Federally regulated industries: The SCC reaffirms and clarifies the interjurisdictional immunity doctrine

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The Supreme Court of Canada (SCC) recently rendered a unanimous and consequential judgment in Opsis Airport Services Inc. v. Québec (Attorney General)[1] that refined the doctrine of interjurisdictional immunity (IJI) while confirming its continued relevance in protecting core federal legislative powers. This decision holds important lessons for federally regulated entities, in areas like aeronautics and interprovincial or international transportation, that seek to determine whether provincial regulatory regimes apply to them.

BLG acted for an intervener in this significant appeal on the constitutional division of powers.

Background

Opsis Airport Services Inc. (Opsis), a federally regulated enterprise, provides airport security services at aerodromes across Canada. After being charged for failing to obtain a permit under the Québec's *Private Security Act* (PSA),[2] it challenged the applicability of the legislative scheme by relying on IJI,[3] arguing that the PSA impaired the core federal power over aeronautics.

Specifically, Opsis objected to the requirements that an enterprise that carries on a private security activity be licensed by Québec's Private Security Bureau and comply with provincial operational directives.

The appeal also included two other federally regulated actors: a marine loading company – Québec Maritime Services Inc. – and a port security employee, all of whom challenged the PSA's applicability on the basis of IJI, arguing in particular that the requirement that security personnel hold an "agent license" impaired the core of the federal power over navigation and shipping.

The SCC confirms the "essential role" of IJI

In a rare decision signed by the Court, the SCC unanimously allowed the appeal. The Court affirmed that while cooperative federalism remains a guiding principle that generally favours the application of laws of both levels of government, IJI "continues to play an essential role in relation to federalism", as it responds to the "need for predictable results".[4]

The Court reiterated that the application of the doctrine depends on two conditions being met: (1) intrusion on the core of an exclusive head of power and (2) impairment of the core of the exclusive head of power. When the doctrine applies, the impugned provisions are declared inapplicable to matters falling under the core of the exclusive power at issue.[5]

1. The core of legislative powers

On the notion of the core of legislative powers (the "basic, minimum and unassailable" content of the power), the Court makes clear that it is not necessary to rely on a precedent, as it was sometimes argued following *Canadian Western Bank*.[6] The Court adds that evidence can sometimes assist in determining the core of a federal power.[7]

In the matter at hand, the Court recognized as evident that airport security and port security were at the core of the relevant federal powers, even without specific precedents.[8]

2. The notion of impairment

With respect to impairment, the Court made important clarifications. First, the Court explains that impairment implies "adverse consequences" on the power at issue (without necessarily amounting to paralysis or sterilization), which may be demonstrated, in concrete terms, by the fact that a "the vital or essential part" of an undertaking is affected. Evidence may be helpful to show impairment but is not required.[9]

Second, the Court notes that, "for predictability to be ensured, it is important to take into account the effects of the application of the impugned statute, whether they have materialized or not".[10] The Court therefore rejects a "wait and see" approach to the application of IJI, noting that showing a "potential for impairment" is sufficient. In the same vein, the Court also indicates that the scheme may generally be considered "as a whole", even if not all provisions are directly in issue, though this may depend on the "specifics of a dispute and the impugned legislation".[11]

In this case, the Court was of the view that the licence requirement and the conditions for obtaining one (such as "good character" and training conditions) were not sufficiently intrusive, in themselves, to amount to impairment.[12]

However, the Court found that specific provisions of the *PSA*, notably those empowering the Private Security Bureau to suspend or revoke security licences based on "standards of conduct"[13] and to issue binding directives, amounted to an impairment of the federal core jurisdiction over aeronautics and navigation and shipping.

Here, impairment is demonstrated by the fact that such provisions would have the effect of placing security activities falling at the core of exclusive federal powers under the

control, “at the mercy”, of a provincial administrative body with broad discretion to dictate the manner in which the activities should be carried out.[14]

3. Remedy

Importantly, in terms of remedy, the Court decided not to limit the scope of the declaration of inapplicability to the two impairing aspects of the licensing scheme. “Given that the impairing provisions cannot be severed from the coherent whole formed by the PSA”, the Court declared the entire scheme inapplicable to the appellants.[15] A narrower “targeted” declaration would have been inappropriate, as it would change the “nature of the legislative scheme intended by the legislature”.[16]

Practical implications

This judgment underscores the continuing importance of IJI to Canada’s federal structure, contrary to the commonly held belief that the doctrine had been relegated to playing a limited role in areas already covered by precedent. It reaffirms that provinces cannot impose regulatory constraints that would amount to controlling the activities of federal undertakings that fall within the core of federal exclusive powers.

For federal undertakings, particularly those operating in complex federal regulatory environments such as aeronautics, maritime transportation, or telecommunications, the ruling will reinforce their ability to resist provincial oversight that impairs their activities.

Perhaps most importantly, it makes clear that it is generally appropriate to look at an entire scheme (even if not all provisions are directly engaged) instead of conducting a “siloed analysis”,[17] and that the potential use of broad discretionary powers to control activities may be sufficient to show impairment, without the need to wait for a specific instance where “adverse consequences” have materialized.[18]

Key takeaways

Federal undertakings that question the constitutional applicability of provincial regulatory schemes to their activities may wish to consider the following takeaways from the *Opsis* judgment:

- While IJI will likely remain applied with relative restraint, the SCC confirmed that it is here to stay, and that it still plays an essential role in the federal division of powers. The doctrine ensures predictability by protecting activities at the core of exclusive legislative powers, such as those of federal undertakings involved in aeronautics or navigation and shipping.
- For IJI to apply, it is not necessary to point to a precedent recognizing the core exclusive power being relied upon. Though not required, evidence may be helpful to show that a matter is part of the core.
- It may be sufficient to show that the scheme at issue has a “potential for impairment”, *i.e.*, that it could cause “adverse consequences”, whether they have materialized or not.
- In practice, an impairment may for instance be demonstrated by showing that the scheme at issue could in effect be used to control the way activities at the core of exclusive powers could be exercised.

- The analysis is not necessarily limited to the specific provisions engaged on the fact of the case. Depending on circumstances, a broader examination of the entire scheme may be the proper approach.
- In the same vein, it is appropriate to declare the entire scheme inapplicable, if the specifically impairing provisions cannot be severed from the rest without changing the nature of the scheme.

Footnotes

[1] Opsis Airport Services Inc. v. Québec (Attorney General), 2025 SCC 17 (Opsis). The judgment also deals with another appeal, Quebec Maritime Services Inc. v. Québec *(Attorney General)*, which had been heard at the same time.

[2] *Private Security Act*, CQLR c S-3.5 (PSA).

[3] *Private Security Act*, CQLR c S-3.5 (PSA).

[4] *Opsis*, at paras 33 and 34.

[5] *Opsis*, at paras 35 and 36.

[6] *Opsis*, at paras 38 and 39, citing *Canadian Western Bank*, 2007 SCC 22 at para 77.

[7] *Opsis*, at para 37.

[8] *Opsis*, at paras 54-61.

[9] *Opsis*, at paras 40-46.

[10] *Opsis*, at para 50.

[11] *Opsis*, at paras 62-63.

[12] *Opsis*, at paras 65-70.

[13] *Opsis*, at paras 71-75.

[14] *Opsis*, at paras 75-78.

[15] *Opsis*, at para 81.

[16] *Opsis*, at para 84.

[17] *Opsis*, at para 63.

[18] *Opsis*, at para 50.

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