

A RE-FORMULATION OF THE INTERJURISDICTIONAL IMMUNITY DOCTRINE

Case comment on: *Canadian Western Bank v. Alberta* 2007 SCC 22; and
British Columbia (Attorney General) v. Lafarge 2007 SCC 23.

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Introduction

Starting from first principles, Hogg on Constitutional Law¹ states that:

The term interjurisdictional immunity does not have a precise meaning. A law that purports to apply to a matter outside the jurisdiction of the enacting legislative body may be attacked in three different ways. The attack may go to (1) the validity of the law, or (2) the applicability of the law, or (3) the operability of the law.

*First, it may be argue that the law is invalid, because the matter of the law (or its pith and substance) comes with a class of subjects outside the jurisdiction of the enacting legislative body . . . A **second** way of attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body is to **acknowledge that the law is valid** in most of its applications, but to **argue that the law should be interpreted so as not to apply to the matter** that is outside the jurisdiction of the enacting body. If this argument succeeds the law is not held to be invalid, but simply **inapplicable** to the extra-jurisdictional matter. The technique for limiting the application of the law to matters within jurisdiction is the **reading down** doctrine . . .*

A third way of attacking a law that applied to a matter outside the jurisdiction of the enacting body is to argue that the law is inoperative through the doctrine of paramountcy. The doctrine of paramountcy stipulates that, where there are inconsistent federal and provincial laws, it is the federal law that prevails . . .

***It is the second issue – the issue of applicability – that I am treating under the present rubric of interjurisdictional immunity** (emphasis added).*

¹ (Loose-leaf Edit, 2006 release).

(para 15.8)

Up until recently, the leading case on the interjurisdictional immunity doctrine was the decision of Beetz, J in *Bell Canada v. Quebec (Commission de la sante et de la securite du travail)*, [1988] 1 S.C.R. 179, which was applied in *Ordon Estate v. Grail* [1998] 3 S.C.R. 437 at para. 82-5² to hold that provincial laws providing for dependant's relief³ and contributory negligence⁴ could not apply incidentally to maritime negligence claims. In a widely quoted passage, the court stated that:

In our opinion, where the application of a provincial statute of general application would have the effect of regulating indirectly an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible [emphasis added - para. 85].

...

... it would be relatively rare that a provincial statute upon which a party seeks to rely in a maritime law negligence action will not have the effect of regulating a core issue of maritime law [emphasis added - para. 86].

Despite its application in *Ordon Estate v. Grail* and several aboriginal and transportation cases, the interjurisdictional immunity as enunciated in *Canada v. Quebec 1988* was not universally accepted, even at the SCC level⁵ and has now been substantially curtailed by the majority judgements of Binnie and LeBel JJ in the following two concurrently released Supreme Court of Canada cases:

Canadian Western Bank v. Alberta 2007 SCC 22; and

British Columbia (Attorney General) v. Lafarge 2007 SCC 23.

Canadian Western Bank v. Alberta

Canadian Western Bank v. Alberta was a case involving a challenge by certain federally regulated banks in Alberta to provincial legislation purporting make these banks subject to a provincial licensing scheme governing the promotion of insurance products. In upholding the provincial legislation, the court embarked upon a detailed analysis of constitutional doctrines and how they relate to each other.

² This judgement was written by Iacobucci and Major JJ, who are no longer on the court.

³ Including claims for loss of guidance care and affection (para. 98-103; 140), claims by siblings (not allowed) and other dependants (para. 104-9), claims by executors of estates (para. 113-17).

⁴ Following *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* [1997] S.C.R. 1210.

⁵ See discussion at paragraphs 35-47 of *Canada Western Bank v. Alberta*. In particular, see the quote from the decision of former Chief Justice Dickson at paragraph 36.

After confirming that the first stage of any constitutional challenge begins with a pith and substance analysis (see Hogg above), the court concluded that in some circumstances “the powers of one level of government must be protected against intrusions, even incidental ones, by the other level”.⁶ The court then reviewed the two methods of doing so, namely (1) the interjurisdictional immunity doctrine and (2) the paramountcy doctrine.

With respect to the interjurisdictional immunity doctrine, after reviewing the doctrine and its sources, the court concluded that the dominant tide of constitutional interpretation does not favour the doctrine. In arriving at this conclusion, the court referred to *Ordon Estate v. Grail* as one of the few cases where a court acknowledged that “the doctrine could potentially apply to all “activities” within Parliament’s jurisdiction” (para. 41), but cautioned that “a broad application of the doctrine to activities creates practical problems of application . . .” (para. 42). In addition to the legal uncertainty created by the difficulty of defining what is at the “core” of a legislator’s jurisdiction, the doctrine also creates legal vacuums because it applies even in the absence of a law created by another level of government. For these and other policy reasons, the court concluded, “the Court does **not** favour an intensive reliance on the doctrine” (para. 47 – emphasis added). As a consequence, the court re-formulated the doctrine with respect to the level of intrusion that is required upon the core of a power of a level of government in order to render a statute inapplicable:

*We believe that the law as it stood prior to Bell Canada (1988) better reflected our federal scheme. In our opinion, it is not enough for the provincial legislation simply to “affect” that which makes a federal subject or object of rights specifically of federal jurisdiction. **The difference between “affects” and “impairs” is that the former does not imply any adverse consequence whereas the latter does.** The shift in *Bell Canada (1988)* from “impairs” to “affects” is not consistent with the view subsequently adopted in *Mangat* that “[t]he existence of a double aspect to the subject matter . . . favours the application of the paramountcy doctrine rather than the doctrine of interjurisdictional immunity” (para. 52). Nor is the shift consistent with the earlier application by *Beetz J.* himself of the “impairment” test in *Dick v. The Queen*, 1985 CanLII 80 (S.C.C.), [1985] 2 S.C.R. 309, at pp. 323-24. **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 (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before** (emphasis added).*

...

In the absence of impairment, interjurisdictional immunity does not apply. (para. 49)

⁶ Para. 32.

In addition, the court adopted a comment from *Ordon Estate v. Grail* regarding the need for uniformity in the context of maritime negligence to support a submission that “the concern for uniformity favours the **provincial** laws so that all promoters of insurance within the province are subject to uniform standards of marketing behaviour and fair practises” (para. 59 – emphasis added).

In addition to reformulating the test respecting the level of intrusion required to trigger the application of the interjurisdictional immunity doctrine, the court also reformulated the order of application of the constitutional doctrines. On the basis of its conclusion that the paramountcy doctrine was preferable to the interjurisdictional immunity doctrine⁷, the court directed that if a constitutional challenge cannot be resolved on the basis of the pith and substance analysis alone, the court should proceed directly to the paramountcy test, unless there is pre-existing case law favouring the application of the interjurisdictional immunity doctrine.

Applying the new interjurisdictional immunity test to the facts of the case, the court easily found that the provision of credit related insurance products was not an activity vital or essential to banking. As result the interjurisdictional immunity doctrine was not applied so as to make the legislation inoperative [para 85-6; 89-97].

In an interesting *obiter* comment, it also suggested that the *Alberta Personal Property Security Act* could not be held inapplicable to the federal *Bank Act*, in part because doing so would “risk a legal vacuum”.⁸

With respect to the paramountcy doctrine, the court found that since the provincial law complimented the federal law rather than frustrated it,⁹ the law was not held to be inoperative.

It is interesting to note that none of the SCC justices on the panel of *Ordon Estate v Grail* participated in these two new cases, except for Bastarache J, who delivered a strong dissent against the majority’s re-formulation of the interjurisdictional immunity doctrine.

British Columbia (Attorney General) v. Lafarge

The case of *British Columbia (A.G.) v. Lafarge*, which was released concurrently with the case of *Canadian Western Bank v. Alberta*, applied the interjurisdictional immunity test to a maritime case. This case involved a proposal by Lafarge Canada Inc. to build an

⁷ Because it only applies if laws are incompatible and only to the extent of the incompatibility (*Canadian Western Bank v. Alberta*, para. 69.)

⁸ Para. 89.

⁹ Para 4. See also paragraphs 98-109.

integrated ship offloading/concrete batching facility in Commissioner Street area of Vancouver Harbour. It was proposed that aggregate would be barged in from the sea, offloaded, stored temporarily in silos on the waterfront, mixed it with cement and then trucked to construction sites. Although not opposed by the City of Vancouver, a ratepayers association commenced a proceeding in the Supreme Court of British Columbia seeking a direction from the court that City enforce its zoning and development by-law requiring Lafarge to obtain a permit. Apparently the ratepayers felt they would have more influence in opposing the project on elected municipal officials than they had upon the Vancouver Port Corporation.

Interjurisdictional Immunity Doctrine

At the Supreme Court level, the application was heard by Lowry J. who in applying the interjurisdictional immunity test, refused to read down the city by-laws because the act of mixing the aggregate with other ingredients to turn it into concrete was “not necessary for the transport to be performed.”¹⁰

Upon appeal, the British Columbia Court of Appeal in two concurring decisions overturned the decision of the Lowry J. Both Finch C.J. in one decision and Thackray and Mackenzie J.J.A. in a separate decision held the lands in question were “public lands” and as such were immune from provincial/municipal regulation.

In addition, Finch C.J. would also have allowed the appeal on the alternative ground that in applying the interjurisdictional immunity test the chamber’s judge erred by focussing on the question of whether the specific activity of making concrete was essential to navigation and shipping when he ought to have been focussing on “whether the application of the City’s Bylaw to regulate the development of port lands would affect a vital aspect of the federal power over navigation and shipping”¹¹ After concluding that “integrated land-use planning and control are essential to the continued strength and competitiveness of the Port of Vancouver”¹², Finch J. declared that the City By-law was constitutionally inapplicable to the proposed development because it “would impermissibly affect a vital federal shipping function.”¹³

Upon further appeal to the Supreme Court of Canada, the majority decision written by Binnie and LeBell JJ, declined to hold the City By-law constitutionally inapplicable pursuant to the interjurisdictional immunity doctrine.

¹⁰ Para. 23 of SCC decision; see also references to the interjurisdictional immunity doctrine at paragraphs 18, 41, 45 and 55 of Lowry J’s decision at 2002 BCSC 1412.

¹¹ Para. 2004 BCCA 104; para 26 SCC decision.

¹² Para. 24 of SCC decision.

¹³ Para. 27 of SCC decision.

With respect to the Public Lands argument adopted by the BCCA, the SCC rejected this argument as the Vancouver Port Authority was only an agent and did not actually own these lands.

With respect to the argument that land use planning by a port was a matter of federal jurisdiction, the court applied a test similar to the test applied by Lowry J. at first instance¹⁴ and focussed on the activities of the port:

*Activities that “support” port operations (directly or indirectly) are not necessarily in themselves port operations and need not necessarily be of a shipping and navigation nature, provided they generate revenue for the development of the port as an economic entity. To qualify as “support” in this sense is clearly not sufficient in our view to justify exclusive federal jurisdiction.*¹⁵

As a result, the court concluded that:

*[L]and-use jurisdiction asserted . . . while valid, does not attract interjurisdictional immunity . . . Authorizing the construction of a cement plant on these port lands does not fall within the core of vital functions of VPA.*¹⁶

Bastarache J, the only member of the panel who participated in the *Ordon Estate v. Grail* decision, dissented on interjurisdictional immunity issue. He would have applied a test similar to that advocated by Finch J. of the B.C.C.A.¹⁷ and found that “the regulation of land-use planning in support of port operations”¹⁸ falls within the core of s. 91(10).¹⁹

Since the Majority concluded that the land-use jurisdiction did not fall within the core of vital functions of the Vancouver Port Authority, it was not necessary for the court to apply the re-formulated second stage of the inter-jurisdictional immunity test developed in *Canadian Western Bank v. Alberta* with respect to the level of intrusion upon a core area that is required to trigger a declaration that a law is inapplicable (impairment).

Paramountcy Doctrine

Given the SCC’s stated dislike of legal vacuums²⁰ and preference for the paramountcy doctrine that was articulated in *Canadian Western Bank v. Alberta*²¹

¹⁴ Para. 46 and 71. See also para. 109 of decision of dissent on this point.

¹⁵ Para. 46.

¹⁶ Para. 72.

¹⁷ This appears to be the more conventional test. See Hogg at 15.5(a).

¹⁸ Para. 127.

¹⁹ Para. 131.

²⁰ Para. 44.

²¹ Para 49 quoted above.

the court went on to consider the application of this doctrine. The test for which, was restated as follows:

*The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reasons of an operational conflict or because such application would frustrate the purpose of the application.*²²

In applying this test, the court found an operational conflict with a City By-law that contained a 30-foot height restriction. There were also some conflicts with respect to noise and pollution from offloading facilities.²³ Even though the City Council had the discretion to grant an exemption to the height restriction, by leaving the final decision in the hands of the City, the purpose of the federal legislation²⁴ would have been frustrated by giving the City the “final say”.²⁵ As a result the City By-law was held inoperative.²⁶

While Bastarache J., would not have applied the paramountcy doctrine unless there was a demonstrated conflict between the City By-law and the port development by way of a refusal of the City to grant a permit.²⁷

In *obiter dictum*, the majority suggested that in future “where the shipping aspect of the project may be severable from the manufacturing operation”²⁸, the application of the paramountcy doctrine will be limited.

Analysis and Implications

Despite the strong dissent of Bastarache J., given the fact that he is the only remaining member of the original *Ordon Estate v. Grail* panel, these two cases represent a strong signal from the SCC that it favours a restrictive application of the interjurisdictional immunity doctrine and a more expansive application of the paramountcy doctrine. How this is applied in the future remains to be seen.

With respect to interjurisdictional immunity, since there are established precedents for application of the doctrine in the maritime context, it will still have to be considered in

²² Para. 77.

²³ Para. 81.

²⁴ The Vancouver Port Authority was created by federal letters of patent and is regulated by the *Canada Marine Act*, S.C. 1998, c. 10.

²⁵ Para. 75 -90.

²⁶ Although paragraph 91(2) refers to the term “inapplicable”, it is clear from paragraph 74 that the court meant to say “inoperative”.

²⁷ Para. 112-3.

²⁸ Para. 88.

maritime cases²⁹. However, based upon its application in *British Columbia (Attorney General) v. Lafarge*, in the future a narrower range of matters will likely be considered to be at the core of federal maritime law. Furthermore, given the use of the word “effect” in the quotes set out above from paragraphs 85 and 86 from *Ordon Estate v. Grail*, it is not likely that the broad application of the interjurisdictional immunity test as suggested by *Ordon Estate v. Grail* will continue.³⁰ In the future, courts will be looking for actual impairment of Canadian maritime law before a provincial law of general application will be declared inapplicable.

Although the Supreme Court of Canada has signalled a preference for the application of the paramountcy doctrine, the application of this doctrine in the maritime context is complicated by virtue of the fact that pursuant to the federal power over navigation and shipping the common law has been incorporated as federal statute law by the *Federal Court Act*³¹. Accordingly, in determining whether or not there exists a federal law that conflicts with an otherwise valid provincial law, the common law as incorporated into Canadian maritime law must also be reviewed. Given this fact, the legal vacuum referred to by the SCC in *Canadian Western Bank v. Alberta* rarely, if ever, exists.³² The application of the paramountcy test is further complicated by the fact that common law is usually not reformed as quickly as statute law. Accordingly, although technically speaking there is no legal vacuum in federal maritime law to trigger the paramountcy doctrine, there often still exists a vacuum in the sense that the common law has not kept pace with the statutory reform of many of the common law rules already undertaken by the provinces. In *Bow Valley Husky*, the SCC resolved this difficulty by deciding that the federal common law could be reformed prior to applying provincial law. In lieu of applying a provincial statute, it reformed the common law rule that barred a contributorily-negligent plaintiff from recovery so as to allow for apportionment of liability under reformed Canadian maritime law. The SCC in *Ordon v. Grail* incorporated this methodology into Step Three of its test, “Considering the Possibility of Reform.”³³ Since the *Ordon v. Grail* test effectively applies the paramountcy test at step two and applies the interjurisdictional immunity test at step four³⁴, it is consistent with the Court’s stated preference in *Canadian Western Bank v. Alberta* of applying the paramountcy test first.

Although the paramountcy test as set out at steps two and three of *Ordon Estate v. Grail* is not particularly easy to apply, it is the only methodology currently available to assist with the difficulty of applying the paramountcy test in cases involving federal maritime law. Given the SCC’s stated preference for the paramountcy test, I would suggest that the

²⁹ Subject to comments below regarding the order of application of the paramountcy test in *Ordon v. Grail*.

³⁰ It is arguable that this broad application never really was fully embraced by many trial courts. See for example the cases discussed in *Ordon v. Grail – Ten Years Later* presented by Andrew Mayer to the Canadian Maritime Law Association 8 March 2007. This is available at cmla.org

³¹ See *ITO v. Miida Electronics* [1986] 1 S.C.R. 752, para. 11-23, *Bow Valley Husky*, para. 89; *Ordon Estate v. Grail*, para 71(7) and 75.

³² See *Bow Valley*, para. 89.

³³ Para. 75.

³⁴ This was referred to by the Court as the “Constitutional Analysis”, but in fact was only the interjurisdictional immunity portion of the constitutional analysis.

courts ought to continue to apply the *Ordon Estate v. Grail* four step test with a revised fourth step to take into account the new requirement that there be actual “impairment” of a matter at the core of federal maritime law to trigger the interjurisdictional immunity doctrine.

In some interesting *obiter dictum* comments the Supreme Court of Canada has given some signals that there may be room for significant overlap in the areas of insurance and personal property security. It has also suggested that in appropriate cases the paramouncy doctrine can be applied selectively to “sever” or limit the extent to which provincial laws will be held inoperable.

Given the difficulty of applying the paramouncy test in situations where there exists only federal maritime common law, the current Transport Canada initiative to enact legislation to modernize a number of these common law principals ought to still be welcomed.

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