JUNE 4, 2025 • 8 MIN READ

Supreme Court: interjurisdictional immunity remains essential constitutional doctrine

AUTHORS

 Jon Silver

 Andrew Bernstein

 Jeremy Opolsky

 Yael Bienenstock

 Stefan Case

 Dennis E. Mahony

 Molly McMahon

Although federal and provincial governments have exclusive heads of power under Canada's *Constitution Act, 1867*, in practice, there can be overlap in the types of activities that both governments can regulate. But not all overlap is permitted. A key constitutional doctrine—interjurisdictional immunity—prevents the laws of one government from impairing the core of the other's legislative powers. In 2007, the Supreme Court of Canada signaled that this doctrine should be applied with restraint. But more recent cases have confirmed that it remains an important and robust tool. In *Opsis Airport Services Inc. v. Québec (Attorney General)*[1], the Supreme Court affirmed this trend, stressing the continued importance of interjurisdictional immunity. The Court also indicated it may be applied more flexibly in the future.

What you need to know

- **Interjurisdictional immunity remains a key constitutional principle.** Once considered by some to be a doctrine in stasis (if not decline), this decision confirms that interjurisdictional immunity is not going anywhere. Despite past cautions about the doctrine, the Court in this case employed a flexible approach to interjurisdictional immunity and emphasized that it "continues to play an essential role in relation to federalism".
- **No precedent requirement.** In 2007, the Supreme Court suggested that the reach of interjurisdictional immunity was generally limited to situations covered by previous case law. But in this decision, the Court clarified that precedent was "not determinative", and that the doctrine could apply to new areas of exclusive jurisdiction.
- **Interjurisdictional immunity may be considered before paramountcy.** Backtracking on previous guidance, the Court held that in federalism cases, interjurisdictional immunity may be considered before the doctrine of paramountcy (which addresses what happens when different levels of government regulate the same conduct in different ways).
- **The effects of a statute may be considered—even if they have not materialized**. Interjurisdictional immunity applies when a provincial statue impairs the core of an exclusive federal power (or vice-versa). In assessing whether this has occurred, courts can and should assess the statute's *potential* effects. There is no need to "wait and see" whether those effects materialize.

- **Interjurisdictional immunity for provincial powers?** To date, all the cases on interjurisdictional immunity relate to whether provincial law applies to federally regulated entities and undertakings. But the language used by the Court in *Opsis* strongly implies that it could—on the right facts—be used to render federal law inapplicable to provincially regulated entities and undertakings. This is most likely to play out in the context of section 92A of the *Constitution Act, 1867*, which gives provinces exclusive jurisdiction over non-renewable resources and the generation of electricity.

Background

Opsis involved two appeals from the Québec courts. The first dealt with Opsis Airport Services Inc.[2], which operates and manages various security services at Trudeau International Airport in Montréal. The second dealt with Québec Maritime Services Inc. (QMS)[3], which performs loading operations for transatlantic ships at a port in La Malbaie, Québec.

Both companies were charged with violations of the *Private Security Act* (*PSA*), a Québec statute that mandates a licensing regime for private security services. There was no dispute that Opsis and QMS violated the *PSA*. But they argued that, under the doctrine of interjurisdictional immunity, the *PSA* was inapplicable to their businesses.

SCC decision: interjurisdictional immunity plays essential role in federalism

In a unanimous judgment, the Supreme Court held that the *PSA* was inapplicable to the parties. Despite earlier caution that interjurisdictional immunity should be "applied with restraint", the Court recognized that the doctrine remains an essential and important part of Canadian federalism. Applying the doctrine on the facts, it held that the *PSA* impaired the core of Parliament's power over aeronautics (in Opsis's appeal) and navigation and shipping (in QMS's appeal) and was thus inapplicable to both companies. They were therefore acquitted of all charges.

Interjurisdictional immunity: expanding the application of the two-part test

The Court explained the two-part test for interjurisdictional immunity in a way that both confirms the continuing importance of the doctrine and expands its potential application:

1. **Intrusion on the "core" of a power.** The party must first show that the impugned statute intrudes on the "core" of an exclusive head of legislative power. This means that the statute must engage the "basic, minimum and unassailable" content of the head of power[4]. Since 2007, there had been a perception that this core be "reserved for situations already covered by precedent". But the Court confirmed that although precedent serves as a "useful guide" in identifying the core of the power[5], courts may recognize new exclusive fields of jurisdiction in the future.

2. **Impairing the core.** The party must also show that the impugned statute "impairs" the core of the head of power. The analysis focuses on the effects of the statute of one level of government on the core of the other level's exclusive power. The Court stressed, though, that courts must "take into account the effects of the application of the impugned statute, *whether they have materialized or not*"[6]. In other words, there is no need to "wait and see" if effects will happen. If the impugned law causes or *has the potential to cause* "adverse consequences" on the core of the power, it constitutes an impairment. This too is an important clarification of the robustness of interjurisdictional immunity.

Although interjurisdictional immunity was the only constitutional doctrine at issue, the Court also clarified its relationship with paramountcy (the constitutional doctrine that addresses conflicts between federal and provincial law). The Court had previously held that interjurisdictional immunity should be addressed only after considering whether paramountcy applies. In *Opsis*, the Court reversed itself and indicated that it will be "logical and appropriate" to consider interjurisdictional immunity first.

Application: *PSA* impairs core federal power

Applying the doctrine, the Court held that the appellants had met the two-part test:

1. **PSA intrudes on the core of the federal power over aeronautics and navigation and shipping**. In both cases, the Court held that the *PSA* intruded on the core of the relevant federal powers. In Opsis's appeal, existing precedent confirmed that airport security activities fell within the core of the federal aeronautics power. And although there were no precedents directly on point in QMS's appeal, the Court applied its flexible approach to recognize that security of marine facilities is within the core of the federal navigation and shipping power.

2. ***PSA* impairs the core of the powers**. The Court also concluded that while not every aspect of the *PSA* impaired the core of federal powers, its enforcement regime met this criterion. In doing so, the Court focused on which level of government has ultimate control over matters within federal jurisdiction. Here, the regime empowered the Bureau (the provincial regulatory enforcement body) to have the final say on matters falling within the core of Parliament's powers over both aeronautics and shipping. It put the appellants' activities at the "mercy" of the Bureau, permitting one level of government to "achieve indirectly what it lacks the authority to achieve directly"[7].

Result: the entire *PSA* is constitutionally inapplicable to the appellants

Even though only some provisions of the *PSA* impaired the core of the federal powers, the Court held that the most appropriate remedy was to "read down" the entire *PSA* so as not to apply to the appellants' activities. That is because the impairing provisions could not be severed from the rest of the *Act*—the enforcement regime related to the Bureau's essential function. Thus, severing only the impugned provisions might change the nature of the *PSA* as intended by the Québec legislature.

Implications

Despite past cautions about interjurisdictional immunity, *Opsis* confirms that the doctrine is alive and well—it "continues to play an essential role". Indeed, given the Court's clarifications about the role of precedent and the focus of impairment on potential effects, *Opsis* may well lead to an even broader application of the doctrine in the future.

One interesting question that arises out of *Opsis* is whether the Court will recognize "reverse" interjurisdictional immunity, to prevent the intrusion of federal law in areas of provincial jurisdiction on the appropriate facts. To date, all the Supreme Court's cases on interjurisdictional immunity relate to whether provincial law applies to federally regulated entities and undertakings. But the language used by the Court in *Opsis* strongly implies that it might in the future be used to render federal law inapplicable to provincially regulated entities and undertakings. This has been affirmed in principle by previous cases, but never applied. However, it was discussed by the Court of Appeal for Alberta in the reference relating to the *Impact Assessment Act* and may turn out to be an important issue in the future, particularly in relation to section 92A, which gives provinces exclusive jurisdiction over non-renewable resources and the generation of electricity.

FOOTNOTES

To discuss these issues, please contact the author(s).