Interjurisdictional Immunity

The doctrine of Interjurisdictional immunity is a rarely used constitutional tool that is employed to insulate the activities of one level of government from another.[1] Thus far in Canadian case law, this doctrine has almost always been used in favour of the federal government.[2]

Typically, interjurisdictional immunity is triggered when a province passes a law of general application, for example laws governing speed limits. These laws can often affect companies or industries, otherwise known as undertakings, which are exclusively governed by federal law.[3] An example of this would be if a Canada Post truck received a speeding ticket. In this instance, the doctrine of interjurisdictional immunity could be invoked to attempt to stop Canada Post from having to pay the ticket because they are a federal undertaking immune from provincial law.

In practice, interjurisdictional immunity is used in only very rare circumstances.[4] Courts have held that it is a doctrine that goes against the modern way of interpreting the Constitution, which favours co-operation and overlap.[5] Concerns have been raised that overusing the doctrine could lead to either legal vacuums where no law would apply or to an over-centralization of power since the doctrine has traditionally favoured the federal government over the provinces.[6]

In order to deal with these issues, the Supreme Court of Canada has created a very strict test that needs to be met in order for the doctrine to be used. The first test was adopted in the 1988 *Bell Canada* case.[7] It stated that a law had to affect a vital or essential part of an undertaking of the other jurisdiction for the doctrine of interjurisdictional immunity to be used.[8] The Supreme Court re-evaluated this test ten years later in the *Canadian Western Bank* case, finding that the *Bell Canada* test overextended the doctrine.[9] Under the new test, a law has to impair a vital or essential part of an undertaking in order for the doctrine to be used.[10] The Supreme Court reaffirmed the limited scope of the doctrine and stated its preference for pith and substance analysis and the doctrine of paramountcy.[11]

Prominent Interjurisdictional Immunity Cases:

Bell Canada v Quebec[12]

Canadian Western Bank v Alberta[13]

[1] Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2021) (loose-leaf revision 1), ch 15 at 16; Kerry Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity" (2019) 52:2 UBC L Rev 697 at 713–714.

[2] Wilkins, *supra* note 1 at 714–723; Hogg & Wright, *supra* note 1 ch 15 at 21.

[3] Hogg & Wright, *supra* note 1 ch 15 at 18.

[4] Hogg & Wright, *supra* note 1 ch 15 at 20.

[5] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 42 ; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras 148–149; Wilkins, *supra* note 1 at 731–733, 735–736.

[6] Wilkins, *supra* note 1 at 729–731, 734–735; *Canadian Western Bank*, *supra* note 5 at paras 43–45.

[7] *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161 .

[8] *Bell Canada*, *supra* note 7 at para 316; Hogg & Wright, *supra* note 1 ch 15 at 20.

[9] *Canadian Western Bank*, *supra* note 5.

[10] *Canadian Western Bank*, *supra* note 5 at paras 48–49; Hogg & Wright, *supra* note 1 ch 15 at 20.

[11] Hogg & Wright, *supra* note 1 ch 15 at 20.

[12] *Bell Canada*, *supra* note 7.

[13] *Canadian Western Bank*, *supra* note 5.