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The Federal Principle and the 2005 Balance of Powers in Canada

Eugénie Brouillet*

I. INTRODUCTION

In 1998, the Supreme Court of Canada stated that federalism is a principle “inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided”.¹ In doing so, it was simply confirming what is apparent from the spirit and the wording of the *Constitution Act, 1867*.² During the pre-Confederation period, various designs were presented concerning the type of regime that would most likely cater adequately to the cluster of wishes and interests of the existing colonies. The group of framers at the origin of the regime finally chose the federal principle as the foundation of the new constitution.³ In this regard, the Preamble to the constitutional text unequivocally asserts: “the Provinces ... have expressed their Desire to be federally united ...”.⁴ As for the wording of the regime, it provides for nothing less than the establishment of a federation in all of its legal aspects; that is to say, essentially, that it creates a distribution of legislative powers between two levels of

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¹ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, at para. 56, [1998] 2 S.C.R. 217, at 251 [hereinafter “*Secession Reference*”].

² (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

³ John A. Macdonald himself, after stating his preference for a unitary state, was obliged to reaffirm the federal nature of the proposed regime and thus defend the provinces’ sovereign character during the Quebec Conference of October 1864: “New Zealand’s constitution was a Legislative Union, ours Federal. . . . In order to guard these [local charters], they [the constituent assembly for New Zealand] gave the powers stated to the Local Legislatures, but the General Government had the power to sweep these away. That is just what we do not want. Lower Canada and the Lower Provinces would not have such a thing.”: G.P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart, 1969), at 124. The status of New Zealand’s local entities was therefore similar to that of municipalities: their existence was in no way guaranteed by the Constitution and stemmed from legislative provisions that could be modified as Parliament willed.

⁴ *Constitution Act, 1867*, *supra*, note 2, Preamble.

government that are autonomous in their respective areas of jurisdiction.⁵

Yet, the highest Canadian court's new-found eagerness for federalism and, in general, for unwritten constitutional principles is not necessarily echoed in its federal jurisprudence relating to the distribution of legislative powers between both levels of government, although that is precisely the core of the federal principle. Indeed, this "lodestar" that is federalism has only explicitly guided the Supreme Court, in its legal reasoning, in a relatively exceptional fashion⁶ and, above all, in a manner that reveals an absence of federal theory.

As an unwritten or implicit constitutional principle, federalism may serve as a guide for the courts in interpreting and applying the provisions of the constitutional text, and thereafter, in closing any gaps if there are any to be found.⁷ Yet, despite the significant importance that the Supreme Court of Canada seems to give to the federal principle in some decisions, notably in the *Secession Reference*, it has not resorted

⁵ K.C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964). The autonomy of the provincial legislatures in matters under their exclusive jurisdiction was fundamentally not undermined by the existence of the Governor General's powers of reservation and disallowance, notably because of the principle of responsible government. For an in-depth analysis of the spirit and the letter of the original federal regime, see Eugénie Brouillet, *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Éditions du Septentrion, 2005), at 105-98 [Brouillet, *La négation de la nation*].

⁶ Since the abolition of appeals to the Judicial Committee of the Privy Council, the Supreme Court of Canada has referred to federalism by name in approximately 30 decisions. This, of course, does not include the decisions where the principle (or one of its synonyms, such as "federal principle" or an equivalent) was found in the cited doctrine or those where the Court simply referred to it in order to assert that it is not relevant for resolving the litigation: *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530; *British Columbia (Milk Board) v. Grisnich*, [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895; Eugénie Brouillet, "La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada" (2004) 45 C. de D. 7-67 [Brouillet, "La dilution du principe fédératif"].

⁷ *Secession Reference*, *supra*, note 1. See also Warren J Newman, "Réflexions sur la portée véritable des principes constitutionnels dans l'interprétation et l'application de la Constitution du Canada" (2001-2002) 13 N.J.C.L. 117; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67; Sujit Choudhry, "Unwritten Constitutionalism in Canada: Where Do things Stand?", (2001) 35 Can. Bus. L.J. 113; Sujit Choudhry, and Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can. J.L. & Jur. 143; Patrick Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (1999-2000) 11 N.J.C.L. 65; Dale Gibson, "Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution" (1999-2000) 11 N.J.C.L. 49; W.H. Hurlburt, "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada" (1998) 26 Man. L.J. 181.

to this principle primarily as a guide for interpreting the express provisions of the Constitution, particularly those pertaining to the distribution of legislative powers. Rather, the Court has resorted to it in order to fill in the gaps and account for whatever seems to be implicit.⁸ The distribution of legislative powers constitutes, however, the very heart of the federal principle.⁹

The purpose of this article is to attempt to discern, in the light of some of the 2005 cases,¹⁰ the Supreme Court's conception of the federal balance between the powers of the two levels of government and of its role relating to its preservation. Our analysis will reveal an absence of a federal theory that prevents the High Court from establishing and

⁸ In *Secession Reference*, *supra*, note 1, Canada's highest court states that federalism is a principle underlying the written Constitution and that it constitutes "a central organizational theme of our Constitution" (para. 57). It is this principle, together with the principle of democracy, which brought the Court to establish, in the hypothesis of a clear expression by Quebecers of the desire to achieve the secession of Quebec, a constitutional obligation to reciprocally negotiate constitutional modifications in order to meet this demand by the population of Quebec. In the *Patriation Reference*, [1981] 1 S.C.R. 753, the Supreme Court of Canada established the federal principle as the *raison d'être* of a constitutional convention requiring the federal government, wishing to unilaterally operate the patriation and heavy modifications to the Canadian Constitution, to obtain prior consent from a good number of provinces. The Court thus considered that the participation of both levels of government in the process of modifying the Constitution is an essential corollary of the federal principle.

⁹ Brouillet, "La dilution du principe fédératif", *supra*, note 6.

¹⁰ This article analyzes the 2005 decisions on the distribution of powers relating to matters that may have a significant impact on the federal balance of powers, namely the general principles of interpretation, the general trade and commerce power, the trenching power and the federal paramountcy doctrine. Therefore, I will not review the cases where the Supreme Court has simply interpreted well-established principles, as the pith and substance doctrine and its corollary, the incidental effects doctrine. In *Fédération des producteurs de volaille du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 and *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, the Supreme Court confirmed the power of the provinces to incidentally affect extraprovincial interests when legislating on matters falling within their field of legislative competence. In *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 52, [2005] 2 S.C.R. 564, the Court concluded that the provincial dispositions did not subvert the scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), because they granted no more rights than are permitted under the BIA. Consequently, there were no conflicts between the federal and provincial legislation, therefore no basis for the application of the federal paramountcy doctrine. In *UL Canada Inc. v. Quebec (Attorney General)*, [2005] S.C.J. No. 11, [2005] 1 S.C.R. 143, the Supreme Court orally confirmed a judgment of the Quebec Court of Appeal concluding that provincial provision respecting the colour of margarine was within the limits of the provinces' legislative authority over local trade. Finally, in *Castillo v. Castillo*, [2005] S.C.J. No. 68, 2005 SCC 83, the majority of the judges found unnecessary to determine whether the provincial impugned provision (which determines the time limits within which the Alberta courts can entertain actions), including live actions arising in a foreign jurisdiction and governed by the substantive law of that foreign jurisdiction, exceeds the territorial limits on provincial legislative jurisdiction.

maintaining a sound federal balance in the Canadian context. This lack of a federal theory can be illustrated by reviewing the general principles of interpretation used by the Court in the *Employment Insurance Act Reference*,¹¹ the application of the trenching power and the general trade and commerce power in the *Kirkbi*¹² case, plus the criteria developed by the Court relating to the federal paramountcy doctrine in the *Rothmans*¹³ decision.

II. SOME THOUGHTS ABOUT THE FEDERAL PRINCIPLE

The essence of the federal principle resides in the union of groups for certain common goals, groups that otherwise maintain their distinctive existence for other purposes. Consequently, the adoption of a federal regime will be appropriate when the implicated entities wish to be united under a single independent government for certain subject matters of a common interest, and meanwhile still maintain or establish independent governments for subject matters that correspond to their distinctive interests. Moreover, amongst the factors that weigh in favour of a separation between communities, the presence of a different culture within given communities is that which, above all, exercises the most pressure in favour of the adoption of a federal rather than a legislative union. In other words, the diversity that is expressed within entities desiring to unite themselves into a federation is often a cultural one. In this regard the Canadian federation is no exception.¹⁴

Federalism results from the encounter of dual intentions, those of maintaining both unity and diversity through a continuous process of adaptation. It is a type of arrangement of the state power that aims to achieve a balance between the individual impulses and the collective tendencies of the implicated groups. Federalism therefore alters between two poles, that of complete centralization, which translates into the creation or the preservation of a unitary state, and that of complete decentralization, which leads to the creation or the preservation of more than one state.

¹¹ *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669 [hereinafter "*Employment Insurance Act Reference*"].

¹² *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302.

¹³ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188.

¹⁴ Brouillet, *La négation de la nation*, *supra*, note 5, at 105-150.

By definition any balance is unstable, thus federalism must be understood as a process, as a model that is evolving and in perpetual adaptation rather than as a static system regulated by immutable rules.¹⁵ The suppleness offered by this principle of state organization allows one to imagine a full spectrum of legal arrangements that can be more or less centralized or decentralized¹⁶ in order for the federal structure to correspond to the social, political, historical and cultural realities of a community.

Despite the extensive plurality of federal systems worldwide, it is still important to define the essential legal characteristics of federations. As a legal principle, federalism essentially implies a distribution of legislative powers between different levels of government that are autonomous or independent of one another in exclusive legislative matters. This autonomy must be guaranteed in a supreme written Constitution, whose interpretation and application must be vested in the hands of a judicial neutral umpire. In matters of disputes concerning the distribution of powers, the judicial umpire must attempt, when adapting the constitutional text to new realities, to maintain a balance between the powers of the different levels of government.

Dictionaries define the notion of “balance” as follows: “a condition in which different elements are equal or in the correct proportion”.¹⁷ Undoubtedly, the perception of the existence or the absence of balance in a given case will be partially influenced by the outlook of the person called to establish or preserve it. In this sense, the concept of balance is subjective. However, in federal matters, the fact remains nonetheless that the actual survival of federalism commands the delicate exercise of properly harmonizing the opposing forces that it involves. The search for a federal balance aims at keeping an equilibrium between the values of unity and diversity, whose first legal expression is laid down in the distribution of powers between the levels of government. The value of unity will be essentially preserved if the autonomy of the central government is protected, as the value of diversity will be maintained if

¹⁵ Carl J. Friedrich, *Tendances du fédéralisme en théorie et en pratique* (London: Frederick A. Prueger Publishers, 1971), at 185.

¹⁶ Different institutional indications enable one to situate a federal regime on the scale of lesser or greater centralization of power, notably the federated entities’ external power, concurrent powers, residual power and each level of government’s financial autonomy. See Brouillet, *La négation de la nation*, *supra*, note 5, at 86-94.

¹⁷ *Concise Oxford Dictionary*, 10th ed. (New York: Oxford University Press, 1999), at 101.

the federated units are free from interference from the central government in the exercise of their exclusive legislative powers.

The Courts have recognized the federal nature of the Canadian Constitution on multiple occasions. The Judicial Committee of the Privy Council, the appellate court of last resort for Canadian affairs until 1949, affirmed this on numerous occasions, notably in the following passage which has since become classic:

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.¹⁸

An analysis of the Judicial Committee of the Privy Council's jurisprudence reveals that the federal principle guided it in the interpretation and the application of the rules relating to the distribution of legislative powers. The Judicial Committee prided itself in reiterating this and making it the source of every legal postulate essential to its survival and to its proper functioning, in particular, the autonomy of provincial legislatures in those matters reserved for their exclusive legislative jurisdiction. While carrying out the task of adapting the constitutional text to the evolution of Canadian society, the Judicial Committee favoured a literal interpretation attentive to the balance between provincial and federal legislative powers.¹⁹ In doing so, the

¹⁸ *Maritime Bank of Canada (Liquidators of) v. New Brunswick (Receiver-General)*, [1892] J.C.J. No. 1, [1892] A.C. 437, at 441 and 442. From the first years of the federation, the Judicial Committee stated that one of the basic premises to the federal character of the Constitution is the provinces' autonomy in their areas of jurisdiction: *Citizens Insurance Co. of Canada v. Parsons*, [1881] J.C.J. No. 1, [1881-82] 7 A.C. 96, at 108; *Hodge v. The Queen*, [1883-84] 9 A.C. 117, at 132. See, also to the same effect, *Ontario (Attorney General) v. Canada (Attorney General)*, [1896] A.C. 348, at 360 and 361; *In re the Initiative and Referendum Act*, [1919] A.C. 935, at 942; *British Coal Corp. v. The King*, [1935] A.C. 500, at 518; *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, at 366 and 367; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, at 722.

¹⁹ In order to do so, the Judicial Committee largely based itself on a correlative interpretation of s. 92(13) on the one hand, and of s. 91(2) and the "peace, order and good government" clause, on the other hand. It also inspired itself with the federal principle and its underlying notion of balance in order to distribute the legislative powers between both levels of government so as to incorporate the contents of international treaties into internal law, according to the subject matter of said agreements (*Canada (Attorney General) v. Ontario (Attorney General)*, *supra*, note 18). For an in-depth analysis, see Brouillet, *La négation de la nation*, *supra*, note 5, at 218-53.

Judicial Committee was simply implementing the intention expressed by the framers at the origins of the regime and formally laid out in the Constitution's actual text. Thus, this article's position is that the critics of the Judicial Committee's jurisprudence, who rebel against its supposedly "provincial bias",²⁰ are rather contesting the federal choice knowingly made by those political figures of the 19th century.

In 1949, the abolition of appeals to the Judicial Committee of the Privy Council certified the Supreme Court of Canada as the appellate tribunal of last resort for all matters.²¹ From that moment on, the Judicial Committee's federal interpretation, attentive to preserving a balance between the respective powers of each level of government by protecting their autonomy in the exercise of their jurisdiction, progressively made way for a more and more power-centralizing interpretation, thus engendering a federal imbalance. The Supreme Court's reasoning, in matters of the federal distribution of legislative powers, is indeed animated by growing considerations of efficiency to the detriment of diversity.²²

Thus, the country's highest Court no longer seems to give much weight or importance to the federal principle when resolving conflicts concerning the distribution of legislative powers. As Professor Donna Greschner appropriately stated:

... for the most part, when the Court now addresses federalism questions, it toils in relative obscurity. . . . In sum, consideration of

²⁰ Vincent MacDonald, "Judicial Interpretation of the Canadian Constitution", (1935-36) 1 U.T.L.J. 260 [MacDonald, "Judicial Interpretation of the Canadian Constitution"]; "The Constitution in a Changing World" (1948) 26 Can. Bar Rev. 21; W.P.M. Kennedy, "The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393; "The Interpretation of the British North America Act" (1944) 8 Cambridge L.J. 146; F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485; "Centralization and Decentralization in Canadian Federalism" (1951) 29 Can. Bar Rev. 1095; William F. O'Connor, *Report to the Senate on the British North America Act* (Ottawa: Queen's Press, 1961); Raphael Tuck, "Canada and the Judicial Committee of the Privy Council" (1941-42), 4 U.T.L.J. 33.

²¹ *An Act to Amend the Supreme Court Act*, S.C. 1949, c. 37.

²² The Supreme Court's jurisprudence is indeed more and more animated by a functionalist logic of the distribution of legislative powers, for example, relating to the national concern doctrine, the general trade and commerce power and the federal trenching power. Brouillet, *La négation de la nation*, *supra*, note 5, at 319-22; Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's L.J. 411; Ghislain Otis, "La justice constitutionnelle au Canada à l'approche de l'an 2000: uniformisation ou construction plurielle du droit?" (1995-96) 27 Ottawa L.R. 261; Henri Brun, "L'évolution récente de quelques principes généraux régissant le partage des compétences entre le fédéral et les provinces" in *Congrès annuel du Barreau du Québec (1992)* (Quebec: Service de la formation du Barreau du Québec, 1992).

federalism questions has diminished as a daily and definitional part of the Supreme Court's obligations and its self-identity.²³

The year 2005 was plentiful insofar as federal jurisprudence is concerned. Indeed, the Supreme Court rendered no less than eight decisions, moreover all unanimous,²⁴ regarding in whole or in part the rules relating to the distribution of legislative powers. An attempt will be made to detect, in light of some of these decisions, the highest Canadian Court's conception of Canadian federalism.

III. THE PRINCIPLES OF CONSTITUTIONAL INTERPRETATION: HEGEMONY OF THE EVOLUTIONARY APPROACH

All interpretative activity involves a certain amount of creation by the interpreter. Judges therefore benefit from a discretionary margin when determining the meaning of legal rules. This discretion takes on considerable proportions in constitutional matters. First, constitutional texts contain general terms that leave the way open for a plurality of plausible meanings. Next, constitutional texts seldom provide precise rules in order to resolve particular cases; this prompts the judges to make up for the silent or spare wording of the Constitution. This is what Professor Vilaysoun Loungnarath calls the vagueness and the insufficiency of the constitutional texts, characteristics that "create a space inside of which the judicial decision is no longer objectivised by legal reasoning or by the wording of the constitutional provision. When the judge advances into this space, inevitably some of his political values penetrate and affect the law".²⁵

The Judicial Committee's application of the statutory rules of interpretation to the provisions of the *Constitution Act, 1867* gave rise,

²³ Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79 Can. Bar Rev. 47, at 58.

²⁴ Except for the decision rendered in *Castillo v. Castillo*, *supra*, note 10, where Bastarache J. drafted separate reasons, although concurring as to the outcome.

²⁵ Vilaysoun Loungnarath, "Le rôle du pouvoir judiciaire dans la structuration politico-juridique de la fédération canadienne" (1997) 57 R. du B. 1003, at 1006 and 1007 (translated by author). See also Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed (Cowansville, Qc.: Yvon Blais, 2002), at 189; Andrée Laloie, Pierrette Mulazzi & Michèle Gamache, "Les idées politiques au Québec et le droit constitutionnel canadien" in Ivan Bernier & Andrée Lajoie, eds., *La Cour suprême du Canada comme agent de changement politique* (Toronto: University of Toronto Press in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada, 1986), at 1-110, in which the authors emphasize that the constitutional jurisprudence is influenced by the current political ideas.

particularly from the 1930s onward, to numerous criticisms by Canadian authors who considered that it was preventing the constitutional text from adapting itself to the latest economic and social conditions of Canadian society.²⁶ It was not so much the Judicial Committee's so-called incapacity to adapt the constitutional text that frustrated them, but more the direction in which it was doing so; that is to say, an adaptation attentive to the balance between provincial and federal legislative powers. For them, the latest conditions demanded that powers be centralized in the hands of federal authorities.²⁷

Since the 1970s, the Supreme Court has progressively distanced itself from the literal interpretation approach in favour of an adaptive or dynamic approach to interpretation. In so doing, the Supreme Court has authorized itself to resolve the inadequacy that can exist between the constitutional text and the social conditions that it is meant to govern. Thus, judges are summoned to decide which constitutional requirements are most advantageous by considering their political consequences. The embedding of a charter of rights and freedoms into the Canadian Constitution in 1982 largely contributed to inspiring a wave of activism in constitutional jurisprudence.²⁸ This is not about denying that any constitutional text inherently requires adaptation, but rather about underlining the need for some bounds²⁹ when accomplishing such a task, without which those who hold judicial power will appear to be encroaching on the framer's power. Yet, one of those bounds in matters of adapting the distribution of legislative powers to the latest

²⁶ W.P.M. Kennedy, *Some Aspects of the Theories and Working of Constitutional Law* (London–Toronto: Oxford University Press, 1932), at 92 and 93; Vincent C. MacDonald, “Judicial Interpretation of the Canadian Constitution”, *supra*, note 20, at 282: “... prevailing political theories which indicate the propriety or necessity of a greater degree of national control over, and governmental intervention in matters of social welfare and business activity”. See also, to the same effect, Bora Laskin, “Peace, Order and Good Government — Re-examined” (1947) 25 Can. Bar Rev. 1054, at 1085.

²⁷ Alan C. Cairns, “The Judicial Committee and Its Critics” (1971) 4 Canadian Journal of Political Science, at 339.

²⁸ Henri Brun & Guy Tremblay, *supra*, note 25, at 770-74; Jacques Frémont, “La face cachée de l'évolution contemporaine du fédéralisme canadien” in G.-A. Beaudoin, J.E. Magnet, *et al.*, *Le fédéralisme de demain: réformes essentielles* (Montreal: Wilson & Lafleur, 1998) 45, at 56.

²⁹ The interpretation process' inherent discretion was exercised by the Judicial Committee of the Privy Council with the help of three main guidelines: the statutory rules of interpretation, the rule of *stare decisis* and the federal principle. As for the Supreme Court of Canada, it greatly freed itself from the literal interpretation approach privileged by the Judicial Committee in favour of a progressive interpretation approach, and it also largely diluted the application of the rule of *stare decisis* and of the federal principle: Brouillet, *La négation de la nation*, *supra*, note 5, at 201-18 and 255-66.

circumstances is the framers of 1867's intention to create a federation in Canada, along with everything that such a choice legally entails, notably respect for each level of government's autonomy in the exercise of their exclusive legislative powers.

The Supreme Court of Canada has long favoured a progressive interpretation of Canadian constitutional texts, notably of the distribution of powers between the federal Parliament and provincial legislatures. In 1976, in *Reference re: Anti-Inflation Act (Canada)*,³⁰ the Supreme Court affirmed the necessity of considering "that a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances".³¹ In 1984, in the *Skapinker* decision, the Court explicitly stated that the Canadian Charter must receive a progressive and realistic interpretation.³² The same year, in the *Southam* decision, it reiterated its commitment to an adaptive interpretation of the Constitution, this time as a whole.³³

In the *Ontario Hydro* decision rendered in 1993, the Supreme Court explicitly recognized the complementary nature of its role with respect to political forces when it resolves litigation relating to the distribution of legislative jurisdictions:

This is not to say that the courts do not have an important, indeed essential, role in balancing federalism as they go about their task of defining the nature and effect of those great but more subtle powers, not susceptible of definition and direction by those elemental political forces that undergird Canadian federalism [contrary to constitutional conventions]".³⁴

Paradoxically, in this decision, the Court affirmed that the federal Parliament's declaratory power³⁵ should not be interpreted restrictively

³⁰ [1976] 2 S.C.R. 373.

³¹ *Supra*, note 30, at 412.

³² *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at 366.

³³ *Canada (Combiner Investigation Acts, Director of Investigation and Research) v. Southam*, [1984] 2 S.C.R. 145, at 155. In this decision, the Court referred to the analogy between the Canadian Constitution and a living tree imagined by Lord Sankey in *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 134. See, also to the same effect, *Beauregard v. Canada*, [1986] S.C.J. No. 50, [1986] 2 S.C.R. 56, at 81.

³⁴ *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327, at 373 [hereinafter "*Ontario Hydro*"].

³⁵ The federal Parliament's declaratory power allows it to declare that a work normally under the legislative power of the province where it is located is henceforth for the general advantage of Canada or for the advantage of two or more provinces, and therefore comes under the exclusive jurisdiction of the federal Parliament: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92(10)(c).

in order to be in conformity with the corollaries of the federal principle.³⁶

It is interesting to emphasize the rhetorical function of the various approaches to or principles of interpretation. Indeed the latter represent guides, tools that are used by judges to justify and legitimate their decisions. The judge has entire discretion to choose one or another interpretation approach, to which he or she will resort in order to persuade the audience that the decision is not only reasonable, but also justifiable in law.³⁷

The margin of judicial discretion inherent in the constitutional interpretation process therefore appears, at least since the 1970s, to have significantly increased along with the Supreme Court's choice in favour of a large and progressive interpretation of the constitutional provisions. In a federal regime that contains a national minority community, the problem that arises is that of the audience. If the large and progressive interpretation requires that societal values and expectations be considered, it surely refers to the dominant values and expectations: those of the majority.³⁸ Yet, the weakening of the federal principle, as a normative principle, responds to the expectations and values that are dominant in Canadian society — at least amongst its elite — in favour of the centralization of powers. The desire for centralization is intimately linked to the strong sentiment of belonging, towards the central government, that Anglo-Canadians generally keep alive. For them, it is the government level that should enjoy as many powers as possible in order to achieve national goals. Regarding this sense of identity, Professor Philip Resnick expressed himself as follows:

In a more general sense, . . . the English Canadian sense of nation has itself been very much a by-product of the creation of the central government in 1867, the year of Canada's Confederation. The sense of

³⁶ *Ontario Hydro, supra*, note 34, at 370-73. Chief Justice Lamer, in a concurring opinion, despite his statement that the general and declaratory powers of the federal Parliament must be interpreted in a way that ensures a federal balance between both levels of government, nonetheless equally judges that the Federal Parliament's jurisdiction extends not only to the works and to the enterprises exploiting these originally provincial works, but also to the integrated activities that are related to them: *id.* The dissent of Sopinka, Cory and Iacobucci JJ. should be noted.

³⁷ Chaïm Perelman, "La motivation des décisions de justice, essai de synthèse", in Chaïm Perelman & Paul Foriers, *La motivation des décisions de justice* (Brussels: Bruylant, 1978), at 412; Pierre-André Côté, *Interprétation des lois*, 3d ed. (Montreal: Thémis, 1999), at 25 and 26.

³⁸ Andrée Lajoie, "Garantir l'intégration des valeurs minoritaires dans le droit: une entreprise irréalisable par la voie structurelle", in Jean-François Gaudreault-Desbiens & Fabien Gélinas, eds., *The States and Moods of Federalism* (Cowansville, Qc.: Yvon Blais, 2005), at 365.

identity and citizenship for most English-speaking Canadians has been caught up with that level of government. Though regionalist sentiment has not been lacking, especially in the Atlantic provinces or in western Canada, the vast majority of English-speaking Canadians define themselves as Canadians first.³⁹

In 2005, the Supreme Court had the opportunity to reiterate its preference for the principle of progressive interpretation during litigation relating to the distribution of legislative powers. In the *Employment Insurance Act Reference*,⁴⁰ the Court had to decide whether provisions of the federal employment insurance statute relating to maternity and parental benefits were *ultra vires* of the Parliament.

After the determination of the provision's pith and substance (to replace the employment income of insured women whose earnings are interrupted when they are pregnant),⁴¹ the Court had to identify the head of power to which the pith and substance relates. It then applied the principle of progressive interpretation in finding the scope of federal power to legislate in matters of unemployment insurance. In doing so, the Court rejected the originalist approach privileged by the Quebec Court of Appeal, and consequently has attributed very little weight to evidence relating to the intent of the framers of the 1940 amendment that transferred power over unemployment insurance from the provincial legislatures to the federal Parliament.

The Quebec Court of Appeal had concluded that evidence shows that the amendment of 1940 was aimed at enabling federal authorities to set up a plan to insure individuals against lost income following the loss of their job for economic reasons, not following the interruption of their employment for personal reasons.⁴² It was the opinion of the Court of Appeal that the principle of progressive interpretation may not be applied if it would disregard the intent of the 1940 amendment:

In the circumstances, I do not believe that the image of a living tree capable of growth can be used to contend that social evolution in Canada would henceforward have rendered the provisions of the

³⁹ Philip Resnick, "The Crisis of Multi-National Federations: Post-Charlottetown Reflections" (1994) 2 Rev. Const. Stud. 189, at 191.

⁴⁰ *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669 [hereinafter "*Employment Insurance Act Reference*"].

⁴¹ *Id.*, at para. 34.

⁴² *Quebec (Attorney General) v. Canada (Attorney General)*, [2004] Q.J. No. 277, [2004] R.J.Q. 399, at para. 72 (C.A.).

Employment Insurance Act pertaining to pregnancy and parental benefits constitutionally valid, whereas the provisions would have been considered invalid had they been incorporated into the *Unemployment Insurance Act, 1940*.⁴³

Rather, the Supreme Court held that the essence of the federal jurisdiction over unemployment insurance is “the establishment of a public insurance program the purpose of which is to preserve workers’ economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment”,⁴⁴ regardless of the reasons for the interruption. Therefore, the Court found the federal provisions valid.

The effect of this decision was to extend the scope of federal power over social matters that the provinces had specifically refused to transfer to the federal Parliament in 1940.⁴⁵ This broad interpretation of federal power necessarily causes a correlative reduction of the scope of provincial powers over property and civil rights in the province. Moreover, after assessing that the adaptation of the Constitution must be “consistent with the limits resulting from the constitutional division of powers”, the Court stated that

where a specific power has been detached from a more general power, the specific power cannot be evaluated in relation to the general power, because any evolution would then be regarded as an encroachment. Rather, it is necessary to consider the essential elements of the power and to ascertain whether the impugned measure is consistent with the natural evolution of that power.⁴⁶

This statement of the Supreme Court could mean that in adapting the constitutional text, it is no longer necessary to interpret heads of powers each in relation to one another (process of mutual modification⁴⁷). In this context, only specific powers could be given a progressive interpretation to the detriment of general power. Many federal heads of power are specific ones detached from the general provincial power over property and civil rights in the province. This

⁴³ *Id.*, at para. 92.

⁴⁴ *Employment Insurance Act Reference*, *supra*, note 40, at para. 68.

⁴⁵ *Quebec (Attorney General) v. Canada (Attorney General)*, *supra*, note 42.

⁴⁶ *Employment Insurance Act Reference*, *supra*, note 40, at para. 44.

⁴⁷ Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf (Toronto: Carswell, 1997), at 15-35.

ruling of the Court may thus have negative effects on the federal balance.

In the same decision, the Supreme Court expressly dismissed any responsibility in maintaining a federal balance when adapting the original federal settlement. For the Court,

[t]o derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments.⁴⁸

This statement illustrates the absence of a federal theory in the jurisprudence of the highest court of the land. First, for the Court, federalism is a political concept devoid of normative content. Second, the Court considers that it has no leading role to play in maintaining a balance between the powers of the two levels of government. The problem with the Court's conception is that it does in fact play a major role in relation to the preservation or non-preservation of such a balance.⁴⁹ In 1867, the federal principle had been chosen instead of a legislative union precisely to insert into the Constitution legal guarantees for the autonomy of the provinces. Political power struggles cannot on their own constitute a real safeguard for minorities, particularly for national minorities: they need the power of law. This is one of the underlying reasons for choosing the federal principle.

The need to adapt constitutional texts to new realities is undeniable. The real questions are rather which evolutionary path must be privileged and how the courts can keep a federal balance when performing their task as umpires of the distribution of powers.

IV. THE TRENCHING POWER AND THE GENERAL TRADE AND COMMERCE POWER

The distribution of subject-matter jurisdictions, though perhaps drafted with some precision, is not so clear when the time comes for its practical

⁴⁸ *Employment Insurance Act Reference*, *supra*, note 40, at para. 10.

⁴⁹ Furthermore, in 1993 the Supreme Court expressly recognized its role to this effect in the *Ontario Hydro* decision, *supra*, note 34, at 373.

application. The complexity of social life inherently involves some overlapping between the different jurisdictions of each level of government. The Courts have indeed recognized that both the federal Parliament and provincial legislatures can validly affect, in an incidental manner, the other government's jurisdiction when making legislation that is in relation to their own jurisdiction.⁵⁰ As long as the impact produced upon the other level of government's jurisdiction is only an incidental side effect, the sole criterion of "pith and substance" will suffice. However, what will happen when the encroachment is blatant, in other words, more meaningful or substantial?

This situation will arise when a provision is, in pith and substance, invalid, but its constitutional validity is nonetheless maintained because it forms part of a legislative whole that is otherwise valid. This is known as the trenching power.

For a century, the Judicial Committee of the Privy Council, and later the Supreme Court, developed and applied a criterion of necessity: the federal Parliament⁵¹ was required to demonstrate that its legislative intervention in a matter of exclusive provincial jurisdiction was "truly necessary" or "integral" to the federal scheme. Traditional case law would only tolerate an encroachment on provincial jurisdiction by the federal Parliament to the extent that it could demonstrate a necessity.⁵² However, in 1978 the Supreme Court enunciated and applied a new

⁵⁰ This is known as the ancillary or necessarily incidental power. See in particular *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641, at 670 [hereinafter "*General Motors*"]; *Quebec (Attorney General) v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.

⁵¹ In cases where such an encroachment is a result of the application of provincial laws, the latter will rather be declared inapplicable to the persons or things under federal jurisdiction: *Bell Canada v. Québec (Commission de Santé et de la sécurité du travail du Québec)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749. The Supreme Court's statements in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494, at para. 19 and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, at para. 58, according to which said power to encroach could also play in favour of the provinces are based on a passage from Dickson J. in *General Motors* where the latter was referring to the provinces' ancillary powers: *General Motors*, *supra*, note 50, at 670. Moreover, the Court did not apply this power to encroach: in *Global Securities*, the provincial provision involved was valid; in *Kitkatla Band*, it was rather a concern relating to the applicability of a provincial provision toward Indians.

⁵² *Ontario (Attorney General) v. Canada (Attorney General)*, [1894] A.C. 189, at 201; *Tennant v. Union Bank of Canada*, [1894] A.C. 31; *Montreal (City) v. Montreal Street Railway*, [1912] A.C. 333; *R. v. Thomas Fuller Construction*, [1980] 1 S.C.R. 695, at 713; *R. v. Fowler*, [1980] 2 S.C.R. 213; *Peel (Regional Municipality) v. MacKenzie*, [1982] 2 S.C.R. 9. In those three Supreme Court decisions, the application of the criteria of necessity prompted the Court to invalidate the federal encroachments on provincial jurisdiction.

requirement, the “functional relationship” test.⁵³ This requirement is much less demanding of the federal Parliament than the criterion of necessity, since it allows an encroachment on provincial jurisdiction for the sole purpose of facilitating or rendering the exercise of federal jurisdiction more convenient.⁵⁴

The few hesitations of the Supreme Court regarding the criterion to be applied in matters of the trenching power came to an end, so to speak, in 1989 with the *General Motors* decision. In this case, the Court declared valid section 31.1 of the *Combines Investigation Act*,⁵⁵ a provision that created a civil right of action before the Federal Court. After concluding that the provision encroached, though in a limited fashion, on provincial jurisdiction in relation to property and civil rights, the Court had to determine whether the disposition formed part of a valid legislative regime. The Court then applied the five hallmarks⁵⁶ of a valid federal intervention under the general branch of the trade and commerce clause and concluded that the *Combines Investigation Act* is valid under section 91(2) of the *Constitution Act, 1867*.⁵⁷

Since section 31.1 was inserted in a valid federal act, the Court was left to determine the level of integration required for its constitutional validity. For the Court, the choice of which criterion to apply (necessity or functional relationship) will depend on the extent of the encroachment on provincial jurisdiction. If the encroachment is minimal, a “functional

⁵³ *R. v. Zelensky*, [1978] 2 S.C.R. 940 [hereinafter “*Zelensky*”]. Here the three Quebec justices’ dissent should be noted.

⁵⁴ Henri Brun, “L’évolution récente de quelques principes généraux régissant le partage des compétences entre le fédéral et les provinces” in *Congrès annuel du Barreau du Québec (1992)* (Quebec: Service de la formation du Barreau du Québec, 1992), at 25. The application of the functional criteria in the *Zelensky* decision prompted the Court to validate a provision of the *Criminal Code*, R.S.C. 1970, c. C-34 that authorized the criminal trial judge to condemn the convict to indemnify the victim, obviously a matter within provincial jurisdiction in relation to property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁵⁵ R.S.C. 1970, c. C-23.

⁵⁶ The first three criteria were stated by Chief Justice Laskin in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at 158 and following. Justice Dickson added two more in *Canada (Attorney General) v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, at 267: (1) the contested legislative measure must be inserted in a general system of regulations; (2) the system must be constantly under the surveillance of a governing body; (3) the legislative measure must concern commerce in general, rather than a particular sector; (4) the law should be of such a nature that the Constitution would not habilitate the provinces to adopt it, whether jointly or separately; and (5) omitting to include a single or several provinces or localities in the legislative system would compromise its application in other parts of the country.

⁵⁷ *Supra*, note 54.

relationship” with the law will suffice to preserve its validity. But in the case of a considerable encroachment, a stricter criterion is applicable: the provision must be “truly necessary” to the federal scheme.⁵⁸

In the *General Motors* case, the Court’s position being that the encroachment on provincial jurisdiction was limited, it applied the “functional relationship” test and concluded that such a link did in fact exist between section 31.1 and the federal legislative regime.⁵⁹ Although it is possible to criticize the development and the application of the “functional relationship” test in this case (since the encroachment on provincial jurisdiction in matters of property and civil rights is rather blatant), the fact is that the provision offered a private remedy solely for particular violations of the Act and did not create a general cause of action of a private nature.

In 2005, the Supreme Court was driven to apply the trenching power and the general trade and commerce power in a context bearing several similarities to the facts of the *General Motors* case. In the *Kirkbi*⁶⁰ case, the questions were whether a provision creating a statutory action of passing-off in the federal trademark legislation was *ultra vires* Parliament and whether the federal trademarks legislation itself was a valid exercise of the Parliament’s general trade and commerce power.

First, even if the Court did not add new hallmarks of a valid exercise of Parliament’s general trade and commerce power to those it already set out in *General Motors* in 1989, it clearly expressed for the first time the idea underlying their application: “The ‘general trade and commerce’ category requires an assessment of the relative importance of an activity to the national economy as well as an inquiry into whether an activity should be regulated by Parliament as opposed to the provinces”.⁶¹ The evaluation of the “importance” of a matter and the determination of what “should be” the distribution of legislative powers are clearly questions of a political nature that should not be relevant in judicial adjudication. One may be troubled by the fact that with these considerations underlying the application of the general trade and commerce power, there will be no effective limits to that head of federal

⁵⁸ *General Motors*, *supra*, note 50, at 669 and 683.

⁵⁹ *Id.*, at 683 and 684.

⁶⁰ *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302 [hereinafter “*Kirkbi*”].

⁶¹ *Id.*, at para. 16.

power. In the *Kirkbi* case, the Court found the federal trademarks legislation to be valid.

Moreover, the Supreme Court reiterates the idea that the five hallmarks developed so far are by no means exhaustive and only amount to “*indicia*” that the federal Parliament must be granted an exclusive authority to legislate in relation to a given matter under its general trade and commerce power.⁶² By reserving the possibility to decide future cases involving the general trade and commerce power on an individual basis, the Court is simply arousing the federal government’s hope of seeing its jurisdiction in this field increase even more.

Second, the Supreme Court found valid the provision of the *Trade-marks Act*,⁶³ creating a civil remedy that, in essence, codifies the common law tort of passing-off, and therefore, is an invasion of provincial legislative power over property and civil rights. For the Court, the degree of relationship between the provision and the regulatory scheme that was appropriate in that case to sustain the validity of the provision was a “functional relationship”, instead of the requirement that it must be “truly necessary” or “integral” to the federal scheme. The Court applied that test because the provision “only minimally intrudes into provincial jurisdiction over property and civil rights”.⁶⁴ In fact, it is difficult to consider a statutory codification of tort rights in federal legislation as a minimal intrusion into the provincial power over property and civil rights. That encroachment upon the provincial domain could have important consequences on the federal balance of legislative power, to the detriment of provincial legislatures. Contrary to the civil remedy integrated into the *Combines Investigation Act* and declared *intra vires* the federal Parliament’s general trade and commerce power in the *General Motors* case, the provision of the *Trade-marks Act* in *Kirkbi* created a general remedy and cause of action on a national basis.⁶⁵

The way the Supreme Court applied the federal general trade and commerce power and the ancillary power doctrine may thus have effects on the federal balance of powers between the federal Parliament and provincial legislatures.

⁶² *Id.*, at para. 17.

⁶³ R.S.C. 1985, c. T-13.

⁶⁴ *Kirkbi*, *supra*, note 60, at para. 33.

⁶⁵ For further critique of the *Kirkbi* decision viewed from the trenching power standpoint, see Bruce Ryder, “The End of Umpire? Federalism and Judicial Restraint”, in this volume.

V. THE FEDERAL PARAMOUNTCY DOCTRINE

The way the courts apply the doctrine of federal paramountcy⁶⁶ can have profound implications on the balance of powers under a federal system. This doctrine provides that where there are inconsistent federal and provincial laws, both valid, the former will prevail and the latter will become inoperative. The effects produced by the provincial rule of law will then be suspended to the extent of their incompatibility with the federal rule of law, and this for as long as the incompatibility endures. The impact of this doctrine on the balance of powers between the two levels of government depends on whether the court will adopt a broad or narrow definition of inconsistency.

The simultaneous presence of two laws, one provincial and the other federal, dealing with the same subject is characteristic of the exercise of concurrent jurisdictions. The *Constitution Act, 1867* only provides for a very limited number of them.⁶⁷ In 1867, the exclusiveness principle dominated the distribution of legislative jurisdiction between the two levels of government. However, the creation of so-called exclusive heads of power does not prevent the existence of numerous laws overlapping one another when implementing the Constitution. Situations of concurrency follow notably from the doctrine of ancillary powers, the trenching power and the dual aspect theory. The main thing to retain is the importance invested in the notion of “conflict”, particularly in this era when there is a multiplication of overlapping laws, because the existence of such a “conflict” entails a federal imbalance in favour of the federal Parliament.

The sole test of inconsistency in the jurisprudence of the Supreme Court has long been understood to be express contradiction: the provincial law is deemed to be inoperative only if there is an impossibility of dual compliance.

Originally, the Courts applied the principle of federal paramountcy from the moment they noticed the simultaneous presence of a federal law and a provincial law dealing with the same subject. They would then presume that the federal legislator intended to handle the issue

⁶⁶ Federal paramountcy is expressly provided for in regard to concurrent jurisdictions under ss. 92A(3), 94A and 95 of the *Constitution Act, 1867*, *supra*, note 54. In the second of these cases, it is nonetheless the provincial law that prevails. This principle of federal paramountcy has been extended by jurisprudence to other conflicts of valid laws. For more on this, see Henri Brun & Guy Tremblay; *Droit constitutionnel*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2002), at 457.

⁶⁷ *Id.*

completely and exclusively, without inquiring about the possibility that both laws might operate in a complementary manner. This was called the “covering the field” (or negative implication) test.⁶⁸

Over the years, the Canadian Courts did nevertheless develop and apply a strict conflict requirement, the express contradiction test: a provincial law and a federal law, both valid, dealing with the same subject can operate in a concomitant fashion, unless there exists between them such a conflict that to observe one of them entails the violation of the other. Numerous decisions went in this direction.⁶⁹ However, it is the Supreme Court’s 1982 decision rendered in the *Multiple Access*⁷⁰ case that serves as the leading authority in relation to the operational conflict requirement. The question raised was that of the compatibility between Ontario and federal legislative texts concerning insider trading, particularly, provisions dealing with the use of confidential information. The provincial and federal provisions were practically identical as to their object, their content and the remedies that were provided. Regarding the conflict requirement, the Court expressed itself as follows: “In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says ‘yes’ and the other says ‘no’, ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other”.⁷¹ By applying such a demanding test, the Supreme Court was displaying judicial deference to the provincial legislators by preserving the operability of their laws, which were perfectly valid in any case. However, it is notable that in this case the provincial and federal provisions were practically identical as to their object, their content and the remedies that were provided for. In a sentence that went unnoticed, so to speak, the Supreme Court

⁶⁸ Brun, *supra*, note 54, at 26; Hogg, *supra*, note 47, at 16-18. Also on this entire issue of federal paramountcy, see François Joyal, “Le principe de la primauté de la législation fédérale en droit constitutionnel canadien” (1993) 27 R.J.T. 109.

⁶⁹ *Fawcett v. Ontario (Attorney General)*, [1964] S.C.R. 625, at 630; *Ross v. Ontario (Registrar of Motor Vehicles)*, [1975] 1 S.C.R. 5, at 12 and 13; *Interprovincial Co-operatives Ltd. v. Dryden Chemicals Ltd.*, [1976] 1 S.C.R. 477, at 515 and 516; *Kozan Furniture (Yorkton) Ltd. (Trustee of) v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753, at 808; *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)*, [1979] 1 S.C.R. 754, at 780.

⁷⁰ *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.

⁷¹ *Id.*, at 191. See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 963 and 964. During this period, only the *Lechasseur* decision handed down by Laskin C.J. made an exception to the application of the express contradiction test: *Quebec (Attorney General) v. Lechasseur*, [1981] 2 S.C.R. 253.

already stated what would later become the determining criteria in matters of federal paramountcy after the *Rothmans*⁷² decision rendered by the Supreme Court in 2005, that

there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; *application of the provincial law does not displace the legislative purpose of Parliament.*⁷³

In 1990, in the *Hall*⁷⁴ decision, while the express contradiction test was thought to be firmly established, the Supreme Court re-examined its application. This re-examination extended the number of situations where the rule of federal paramountcy could be applied. From that moment on, the question of whether an incompatibility exists between federal and provincial provisions remains however, the nature of this incompatibility is different: from the strict operational conflict that was targeted by the incompatibility of application, the Supreme Court from then on considers that a conflict arises when the provincial rule of law can potentially have the effect of displacing the legislative purpose of Parliament. This was an important jurisprudential turnaround that allowed a considerable extension of the number of cases where the federal paramountcy doctrine could be applied. In this case, the Court had to determine if a conflict existed between two provisions of the *Bank Act*,⁷⁵ which permitted banks to execute their securities in case of debtors' default, and two provisions of a Saskatchewan law⁷⁶ that obliged creditors to send prior notices to debtors before the execution of their securities.

In the *Hall* case, there was no incompatibility of application between the federal and provincial provisions, the latter simply imposing an additional condition for the realization of securities, that is to say a prior notice from the creditor. In other words, by sending a prior notice to the debtor, in conformity with the provincial law, the financial institution was not contravening the federal law (the latter being silent as to the question of a prior notice). Nonetheless, the Court concluded

⁷² *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188 [hereinafter "*Rothmans*"].

⁷³ *Multiple Access Ltd. v. McCutcheon*, *supra*, note 70, at 190-91 (emphasis added).

⁷⁴ *Bank of Montreal v. Hall*, [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121 [hereinafter "*Hall*"].

⁷⁵ R.S.C. 1985, c. B-1, ss. 178, 179.

⁷⁶ *The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, ss. 19, 27.

that a “true conflict of application” exists between them.⁷⁷ In substance, it came to this conclusion because there is reason to believe that by adopting these provisions, the federal legislator intended to prevent provincial laws from imposing conditions on the banks for realizing their securities without delay. From then on, the approach simply consists of asking whether the provincial law’s application could displace the federal Parliament’s legislative purpose. This very subjective criteria is centralizing because it conditions the application of federal paramountcy — and thus the inoperability of an otherwise perfectly valid provincial law and to the mere explicit or even implicit intention of the federal legislator to exclude the operation of otherwise valid provincial legislative intervention.

In the *Mangat*⁷⁸ case, a decision rendered in 2001, the Supreme Court was called to determine if a conflict existed between, on the one hand, section 30 and section 69(1) of the *Immigration Act*⁷⁹ (which allowed non-lawyers to represent clients before the Immigration and Refugee Status Commission) and, on the other hand, section 26 of the *Legal Profession Act*⁸⁰ of British Columbia (which forbade any person other than a member in good standing of the Bar from practising law). After mentioning its jurisprudential position developed in the *Hall* decision and applied in the *M & D Farm* case,⁸¹ to the effect that a conflict exists when it is reasonable to conclude that the provincial law’s operation would displace Parliament’s purpose, it concluded that the provincial law’s provision was inoperative, although abiding by it would not have entailed violating the federal provisions. In *Mangat*, according to the Court, abiding by the provincial provision would have the effect of displacing the legislative purpose of Parliament by adopting its norms, that is to establish “an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals”.⁸²

⁷⁷ *Hall, supra*, note 74, at 152.

⁷⁸ *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 [hereinafter “*Mangat*”].

⁷⁹ R.S.C. 1985, c. I-2, ss. 30, 69(1).

⁸⁰ S.B.C. 1987, c. 25, s. 26.

⁸¹ *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] S.C.J. No. 4, [1999] 2 S.C.R. 961, at paras. 41-42.

⁸² *Mangat, supra*, note 78, at 154.

The same year, in the *Spraytech*⁸³ case, the Supreme Court reiterated the importance of the federal Parliament's purpose when applying the conflict requirement. It concerned an alleged conflict between, on the one hand, the federal *Pest Control Products Act*⁸⁴ and, on the other hand, a municipal bylaw restricting the usage of pesticides. The Court concluded in favour of the municipal bylaw's operability because it felt that: "No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes".⁸⁵ The federal law simply regulates which pesticides can be registered for manufacture and/or use in Canada. The Court added that "there is, moreover, no concern in this case that the application of By-law 270 displaces or frustrates 'the legislative purpose of Parliament'".⁸⁶ Once again, the notion of Parliament's legislative purpose constitutes the determining factor when applying the conflict requirement.

The decision rendered by the Supreme Court in *Rothmans* permanently put an end to the doubts that may still have been lingering as to the applicable requirements in matters of conflicting federal and provincial laws. In that case, the Supreme Court had to determine whether there was an inconsistency between federal tobacco legislation allowing retailers to display tobacco and tobacco-related products, and provincial tobacco control legislation banning all advertising, display and promotion of tobacco or tobacco-related products in any premises in which persons under 18 years of age are permitted. The Court made clear what was implicit in its previous decisions, and held, after a review of its precedents on that issue, that impossibility of dual compliance is not the sole mark of inconsistency: provincial law that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the doctrine of federal paramountcy. Therefore, for the Court, impossibility of dual compliance is sufficient but not the only test for inconsistency. The express addition of the "frustration of legislative purpose" test may have important implications for the balance of power in favour of the federal Parliament. Applying these two marks of

⁸³ 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241 [hereinafter "*Spraytech*"].

⁸⁴ R.S.C. 1985, c. P-9, ss. 4(1), 4(3), 6(1)(j).

⁸⁵ *Spraytech*, *supra*, note 83, at 269.

⁸⁶ *Id.*

inconsistency, the Court has surprisingly concluded,⁸⁷ in this case, that the federal paramountcy doctrine must not apply.

The express addition of the “frustration of the legislative purpose” test calls for certain comments concerning the classic conception and the modern conception of the distribution of powers.⁸⁸ The classic conception of the distribution of powers consists of the idea that the powers conferred by sections 91 and 92 constitute “watertight compartments”⁸⁹ and that, as much as possible, it is necessary to avoid any overlapping between the powers of each level of government. The notion of exclusivity of legislative powers is the foremost preoccupation. The correlative interpretation in the Judicial Committee of the Privy Council’s case law of provisions relating to the distribution of powers is part of this conception. In the modern conception of the distribution of legislative powers, the principle of exclusivity is applied more gently by accentuating the laws’ actual character. By doing so, as Fabien Gélinas has written, “the notion of exclusivity is drained of any connotation relating to the water-tightness of jurisdictions and simply means that the same subject matter cannot be found in both of the lists drawn up in sections 91 and 92”.⁹⁰ If a law contains several aspects, it is necessary to choose the dominant aspect, which then becomes its subject matter. If the legislature that adopted the law has jurisdiction regarding this subject matter, the side effects that might be produced upon subject matters that come under the jurisdiction of the other level of government will not affect its constitutional validity. However, if the importance of both the federal and provincial aspects is comparable, the double aspect theory will be applied. Thus, according to the preceding theory, the doctrine of ancillary powers and the trenching power participate in the modern conception of the distribution of powers.

⁸⁷ For an in-depth analysis and criticism of the Court’s conclusion in the *Rothmans* decision, see Peter W. Hogg, “Paramountcy and Tobacco”, in this volume.

⁸⁸ For a detailed study of the tenets of both conceptions and their jurisprudential applications, see Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 308.

⁸⁹ This expression is from the Judicial Committee of the Privy Council in *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, at 354, where Lord Atkin stated in the following terms: “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure”.

⁹⁰ Fabien Gélinas, “La doctrine des immunités interjuridictionnelles dans le partage des compétences : éléments de systématisation” (1994) 28 R.J.T. 507, at 512 (translated by author).

As a general rule, the classic conception tends to favour respect for the principle of provincial autonomy since it limits the overlapping of laws that lead to the application of the rule of paramountcy in case of conflict.⁹¹ Therefore, the issue is about limiting the “zones of contact” between each level of government. Professor Jean Beetz, before being nominated to the Supreme Court, highlighted the importance of the classic conception of the distribution of legislative jurisdiction, particularly as to the protection of Québec’s cultural identity, in the following terms:

The protection of Québec identity is foremost a legal issue rather than a political one. . . . The purpose is one of reducing zones of contact between an overly powerful majority and a too fragile minority in spheres of influence deemed to be of vital importance because it was thought to be at that time that such contact with one or another within such zones would risk denaturing the collective identity of the minority.⁹²

However, there are cases where insisting upon the watertightness or exclusive character of the distribution of powers will greatly hinder the preservation of the provinces’ autonomy in their fields of jurisdiction.⁹³ By recognizing the provinces’ power to legislate concurrently with the federal Parliament on certain issues, the modern conception of the distribution of powers, from which flows the double aspect theory, can effectively tend to protect the balance of powers between each level of government: from a provincial autonomy perspective, the tenure of a subordinate space is better than no space at all.⁹⁴ Furthermore, the beneficial effects that an application of the modern conception of the distribution of powers may have regarding the respect of provincial

⁹¹ Many authors are indeed of the opinion that provincial autonomy is generally better preserved by seeking to limit the overlapping of jurisdictions: Bruce Ryder, “The End of Umpire? Federalism and Judicial Restraint”, in this volume; Jean Beetz, “Les attitudes changeantes du Québec à l’endroit de la Constitution de 1867”, in P.-A. Crépeau & C.B. MacPherson, *L’avenir du fédéralisme canadien* (Toronto: University of Toronto Press, 1966), 113; Jean-Charles Bonenfant, “L’étanchéité de l’A.A.N.B. est-elle menacée?” (1977) 18 C. de D. 383; Pierre Patenaude, “L’érosion graduelle de la règle d’étanchéité: une nouvelle menace à l’autonomie du Québec” (1979) 20 C. de D. 229; Gil Rémillard, *Le fédéralisme canadien*, 2d ed. (Montreal: Québec Amérique, 1983), at 282-95; Gélinas, *supra*, note 90, at 510-15.

⁹² Beetz, *supra*, note 91, at 123.

⁹³ Ryder, *supra*, note 88.

⁹⁴ *Id.*, at 351.

autonomy require a restrictive interpretation of the “conflict” notion, and thus a parsimonious application of federal paramountcy.⁹⁵

The changes made by the Supreme Court to the application of the conflict requirement, by the addition of a “frustration of legislative purpose” test, from a provincial autonomy perspective, have the effect of annihilating for all practical purposes the beneficial effects that might flow, in this specific case, from the application of the modern concept of the distribution of powers, which favours the overlapping of laws. Thus the Court is preventing the maximization of provincial powers.

VI. CONCLUSION

In conclusion, 2005 has not been a very reassuring year for the federal principle and the balance of legislative powers in Canada. The Supreme Court seems to solve disputes involving the distribution of powers without having any vision of what federalism legally implies nor of the main role it inevitably plays in the preservation of a balance of powers between the two levels of government. The dynamics of centralization that exists in Canada as in many federations⁹⁶ calls for the elaboration of a legal federal theory in the Supreme Court of Canada’s jurisprudence.

If federalism still means something to Canada, the Supreme Court should inspire itself from the federal principle and its essential corollaries in its task of adapting the Constitution to the evolution of Canadian society. Thus, it would permit both levels of government to benefit from the expansion of the spheres of state activity and preserve a balance between their respective powers. Without promoting a return to the “watertight compartments”, which would be a mistake in this era of numerous and more complex state interventions, federalism will be unable to survive in the long run if there is a total decompartmentalization of each level of government’s legislative powers. Its basic survival commands the preservation of a certain untouchable core for each head of power. The creation of ever-increasing concurrent zones evidently gives a

⁹⁵ The federal paramountcy doctrine takes its place in the classic conception of the distribution of powers in that it precisely aims to avoid the coexistence of laws concerning the same subject emanating from both levels of government.

⁹⁶ André Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” (1993) 26 Canadian Journal of Political Science 3; Edmond Orban, *La dynamique de la centralisation dans l’État fédéral : un processus irréversible?* (Montreal: Québec-Amérique, 1984).

firm grip to the doctrine of federal paramountcy whose application risks becoming more and more frequent since the *Rothmans* decision.

The “lodestar” of federalism obviously does not always shine with much brightness in the Supreme Court’s jurisprudence. The image that comes to mind when characterizing the use of the federal principle by Canada’s highest court is more like that of a shooting star: shining in all of its glory for an instant, but then immediately disappearing and leaving behind only a dark sky.

