal legislation; in the latter, it was held that provincial legislatures cannot legislate in such a way as to deprive a federally regulated undertaking of operational rights granted to it by federal legislation.

The purpose of the doctrine of interjurisdictional immunity is not to protect particular entities, or particular kinds of "right-holders", from legislation that they would like to be able to ignore. It is to protect the principle of exclusivity of legislative jurisdiction. If that is its purpose, the test should be formulated in such a way as to reflect that concern. In my view, the real test should therefore be *whether or not application of the impugned legislation to the context in question would result in an encroachment on a core area of one of the heads of power assigned to the other order of government.* This would mean that, in a case in which the doctrine is invoked against provincial legislation by a federally regulated undertaking — as occurred, for example, in *Bell No. 1* and *Bell No. 2* — the question should be whether or not application of that legislation to those undertakings — dealing respectively with the remuneration and working conditions of an undertaking's employees in the province — would result in an encroachment by a provincial legislature on a core aspect of Parliament's jurisdiction over federally regulated undertakings. In a case in which the doctrine is invoked against provincial legislation by an RCMP officer — as occurred, for example, in *Keable* and *Putnam* — it would mean that the question should be whether or not application of that legislation to the RCMP — dealing respectively with a provincial commission of inquiry into the conduct of the police in the province and the processing of complaints

against individual police officers in the province enforcing legislation on the basis of a contract between the province and the RCMP — would result in an encroachment on a core aspect of Parliament's jurisdiction over the RCMP.

Support for thinking about the test in these terms can readily be found in the reasoning of Martland and Beetz JJ. in *Bell No. 1* and *Bell No. 2*. While it is true, as we saw above, that both of these judges used language that suggested that the test to be applied when a claim of immunity from provincial legislation was made by a federally regulated undertaking is one that focuses on the impact of that legislation on the entity making the claim, it is also true that the use of that language followed passages in which these judges pointed out that Parliament had by the text of sections 91 and 92 been given exclusive legislative jurisdiction over certain kinds of undertakings, and then held that, if that exclusive jurisdiction covered anything, it had to cover the power to regulate wages and other working conditions within those undertakings. Ultimately, therefore, the rationale for granting the immunity claimed in those two cases lay not in a desire to protect the interests of the federally regulated undertaking involved, but in the need to protect an area of exclusive federal legislative jurisdiction from encroachment by provincial legislation. In other words, what the Court was really seeking to protect in those two cases was a "vital part" of Parliament's exclusive jurisdiction over federally regulated undertakings, not a "vital part" of the undertaking's operations. That reading of Beetz J.'s reasons for judgment in *Bell No. 2* is strongly supported by his emphasis on the importance of recognizing and protecting the "basic, minimum and unassailable core" of Parliament's jurisdiction over federally regulated undertakings. It is also supported by the "more general rule" that he extracts from the interjurisdictional immunity cases that had been decided prior to that case, which he formulates in terms of preserving "works, things or persons under the special and exclusive jurisdiction of Parliament ... [from the application of] provincial legislation, *when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject ...*".[248]

Further, albeit indirect, support for thinking about the test in these terms can be found in the Supreme Court of Canada's approach to the application of another doctrine in the law of Canadian federalism, the

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[248] *Bell No. 2*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at 751 (headnote) (S.C.C.) (emphasis added).

necessarily incidental doctrine. That doctrine comes into play when a court has to deal with a challenge to the validity of part only of a statute, and applies in the same way to both federal and provincial statutes.[249] According to the analytical framework that the Court established for the doctrine in *General Motors of Canada Ltd. v. City National Leasing*,[250] the first question that must be asked in such a case is whether and to what extent the impugned part, viewed in isolation from the rest of the statute, encroaches on the jurisdiction of the other order of government. Depending on the answer to that question, and assuming that the court is satisfied that the rest of the statute is valid, the court then determines what it considers to be the necessary degree of integration between the impugned part and the rest of the statute and decides whether the required degree of integration — which could be all the way from a rational or functional connection to truly integral — is present. The important feature of that analytical framework for our purposes is, of course, the first — the inquiry into the extent to which the impugned part of the statute can be said to encroach on the jurisdiction of the other order of government. That inquiry provides a model for the test that I am suggesting should be used when the doctrine of interjurisdictional immunity is invoked.

The jurisprudence relating to the necessarily incidental doctrine is relevant to the doctrine of interjurisdictional immunity for another reason as well. As a matter of principle, the ability of one order of government to encroach on the exclusive jurisdiction of the other should not depend on the form of the legislation it enacts. A provincial legislature that decides to enact a generally worded — and, we can assume for present purposes, perfectly valid — statute that the provincial government subsequently seeks to apply in a context that arguably falls within the exclusive jurisdiction of Parliament should be neither worse nor better off than a provincial legislature that specifies, in a long list of contexts within which its virtually identical statute is to apply, that very same arguably federal context. It is clear, however, that the basis for a federalism challenge to the application of these enactments in that problematic context would be different. A challenge to the attempted application of the generally worded statute in that context would be

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[249] See *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494 (S.C.C.) and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146 (S.C.C.).

[250] [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.).

governed by the doctrine of interjurisdictional immunity, while a challenge to the inclusion of that context in the list-based statute would be governed by the necessarily incidental doctrine. One would hope — and expect — that the same result would be arrived at in both cases. Using similar lines of inquiry — with the extent of the encroachment being at their heart — would clearly help to ensure that that was the case. (So too, it must be said, would a refinement to the analytical framework from *General Motors*. That refinement would entail requiring a court to end its analysis and strike down the impugned part of the statute if it found that that part, viewed in isolation, encroached on a core aspect of a head of power assigned to the other order of government.)

It will be recalled that Binnie and LeBel JJ. express particular concern about the use of the doctrine of interjurisdictional immunity in the realm of what they termed "'activities' within Parliament's jurisdiction".[251] While they were prepared to concede that such an extension was justified by "the text and logic of our federal structure", they say that "a broad application of the doctrine to 'activities' creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined".[252] Whether or not one thinks that such a distinction makes sense if one understands one of the purposes of the doctrine to be to protect the interests of particular entities, as the test proposed by Binnie and LeBel JJ. suggests is the case, it is difficult to see how it can be said to make any sense if one accepts that the doctrine's sole purpose is to protect the principle of exclusivity. On what basis can it be said that the "core" or "basic, minimum and unassailable content" of Parliament's jurisdiction over federal elections,[253] maritime law[254] and criminal law,[255] the federal "activities" to which they refer, is any more or less difficult to define than the "core" or "basic, minimum and unassailable content" of its jurisdiction over federally regulated undertakings, "Indians, and Lands reserved for the Indians" and the "Militia, Military and Naval Service, and Defence"?

I conclude this part of my analysis with a suggestion about nomenclature. That suggestion is that we abandon the use of the term "interjurisdictional immunity" in this context altogether and replace it with

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251 *CWB*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 41 (S.C.C.).

252 *Id.*, at para. 42.

253 See *R. v. McKay*, [1965] S.C.J. No. 51, [1965] S.C.R. 798 (S.C.C.).

254 See *Ordon Estate v. Grail*, [1988] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.).

255 See *Scowby v. Glendinning*, [1986] S.C.J. No. 57, [1986] 2 S.C.R. 226 (S.C.C.).

the term "exclusivity". Use of the term "interjurisdictional immunity" carries with it the implication that the doctrine's purpose is to protect the interests of particular entities, and encourages the kind of thinking that has led to the test being formulated, as Binnie and LeBel JJ. have now reformulated it, in terms of the impact of the impugned legislation on such entities and/or their rights. The term appears to have its origins in the article in which Professor Gibson criticized the reasoning in *Bell No. 1*. That article was directed primarily to the law relating to Crown immunity within the Canadian federal state. In that context, use of the term makes eminent sense. It makes less sense when one is looking for a label to attach to a doctrine whose purpose, as I have argued, is to protect the principle of jurisdictional exclusivity. If we accept that that is the doctrine's true purpose, the doctrine should be given a name that reflects it. I would therefore suggest that we rename the doctrine "the doctrine of exclusivity", or perhaps "the doctrine of jurisdictional exclusivity". Not only will that label more accurately reflect the doctrine's true purpose, it will serve as a reminder to the courts to keep their focus on the principle of legislative exclusivity when they are called upon to apply it.

The second change made by Binnie and LeBel JJ. to the content of the doctrine of interjurisdictional immunity relates to the circumstances in which it is to be applied after rather than, as has become customary, before the doctrine of federal paramountcy. In their view, unless the doctrine is invoked to protect the exclusivity of a head of power that the courts have used the doctrine to protect in the past, it is to play second fiddle to the doctrine of federal paramountcy. In other words, if the doctrine is invoked to protect the exclusivity of a "new" head of power, the court should first determine whether or not there is a federal enactment governing the same context. If there is, the court should go on to determine whether or not the impugned provincial legislation conflicts with the federal and, if it does, hold it inoperative in that context. Only if one of those inquiries results in a negative answer should the court address the argument based on the doctrine of interjurisdictional immunity.

There are a number of problems with a change of that nature. The most obvious is that its application only makes sense if the doctrine of interjurisdictional immunity is invoked against provincial legislation. To require that a court first consider the paramountcy doctrine in a case in which the doctrine of interjurisdictional immunity is invoked against a federal enactment would clearly be pointless. Another is that it invites argument from counsel on a question — is this a category A case (first paramountcy and then interjurisdictional immunity) or a category B case

(first interjurisdictional immunity and then paramountcy)? — that is not only peripheral to the real issue, but may in some instances pose a real challenge. How much jurisprudential support does one have to produce in order to qualify for category B status? One Supreme Court of Canada judgment? Two? One or more provincial court of appeal judgments? How recent do the judgments have to be? Do they have to have been unanimous? If lower court judgments count, does it matter whether or not they are considered to have been correctly decided? It is difficult to see how either the parties or the courts can be said to be better off under a regime that incorporates what amounts to an added — and unnecessary — layer of complexity to an already complex area of the law.

A third problem is that this approach runs the risk of producing uncertainty where certainty is to be preferred. Assume that a court applying this approach in a category A case involving provincial legislation were to hold that legislation inoperative because it conflicted with federal legislation governing the same context and, having made that holding, decline to consider the doctrine of interjurisdictional immunity. That holding might well resolve the problem for the time being, but what happens if the federal legislation is repealed, or amended in such a way that the provincial legislation (which we can assume is still on the books) no longer conflicts with it? At this point, the question as to whether or not the provincial legislation can apply in that same context will have to be addressed. Surely it makes more sense to address that issue when it is first raised.

Finally, it is difficult to see how this approach does anything to alleviate the asymmetrical character of the doctrine, which appears to trouble Binnie and LeBel JJ. a good deal. The only principled way to address that concern is to ensure that the doctrine is applied on the same basis and with equal vigour in both directions. And if one attaches importance to the principle of subsidiarity, as Binnie and LeBel JJ. appear to do, that is also the only principled way to advance that goal as well.

I conclude this section of the paper with two observations about the notion of "core" jurisdiction which, in my view at least, underlies the doctrine of interjurisdictional immunity. The first is that if one is persuaded by the arguments advanced by Binnie and LeBel JJ. in support of taking a more cautious approach to the application of that doctrine, the feature of the doctrine to use to give effect to that approach should be the concept of "core" jurisdiction. The size of those "core" areas of exclusive jurisdiction under the heads of power in sections 91

and 92 is clearly critical to the outcome of cases in which claims of immunity are made. The larger those areas are, the easier it will be for those seeking immunity to obtain it; the smaller they are, the less easy it will be. By narrowly construing the "core" areas of jurisdiction under the heads of power in sections 91 and 92 that are invoked in support of claims of immunity, the courts can limit the range of circumstances in which those claims will succeed. The second observation is that the language used by Beetz J. in *Bell No. 2* to define the concept of "core" — "basic, minimum and unassailable content" — as refined by Binnie and LeBel JJ. in *CWB* — "the minimum content necessary to make the power effective for the purpose for which it was conferred" — reflects a narrow understanding of it. In fact, I would argue that that language reflects as narrow an understanding of the concept as it can reasonably be given if it is to retain any real meaning at all.

V. CONCLUSION

The tension between classical and modern federalism — between an interpretation of sections 91 and 92 that seeks to give effect to the principle of jurisdictional exclusivity and one that allows for a good deal of jurisdictional overlap — has been a significant feature of our constitutional jurisprudence since this country was founded, and is likely to remain so for the foreseeable future. Agreement on precisely how that tension can best be resolved is unlikely ever to be achieved. Different generations of judges, addressing different challenges in different contexts, and bringing to bear different conceptions of Canadian federalism, will inevitably proffer different answers, if not in general terms, then at least in relation to particular kinds of issues. For the past few decades, it is fair to say that, when the validity of legislation has been at issue, modern federalism, with its heavy reliance on the pith and substance and double aspect doctrines, has had the upper hand with the members of our Supreme Court. However, even with them, the case can be made that, like their predecessors on the Privy Council, classical federalism has tended to be the preferred approach in relation to the power to regulate economic activity. The Supreme Court's new understanding of the federal paramountcy doctrine, which makes a finding of conflict easier to make than did the jurisprudence of a few decades ago, suggests a drift back in the direction of classical federalism insofar as its approach to questions of operability is concerned. And for most of the past 40 years, the Court's

approach to questions of applicability and the doctrine of interjurisdictional immunity has also evidenced a moderately classical disposition. Given the views expressed about that doctrine in *CWB* and *Lafarge*, it would appear that that disposition is in the process now of being replaced by a more modern one.

The fact that consensus on the question of how best to strike the balance between these two conflicting tendencies is unlikely ever to be achieved does not, of course, preclude the taking of strong positions in favour of one or the other, either generally or in particular contexts. The position for which I have contended in this paper is that, while the pedigree of the doctrine of interjurisdictional immunity may not be as lengthy as we have tended to assume, the rationale for including it alongside the pith and substance and paramountcy doctrines as a fundamental feature of the law of Canadian federalism — the need to respect the principle of exclusivity embodied in the text of sections 91 and 92, at least insofar as the core areas of each head of power are concerned — is a compelling one. That the Supreme Court of Canada has affirmed the correctness of that view in the *CWB* and *Lafarge* cases is, from my vantage point, therefore to be applauded. It is unfortunate, however, that, having provided that affirmation, the Court saw fit both to attenuate the status and to dilute the content of the doctrine.

It is to be hoped that the next time the Court sees fit to offer an extended commentary on the doctrine, it will do so on the basis that the approach that courts are to take in applying it should give meaningful effect to the rationale underlying it. Such an approach would avoid asking whether or not application of the generally worded federal or provincial legislation in question impacts negatively on the rights of entities seeking immunity from it, and instead ask whether application of that legislation encroaches on a core area of one of the heads of power assigned to the exclusive jurisdiction of the other order of government. And it would entail always asking that question before, and not after, considering the paramountcy doctrine. If, in the course of articulating such an approach, the Court were to rename the doctrine the doctrine of jurisdictional exclusivity, so much the better.