

In a welcome sign for major new project proponents, SCC breathes new life into interjurisdictional immunity

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Authors: [Maureen Killoran, KC](#), [Richard Wong](#), [Alexandre Fallon](#), [Sean Sutherland](#), [Dane Boczkowski](#)

Introduction

On May 30, 2025, the Supreme Court of Canada (the Court) in *Opsis Airport Services Inc. v. Québec (Attorney General)*^[1] unanimously held, in a consolidated appeal of two cases, that Québec's *Private Security Act* (PSA) is constitutionally inapplicable to the appellant companies' activities at federally regulated airports and at marine facilities, respectively, pursuant to the doctrine of interjurisdictional immunity (IJI).

The decision is a significant reaffirmation of the continued relevance of IJI to protect federal powers and undertakings (such as airports, marine ports, banks, and interprovincial transportation projects such as cross-border pipelines) from the application of certain provincial laws. In particular, the decision reaffirms that the final say over the manner in which activities falling within the core of federal power operate remains within the exclusive jurisdiction of the federal government.

Given the federal government's current focus on advancing projects of national interest, the decision is a timely reaffirmation of a doctrine that has been used successfully by proponents of federal undertakings to advance their projects in an orderly and efficient manner notwithstanding provincial and/or municipal opposition. Conversely, and of equal importance to proponents of intraprovincial undertakings, the Court also reaffirmed that IJI reciprocally protects the core of exclusive provincial powers, and that such projects may conversely be interjurisdictionally immune from the application of federal laws that impair core provincial powers.

Background

The appellants Opsis Airport Services Inc. (Opsis) and Québec Maritime Services Inc. (QMS) were each charged with contravening the PSA. Opsis provides airport security services, operating an emergency call centre at the Pierre Elliott Trudeau International Airport (Trudeau Airport) in Montréal. QMS operates in the marine transportation sector, providing loading services at the international shipping terminal in La Malbaie.^[2] The activities of Opsis

and QMS are regulated by federal legislation.

The PSA provides for a licensing scheme for private security activities and establishes a self-regulated board (the Bureau) charged with enforcing the statute and making regulations, issuing licences and directives to licensees, and providing mandated training to licensees. The Bureau possesses broad powers, including the power to suspend, cancel or refuse renewal of licences, which may be invoked where a licence holder fails to comply with Bureau directives, or has violated the standards of conduct defined by the Bureau in its regulations.^[3]

The appellants did not contest their failure to comply with PSA requirements — they acknowledged they were operating without the required licences to conduct private security operations under the PSA. Instead, they relied on the IJI doctrine to argue that the PSA impairment of the core of exclusive federal powers rendered it constitutionally inapplicable to their operations.

The doctrine of interjurisdictional immunity

IJI is rooted in the exclusivity of federal and provincial powers outlined in ss. 91 and 92 of the *Constitution Act, 1867* (the Constitution Act).^[4] For the doctrine to apply: (1) the impugned provision(s) must intrude on the core of an exclusive head of power of the other level of government and (2) the intrusion must amount to an impairment. The core of a power is defined as its “basic, minimum and unassailable content”.^[5]

The Court clarified two important issues regarding IJI

First, the Court revisited its prior statement in *Canadian Western Bank v. Alberta*^[6] that IJI is “in general” confined to situations covered by precedent.^[7] Since *Canadian Western Bank*, parties resisting IJI-based arguments have relied on this statement to argue that the applicability of the doctrine was effectively frozen in time, only applying to fact patterns captured by the four corners of prior decisions. In *Opsis*, the Court confirmed that a lack of precedent is “not determinative” and does not prohibit the application of IJI. While precedents are a useful guiding tool, they are not a necessary requirement.^[8]

Second, in determining whether the core of an exclusive power has been impaired, the Court did not limit its assessment to manifested effects. The Court held that IJI also applies where the *potential* for impairment is clearly present.^[9] This is an important reaffirmation for parties that operate under broad discretionary regulatory and permitting regimes under, regardless of whether the current or only future potential application of those discretionary powers is at issue.

The Court found interjurisdictional immunity applies

Opsis’s aeronautic activities fall within Parliament’s exclusive power to make laws for the peace, order and good government of Canada, contained in s. 91 of the *Constitution Act*. The Court held that airport security lies at the core of the aeronautics power as an integral component of air transportation itself. Therefore, Opsis’s activities relating to surveillance and monitoring at Trudeau Airport “unquestionably” fall within the core of the aeronautics power.^[10]

With respect to QMS, despite no existing precedent establishing marine facility security at the core of the federal navigation and shipping power in s. 91(10) of the *Constitution Act*, the Court considered it an “absolutely necessary” component of the power.^[11] The Court analogized port facilities with aerodromes, finding both QMS’s longshoring activities and its security activities as “squarely within” the core of the navigation and shipping power.^[12] This aspect of the Court’s decision runs contrary to the constrained interpretation of IJI that some had advocated for since the Court’s 2007 decision in *Canadian Western Bank*.

Notwithstanding its findings that the PSA constituted an “intrusion” upon both the aeronautics and navigation and shipping powers under s. 91 (the first branch of the test), the Court made clear that the mere presence of a licensing scheme is not necessarily sufficient to find an “impairment” under the second branch. It further held that if IJI did apply, such application must be limited to the specific provisions of the impugned statute that impair the core of the exclusive power.^[13] On the facts of this case, the Court concluded as follows:

- While some provisions of the *PSA*, namely those dealing with requirements for obtaining a licence, do not constitute an “impairment” in and of themselves, other provisions clearly revealed the “potential for impairment”.^[14]
- Specifically, certain provisions grant the Bureau with the “final say” on how activities that fall within an exclusive federal head of power must be conducted. This occurs under general “standards of conduct”, the content of which is determined by the Bureau alone. Such a directive power gives the Bureau the authority to dictate how a licence holder must carry on its activities, failing which the license holder may lose its licence. This leaves licence holders “at the mercy” of the Bureau. As such, a provincially created entity (the Bureau) is regulating matters under exclusive federal jurisdiction. These provisions impair the core of Parliament’s exclusive powers.^[15]

The Court found that the offending provisions of *PSA* are “truly unseverable” from the rest of the *PSA* and, as a result, declared the statute constitutionally inapplicable to the appellants.^[16]

Practical implications of the decision

The Court’s decision is a timely reaffirmation and clarification of the doctrine of IJI.

First, by affirming that the limits of exclusive powers are not confined to existing precedents, the Court has potentially left the door open for more expansive applicability of the doctrine, in particular to federal powers and undertakings. This aspect of the decision may be welcomed by project proponents facing intergovernmental challenges in circumstances where a clear precedent does not exist.

Second, by noting that IJI is intended to protect the core of an exclusive power “either federal or provincial”, the Court has clarified that the doctrine is reciprocal. To date, the Supreme Court has not yet applied IJI to immunize the core of a provincial power from the application of generally applicable federal law. However, the time may be ripe for the application of IJI to immunize provincial powers and undertakings to the same degree as the Court has applied the doctrine to immunize federal powers and undertakings from the application of provincial laws.

Third, the Court emphasized that the core of an exclusive power may be impaired without any adverse consequences yet manifesting. As the Court made clear by focusing on the need

for predictability, where the impugned legislation clearly reveals the potential for impairment, a “wait and see” approach, or a presumption that one level of government will in its discretion decline to exercise its statutory authority, will not render the doctrine inapplicable.

Whether the potential for an expanded use of IJI doctrine following *Opsis* will be realized will depend on its subsequent interpretation and application by lower courts and regulatory tribunals empowered to make constitutional determinations on the facts before them. However, even the potential for such an expanded application is a welcome development for proponents of regulatory and jurisdictional certainty, particularly in the current geopolitical context and its focus on getting projects in the provincial and/or national interest built in a timely fashion.

Finally, it is noteworthy that *Opsis* was rendered in respect of Québec legislation. Québec has consistently advocated for an expansive application of provincial legislation to federal undertakings, and recently mandated that federal undertakings submit to the oversight of the provincial language regulator, the *Office québécois de la langue française*. *Opsis* potentially calls into question the constitutional validity of this approach.

[1] *Opsis Airport Services Inc. v. Québec (Attorney General)*, 2025 SCC 17 [*Opsis*].

[2] *Opsis* at para 3-5.

[3] *Opsis* at para 19-24.

[4] *Opsis* at paras 32, 36.

[5] *Opsis* at paras 36-37.

[6] 2007 SCC 22 (*Canadian Western Bank*).

[7] *Opsis* at para 38.

[8] *Opsis* at para 39.

[9] *Opsis* at para 50.

[10] *Opsis* at paras 54-56.

[11] *Opsis* at para 60.

[12] *Opsis* at para 61.

[13] *Opsis* at paras 63, 66.

[14] *Opsis* at paras 67-78.

[15] *Opsis* at paras 74-78.

[16] *Opsis* at para 84.