Federalism Revisited by Supreme Court

Canadian Western Bank v. Alberta & British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority

The Supreme Court of Canada has released two judgments related to federalism and the division of powers. These cases discussed the scope of the doctrines of interjurisdictional immunity and federal paramountcy, which are applied in circumstances where it is necessary to protect the legislative powers of one level of government from the other [1]. In Canadian Western Bank v. Alberta and British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority, both doctrines were argued as a means of avoiding provincial legislation.

The doctrine of interjurisdictional immunity applies in situations where a federal person, thing, or undertaking is called into question by competing provincial legislation [2]. The leading case, Bell Canada v. Quebec, held that the "classes of subject" set out in sections 91 and 92 of the Constitution Act, 1867 must be assured a "basic, minimum and unassailable content" which is immune from the application of legislation enacted by the other level of government [3]. Essentially, this means that the powers set out in the Constitution Act must be preserved such that neither level of government has the authority to infringe in a major way on the powers of the other level of government.

The doctrine of federal paramountcy is used when federal and provincial laws are both valid but are inconsistent with one another [4]. In Canadian Western Bank, the Supreme Court held that "where the operational effects of provincial legislation are incompatible with the federal legislation, the federal legislation must prevail and the provincial legislation be rendered inoperative to the extent of the incompatibility" [5].

In 2000, Alberta enacted changes to the Insurance Act, which made federally legislated banks selling various forms of insurance subject to provincial regulations governing the promotion of insurance products. The purpose of the legislation in question was to protect consumers.

The issue on appeal to the Supreme Court of Canada was whether the "authorized creditor insurance products are themselves so vital and essential to lending that they join lending at the core of banking" [6].

1. Canadian Western Bank, the appellant banks argued that the promotion of insurance was within the "core of banking" (and therefore infringed upon the provincial regulations in question), because the lending of money and the promotion of insurance are closely connected. As a result, they argued

that the doctrine of interjurisdictional immunity applied, exempting them from following the provincial legislation. The banks also argued that the amendments of the Insurance Act conflicted with the Bank Act, a federal piece of legislation falling under section 91(15) of the Constitution Act, which confers the exclusive ability to legislate regarding banking upon the federal government. As the Bank Act deals with credit-related insurances by banks, the petitioners argued that they were exempt based on the doctrine of federal paramountcy.

The Court rejected the banks' claim to interjurisdictional immunity and found that the fact that Parliament allows banks to enter into a provincially regulated line of business (insurance) does not "broaden the scope of the exclusive legislative power granted by the Constitution" [7]. The Court ruled that in promoting insurance, banks are only secondarily furthering the security of their loan portfolios and that the business of insurance for banks was primarily an issue of profit. Alberta's insurance law does not deny banks access to insurance as collateral [8]. The Court held that the optional nature of insurance shows that it is not connected to a "basic, minimum and unassailable" element of banking [9].

With respect to federal paramountcy, the onus is on the party relying on the doctrine to show that the federal and provincial laws are actually incompatible. In this case, the onus was on the bank. The Court held that neither operational incompatibility nor the frustration of a federal purpose had been made out, and therefore, the doctrine of federal paramountcy was an ineffective argument [10]. The Court rejected the bank's argument on five grounds:

1. Parliament did not consider the promotion of insurance to be "the business of banking" [11];
2. The insurance that the banks sell is optional, not mandatory, and can be canceled at any point;
3. Insurance is only loosely connected to the eventual payment of debt [12];
4. Banks deal with insurance as a profitable business venture that is separate from other banking operations; and
5. The promotion of insurance does not necessarily help reduce overall portfolio risk as the bank's contended given that there are other means of securing loans [13].

The Court held that neither operational incompatibility ("compliance with one is defiance of the other") [14] nor frustration of a federal purpose has been made out. Therefore, the federal paramountcy argument failed.

In the companion case, British Columbia (Attorney General) v. Lafarge Canada Inc. and Vancouver Port Authority, a similar issue was argued with respect to a project to build an

“integrated” ship offloading/concrete batching facility on the Vancouver port. Objection was taken to the Lafarge project by the Burrardview Neighbourhood Association (the “Ratepayers,”) who argued that the City ought to have insisted that Lafarge obtain a City Development Permit for the project [15]. However, the Vancouver Port Authority (VPA) argued that they enjoyed interjurisdictional immunity as federal “public property” under section 91(1A) of the Constitution Act or, in the alternative, that their management is vital to the VPA’s “federal undertaking” pursuant to section 91(10) regarding “navigation and shipping” [16].

The Court held that the doctrine of interjurisdictional immunity should not be used where the legislative subject matter deals with the same issue. In this case, both the federal and provincial authorities have a compelling interest.

Unlike the companion case, however, the doctrine of federal paramountcy did apply and the case was resolved in favour of the VPA on that basis.

Further Reading:

Fred Wynne, Federalism Backgrounder

Sources:

[1] Canadian Western Bank v. Alberta, 2007 SCC 22 at 32 [Canadian Western Bank].
[2] Peter Hogg, Constitutional Law of Canada, Student Edition 2006 (Toronto: Thomson Carswell, 2006) at 406.
[3] Bell Canada v. Quebec (Comission de la santé et de la securité du travail) [1988] 1 S.C.R. 749 at 254.
[4] Hogg, supra, note 2 at 245.
[5] Canadian Western Bank, supra, note 1 at 69.
[6] Ibid at 20.
[7] Ibid at 4.
[8] Ibid at 58.
[9] Ibid at 63.
[10] Ibid at 98.
[11] Ibid at 91.
[12] Ibid at 93.
[13] Ibid at 95.
[14] Multiple Access Ltd. v. McCutcheon, [1982] S.C.R. 161 at 191-192.
[15] British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23 at 3 [Lafarge].
[16] Lafarge, supra, note 15 at 3.