

# Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers

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# Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers

Bruce Ryder\*

## I. INTRODUCTION

During most of the past decade, the justices of the Supreme Court of Canada have achieved and maintained a remarkable degree of consensus around their approach to the interpretation of the division of legislative powers in the *Constitution Act, 1867*.<sup>1</sup> Since Beverley McLachlin's appointment as Chief Justice in January 2000, the Court has been unanimous in its disposition of division of powers issues in 25 rulings or reference opinions.<sup>2</sup> The Court was divided on the disposition of a division of powers issue in only one case between 2000 and 2008.<sup>3</sup>

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<sup>1</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>2</sup> The 25 rulings or opinions, in chronological order, are: *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494 (S.C.C.) (9-0 ruling, per Iacobucci J., upholding challenged provision of the *Securities Act*, R.S.B.C. 1996, c. 418); *Reference re Firearms Act (Can.)*, [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783 (S.C.C.) (9-0 ruling, issued by "the Court", upholding the *Firearms Act*, S.C. 2005, c. 39, as a valid exercise of Parliament's criminal law power); *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.) (7-0 ruling, per Iacobucci J., finding provincial casino program did not encroach on federal jurisdiction in relation to Aboriginal people); *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.) (9-0 ruling, per Gonthier J., finding provisions of *Immigration Act*, R.S.C. 1985, c. I-2, paramount over conflicting provisions of B.C. *Legal Profession Act*, S.B.C. 1987, c. 25); *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, [2002] 1 S.C.R. 569 (S.C.C.) (9-0 ruling, per McLachlin C.J.C., finding challenged provision of *Marine Mammal Regulations*, SOR/93-56, to be a valid exercise of Parliament's fisheries power); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146 (S.C.C.) (7-0 ruling, per LeBel J., upholding challenged provisions of B.C. *Heritage Conservation Act*, R.S.B.C. 1996, c. 187); *Krieger v. Law Society of Alberta*, [2002]

S.C.J. No. 45, [2002] 3 S.C.R. 372 (S.C.C.) (9-0 ruling, *per* Iacobucci and Major JJ., upholding the application to Crown prosecutor of Code of Professional Conduct passed pursuant to Alberta's *Legal Profession Act*, S.A. 1990, c. L-9.1); *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6 (S.C.C.) (9-0 ruling, *per* Major J., upholding the validity of the Manitoba statute regulating video lottery terminals); *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.) (9-0 ruling, *per* Bastarache J., finding that the provincial legislature has jurisdiction to endow administrative tribunals with the power to consider Aboriginal rights); *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) (9-0 ruling finding prohibitions on marijuana to be a valid exercise of federal jurisdiction; Gonthier and Binnie JJ. wrote the principal opinion for 6; Arbour J., Deschamps J. and LeBel J. agreed in their opinions dissenting on Charter grounds); *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.) (9-0 opinion, issued by "the Court", affirming that the proposed *Civil Law Harmonization Act*, S.C. 2001, c. 4, would be within Parliament's jurisdiction to enact laws in relation to marriage); *UL Canada Inc. v. Quebec (Attorney General)*, [2005] S.C.J. No. 11, [2005] 1 S.C.R. 143 (S.C.C.) (7-0 ruling, *per* LeBel J., finding the Quebec regulation respecting the colour of margarine to be a valid exercise of provincial jurisdiction in relation to local trade); *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188 (S.C.C.) [hereinafter "*Rothmans*"] (9-0 ruling, *per* Major J., upholding the operation of provincial law regulating retail displays of tobacco products); *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 (S.C.C.) (7-0 ruling, *per* Abella J., upholding the provincial component of the cooperative marketing scheme for chickens); *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473 (S.C.C.) (9-0 ruling, *per* Major J., upholding the B.C. *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, as a valid exercise of provincial jurisdiction); *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669 (S.C.C.) (7-0 ruling, *per* Deschamps J., upholding maternity and parental leave provisions of the *Employment Insurance Act*, S.C. 1996, c. 23); *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302 (S.C.C.) (9-0 ruling, *per* LeBel J., upholding passing off civil action in federal *Trade-marks Act*, R.S.C. 1985, c. T-13, as a valid exercise of Parliament's trade and commerce power); *Isen v. Simms*, [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349 (S.C.C.) (9-0 ruling, *per* Rothstein J., finding that provincial law applies to negligence action involving a boat in a parking lot); *Dunne v. Quebec (Deputy Minister of Revenue)*, [2007] S.C.J. No. 19, [2007] 1 S.C.R. 853 (S.C.C.) (9-0 ruling, *per* LeBel J., upholding the validity of Quebec law taxing partnership retirement benefits of non-residents); *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Canadian Western Bank*"] (7-0 ruling, *per* Binnie and LeBel JJ. for 6, finding Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, applied to delivery of insurance services by banks; Bastarache J. wrote a separate concurring opinion); *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.) (7-0 ruling finding a Vancouver by-law inoperative (*per* Binnie and LeBel JJ. for 6), or inapplicable (in Bastarache J.'s lone concurring opinion), to a cement mixing facility on port lands); *Confédération des syndicats nationaux v. Canada (Attorney General)*, [2008] S.C.J. No. 69, [2008] 3 S.C.R. 511 (S.C.C.) (7-0 ruling, *per* LeBel J., finding the challenged provisions of the *Employment Insurance Act*, S.C. 1996, c. 23, to be within Parliament's jurisdiction pursuant to s. 91(2A)); *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624 (S.C.C.) (7-0 ruling, *per* Binnie J., upholding Ontario's civil forfeiture statute as a valid exercise of provincial jurisdiction pursuant to s. 92(13)); *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] S.C.J. No. 45, [2010] 2 S.C.R. 696 (S.C.C.) [hereinafter "*NIL/TU, O*"] (9-0 ruling, *per* Abella J. for 6, finding the agency subject to provincial labour relations jurisdiction; McLachlin C.J.C. and Fish J. wrote a separate concurring opinion); *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] S.C.J. No. 46, [2010] 2 S.C.R. 737 (S.C.C.) [hereinafter "*Native Child*"] (9-0 ruling, *per* Abella J. for 6, finding an Aboriginal child welfare agency subject to provincial labour relations jurisdiction; McLachlin C.J.C. and Fish J. wrote a separate concurring opinion).

The judges on the McLachlin Court have been united around a commitment to a modern, flexible vision of federalism that generously interprets both federal and provincial heads of legislative power. The Court tends to give the pith and substance, double aspect, ancillary powers and living tree doctrines liberal rein, thus promoting a great deal of overlap and interplay between federal and provincial laws in growing areas of *de facto* concurrent jurisdiction.<sup>4</sup> In Abella J.'s words: "[t]oday's constitutional landscape is painted with the brush of co-operative federalism ... A co-operative approach accepts the inevitability of overlap between the exercise of federal and provincial competencies".<sup>5</sup> Indeed, the Court has accorded legislators so much constitutional breathing space that, by 2010, it was becoming hard to remember the last time the Court ruled a law *ultra vires* on the grounds that it was in pith and substance in relation to the other level of government's powers pursuant to sections 91 or 92.<sup>6</sup>

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<sup>3</sup> *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489 (S.C.C.) (8-1 ruling, *per* Bastarache and Iacobucci JJ. for the majority, finding the challenged provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, to be within Parliament's jurisdiction pursuant to s. 91(27); LeBel J. was alone in finding the provisions *ultra vires* on division of powers grounds). The Court also divided in *R. v. Morris*, [2006] S.C.J. No. 59, [2006] 2 S.C.R. 915 (S.C.C.) (4-3 ruling, *per* Deschamps and Abella JJ. for the majority, finding that a provision of the B.C. *Wildlife Act*, S.B.C. 1982, c. 57, prohibiting hunting at night could not apply to the exercise of treaty rights by the accused hunters; McLachlin C.J.C. and Fish J. wrote the dissenting opinion). However, the different results reached by the majority and the dissent in *Morris* were a product of their different interpretations of the scope of the Aboriginal treaty right at issue, rather than differing approaches to the interpretation of the limits placed on provincial power by the division of legislative powers in the *Constitution Act, 1867*.

<sup>4</sup> This approach was comprehensively described and defended in the joint opinion of Bin-  
nie and LeBel JJ. in *Canadian Western Bank*, *supra*, note 2, at paras. 21-47. For a pre-*Canadian  
Western Bank* overview of these tendencies in the Court's jurisprudence, see Bruce Ryder, "The End  
of Umpire? Federalism and Judicial Restraint" [hereinafter "Ryder"] in J. Cameron, P. Monahan &  
B. Ryder, eds. (2006) 34 S.C.L.R. (2d) 345, esp. at 350-52.

<sup>5</sup> *NIL/TU,O*, *supra*, note 2, at para. 42.

<sup>6</sup> Some of us are old enough to remember. Before 2010, the last time a provincial or municipal law was declared invalid on division of powers grounds was in 1993, when Nova Scotia abortion regulations were found to be an invasion of the federal criminal law power: *R. v. Morgentaler*, [1993] S.C.J. No. 95, [1993] 3 S.C.R. 463 (S.C.C.). As for federal statutes, apart from an inconsequential declaratory provision of the proposed *Civil Marriage Act* that the Court said would be *ultra vires* in *Reference re Same-Sex Marriage*, *supra*, note 2, one has to go back to the early 1980s to find the Court declaring a federal statute *ultra vires* on division of powers grounds. See *Reference re Proposed Federal Tax on exported Natural Gas*, [1982] S.C.J. No. 52, [1982] 1 S.C.R. 1004 (S.C.C.) (part of a proposed federal Bill *ultra vires*); *Peel (Regional Municipality) v. Mackenzie*, [1982] S.C.J. No. 58, [1982] 2 S.C.R. 9 (S.C.C.) (severing an invalid portion of the *Criminal Code* provision). If it helps to situate these rulings in the mists of time, the week *Mackenzie* was released, the song "Tainted Love" by Soft Cell was climbing the North American pop charts.

Because the Court was not striking down legislation on division of powers grounds, and because its rulings were almost always unanimous, the individual members of the McLachlin Court have had limited opportunities to stamp their distinct judicial personalities on federalism jurisprudence in the past decade. The epic constitutional battles of the past, featuring, for example, sharp divisions between six anglophone judges and three francophone judges from Quebec,<sup>7</sup> or clashes between a strong centralist like Chief Justice Bora Laskin and a strong provincial autonomist like Justice Jean Beetz,<sup>8</sup> seemed, well, a thing of the past.

Some of us were lulled into imagining that the extended period of jurisprudential quiescence on the federalism front that prevailed on both sides of the turn of this century might endure. How wrong we were.

The curtain started to be pulled back on the current Supreme Court justices' differences on issues of provincial versus national power in the Court's 2009 ruling in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*.<sup>9</sup> Out of the Court's engagement with a prosaic issue — which level of government had jurisdiction over labour relations at a freight forwarding company — emerged profoundly contrasting views.

Justice Rothstein, writing for a majority of six judges in *Fastfrate*, emphasized that the power-conferring provisions in sections 91 to 95 of the *Constitution Act, 1867* are “the bedrock of our federal system. They seek to preserve local diversity within the federal nation by conferring ‘broad powers’ on provincial legislatures”.<sup>10</sup> After undertaking a historical and textual analysis of section 92(10) of the Act, he stated that “the preference for diversity of regulatory authority over works and undertakings should be respected”<sup>11</sup> by treating federal jurisdiction “as the exception, rather than the rule”.<sup>12</sup> He concluded that *Fastfrate*'s labour relations fell within provincial jurisdiction because its physical operations did not extend beyond provincial borders, even though the com-

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<sup>7</sup> See, e.g., *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1977] S.C.J. No. 119, [1978] 2 S.C.R. 141 (S.C.C.); *Quebec (Public Service Board) v. Canada (Attorney General)*, [1977] S.C.J. No. 120, [1978] 2 S.C.R. 191 (S.C.C.).

<sup>8</sup> See, e.g., *Reference re Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 (S.C.C.).

<sup>9</sup> [2009] S.C.J. No. 53, [2009] 3 S.C.R. 407 (S.C.C.) [hereinafter “*Fastfrate*”].

<sup>10</sup> *Id.*, at para. 29.

<sup>11</sup> *Id.*, at para. 39.

<sup>12</sup> *Id.*, at para. 44. See also para. 68: “a limited *genus* of works and undertakings should qualify as federal”.

pany provided interprovincial services to its customers through contractual arrangements with other carriers.<sup>13</sup>

In dissent, Binnie J., with the concurrence of the Chief Justice and Fish J., reached the opposite conclusion starting from a very different normative premise. In Binnie J.'s view, *Fastfrate's* activities and labour relations should be federally regulated because of the interprovincial nature of the services it provides. In contrast to Rothstein J.'s emphasis on the value of provincial diversity in the regulation of presumptively local works and undertakings, Binnie J.'s starting point was the desirability, from a functional perspective, of a single uniform approach to regulation of transportation undertakings. "Checkerboard provincial regulation", he wrote, "is antithetical to the coherent operation of a single functionally integrated indivisible national transportation service."<sup>14</sup> He rued "the sort of 'originalism' implicit" in Rothstein J.'s reliance on the drafting history of the 1867 Act, suggesting instead that constitutional powers "must now be applied in light of the business realities of 2009 and not frozen in 1867".<sup>15</sup> In a telling aside, he referred to "[t]he persistent feebleness of the federal power over trade and commerce and the eclipse of the federal authority related to peace, order and good government."<sup>16</sup> This familiar lament echoes that of other frustrated centralists over the years, like Bora Laskin<sup>17</sup> and Frank Scott.<sup>18</sup> One could keep worse company.

The divisions that emerged in the *Fastfrate* ruling proved to be a harbinger of things to come. Indeed, in all six federalism rulings released by the Supreme Court in 2010, the Court divided sharply on fundamental issues of principle. It was as if once the gloves came off in *Fastfrate*, pent up conflicts broke loose. Dissensus quickly emerged in place of the apparent harmony that had previously prevailed on the Court.

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<sup>13</sup> *Id.*, at paras. 69-80.

<sup>14</sup> *Id.*, at para. 83.

<sup>15</sup> *Id.*, at para. 89.

<sup>16</sup> *Id.*

<sup>17</sup> For a summary of Laskin's views on federalism, see Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990), esp. c. 8, "Laskin's Centralist Vision", and Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005), esp. c. 9, "Federalism".

<sup>18</sup> See Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977).

First, in *Quebec (Attorney General) v. Moses*,<sup>19</sup> the Court split 5-4 on whether a federal environmental assessment of a mining project was required in addition to the assessment required under the terms of the *James Bay and Northern Québec Agreement*. Justice Binnie, writing for the majority, found in favour of an additional federal assessment. The dissent of LeBel and Deschamps JJ. found that only a single provincial environmental assessment was consistent with the terms of the treaty. Justice Binnie accused the dissenters of reaching an “anomalous result”<sup>20</sup> that substituted “provincial paramountcy” for “cooperative federalism”.<sup>21</sup> For their part, the dissenters accused the majority of permitting “the federal government to unilaterally renege on its own solemn promises” in “stark contradiction to the honour of the Crown”.<sup>22</sup> Gloves off indeed.

Then, in a series of four rulings, two dealing with jurisdiction over labour relations at agencies providing Aboriginal child and family services in British Columbia and Ontario respectively,<sup>23</sup> and two dealing with jurisdiction over the location of aerodromes in Quebec,<sup>24</sup> the Court split on the appropriate role of the interjurisdictional immunity doctrine following the Court’s reconsideration of the doctrine a few years earlier in *Canadian Western Bank*.<sup>25</sup> Notably, in *Lacombe* and *COPA*, the

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<sup>19</sup> [2010] S.C.J. No. 17, [2010] 1 S.C.R. 557 (S.C.C.).

<sup>20</sup> *Id.*, at para. 3.

<sup>21</sup> *Id.*, at para. 13.

<sup>22</sup> *Id.*, at para. 58.

<sup>23</sup> *NIL/TU,O*, *supra*, note 2 (9-0 ruling; Abella J. for six members of the Court found the Society subject to provincial labour relations jurisdiction without relying on the interjurisdictional immunity doctrine; McLachlin C.J.C. and Fish J. wrote a separate concurring opinion, joined by Binnie J., focused on the interjurisdictional immunity doctrine); *Native Child*, *supra*, note 2 (9-0 ruling; the opinions of Abella J. and of McLachlin C.J.C. and Fish J. each took the same approach as in *NIL/TU,O*).

<sup>24</sup> *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”] (8-1 ruling; McLachlin C.J.C. for seven members of the Court found the by-law regulating the location of aerodromes invalid, and, even if valid, inapplicable; LeBel J. in his concurring opinion found the by-law valid and applicable but inoperative by virtue of the paramountcy doctrine; Deschamps J., dissenting, would have found the by-law valid, applicable and operative); *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536 (S.C.C.) [hereinafter “*COPA*”] (7-2 ruling; McLachlin C.J.C., writing for the majority, found that Quebec’s *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, had to be read down to prevent an impairment of a core aspect of exclusive federal jurisdiction in relation to aeronautics; LeBel and Deschamps JJ. wrote separate dissents finding the Act valid, applicable and operative).

<sup>25</sup> *Canadian Western Bank*, *supra*, note 2.

aerodrome cases, two of the Quebec judges, LeBel and Deschamps JJ.,<sup>26</sup> criticized the Chief Justice's majority opinion for taking an approach that it is antithetical to co-operative federalism,<sup>27</sup> promotes "a more dualistic or even a more centralized form of federalism", and "opens the door for predation upon provincial jurisdiction".<sup>28</sup>

Finally, in *Reference re Assisted Human Reproduction Act*,<sup>29</sup> the Court split 5-4 on the validity of the challenged provisions of the *Assisted Human Reproduction Act*.<sup>30</sup> Chief Justice McLachlin, writing for four members of the Court, found all of the challenged provisions to be a valid exercise of Parliament's criminal law power. In their joint opinion, also for four members of the Court, LeBel and Deschamps JJ. found all of the challenged provisions to be beyond federal legislative jurisdiction. Justice Cromwell cast the deciding vote, upholding the "prohibited activities" provisions of the Act (thus forming a majority with the Chief Justice in this regard), but finding most of the provisions regulating "controlled activities" to be beyond the scope of the criminal law power (thus forming a majority with LeBel and Deschamps JJ. in this regard).

As in the other recent divided federalism rulings, the mutual recriminations flew in the opinions in the *AHRA Reference*. The Chief Justice accused her colleagues of asserting "a new approach of provincial exclusivity that is supported by neither precedent nor practice",<sup>31</sup> one that circumscribed the purpose of the criminal law power, which is "to permit Parliament to create uniform norms".<sup>32</sup> In the view of LeBel and Deschamps JJ., the Chief Justice's opinion "goes further than any previous judicial interpretation" of the criminal law power, essentially posing no limits and thus jeopardizing "the constitutional balance of the federal-provincial division of powers".<sup>33</sup>

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<sup>26</sup> Justice LeBel's separate opinions in *Lacombe* and *COPA* each expressly concurred with Deschamps J.'s approach to the interjurisdictional immunity doctrine. See *Lacombe*, *supra*, note 24, at para. 71; *COPA*, *supra*, note 24, at para. 76.

<sup>27</sup> *Lacombe*, *id.*, at para. 116.

<sup>28</sup> *Id.*, at para. 184.

<sup>29</sup> [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.) [hereinafter "*AHRA Reference*"].

<sup>30</sup> S.C. 2004, c. 2, ss. 8-19, 40-53, 60-61, 68.

<sup>31</sup> *AHRA Reference*, *supra*, note 29, at para. 67. See also para. 76: "My colleagues break new ground in enlarging the judiciary's role in assessing valid criminal objectives. It is ground on which I respectfully decline to tread."

<sup>32</sup> *Id.*, at para. 68. See also para. 77.

<sup>33</sup> *Id.*, at para. 239.



In contrast to the common front the Court was able to present in the previous decade, the 2010 federalism rulings, in conjunction with the 2009 ruling in *Fastfrate*, have revealed a sharply divided Court. The Court has an apparently “centralist” bloc led by McLachlin C.J.C., Binnie J. and Fish J., and an apparently “decentralist” bloc led by Deschamps and LeBel JJ. In the Court’s five most significant recent federalism rulings (*Fastfrate*, *Moses*, *Lacombe*, *COPA* and the *AHRA Reference*), the centralist bloc consistently took the position that favoured federal power, and the decentralist bloc, with the exception of LeBel J.’s concurrence based on the paramountcy doctrine in *Lacombe*, consistently took the position that favoured provincial power. In seeking to understand these divisions and tendencies, and in considering the relative merits of the competing positions taken by the judges, we should not begin, as Jean-François Gaudreault-DesBiens urges in this volume, with an *a priori* commitment to either centralization or decentralization, “as if decentralization or centralization were abstractly valuable for their own sake”.<sup>34</sup> Nor should we attribute to judges such *a priori* commitments, although their normative visions of the relative merits of centralization vs. decentralization in particular contexts will inevitably inform their commitment to constitutional interpretation. “Absolute neutrality”, as Gaudreault-DesBiens notes, “is illusory in such matters”.<sup>35</sup> Nevertheless, we should seek to avoid “ideological determinism”<sup>36</sup> and assess judicial decisions by reference to their fidelity to constitutional understandings of the federal principle itself.

Why did the divisions on the Court emerge so starkly and suddenly in the past year? Arguably it was inevitable when one considers the general trends in the Court’s federalism jurisprudence and the nature of the issues presented by the cases described above — and indeed the nature of the issues it will be addressing in the *Securities Reference*.<sup>37</sup>

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<sup>34</sup> Jean-François Gaudreault-DesBiens, “The ‘Principle of Federalism’ and the Legacy of the *Patriation* and *Quebec Veto* References” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 77, at 79 [hereinafter “Gaudreault-DesBiens 2011”]. See also Jean-François Gaudreault-DesBiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy”, in Sujit Choudhry, Jean-François Gaudreault-DesBiens & Lorne Sossin, eds., *Dilemmas of Solidarity: Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006) 185.

<sup>35</sup> Gaudreault-DesBiens 2011, *id.*

<sup>36</sup> *Id.*, at 115 n. 139.

<sup>37</sup> *In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council, P.C. 2010-667*, [2010] S.C.C.A. No. 190 (S.C.C.).

(heard and reserved on April 13 and 14, 2011) and did address in the recent decision in *PHS Community Services*.<sup>38</sup>

The recent cases land on terrain that exposes two features of the doctrinal structure of the Court's division of powers jurisprudence that pose basic threats to the federal principle. The first is the interjurisdictional immunity doctrine, the problematic features of which LeBel and Binnie JJ. exposed and critiqued at length in *Canadian Western Bank*.<sup>39</sup> The second is the use of the pith and substance doctrine, the ancillary powers doctrine, the double aspect doctrine and the living tree doctrine to extend the scope of areas subject to *de facto* concurrent jurisdiction.

## II. THE NEED TO MEASURE THE JURISPRUDENCE AGAINST THE FEDERAL PRINCIPLE

Federalism is one of the five foundational principles of the Canadian Constitution that have been identified by the Supreme Court of Canada.<sup>40</sup> It “dictate[s] major elements of the architecture of the Constitution itself” and is part of “its lifeblood”.<sup>41</sup> The Court has accorded federalism and the other fundamental constitutional principles special interpretive significance. Not only do they assist in the interpretation of the constitutional text,<sup>42</sup> they can also be used to fill gaps in the express terms of the Constitution.<sup>43</sup> Given the superordinate normative status accorded to the restricted number of fundamental, structural constitutional principles, we should measure not just the text, but also the accumulated body of judicial interpretation of the text against the demands of those principles. When the judiciary uses fundamental constitutional principles to fill the

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<sup>38</sup> *PHS Community Services Society v. Canada (Attorney General)*, [2010] B.C.J. No. 57, 2010 BCCA 15 (B.C.C.A.), affd [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.) [hereinafter “*Insite*”].

<sup>39</sup> *Supra*, note 2, at paras. 35-47.

<sup>40</sup> *Reference re Remuneration of Judges of the Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Provincial Judges Reference*”]; *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter “*Secession Reference*”].

<sup>41</sup> *Secession Reference*, *id.*, at para. 51.

<sup>42</sup> *Id.*, at para. 52.

<sup>43</sup> *Id.*, at para. 53. As Jean-François Gaudreault-DesBiens demonstrates in his contribution to this volume, the Court has not always defined the federal principle clearly or accorded it consistent interpretive weight in its constitutional jurisprudence: see Gaudreault-DesBiens 2011, *supra*, note 34.

gaps in the constitutional text, it is engaged in a task that raises profound questions of democratic legitimacy: normally, gaps in the text of the supreme law should be filled through democratically accountable constitutional amendment procedures rather than by the judges expanding the sphere of constitutional supremacy without a clear mandate to do so.<sup>44</sup>

In contrast, the need to measure the rules and principles developed by the courts when interpreting the constitutional text against the evolving understandings of the demands of fundamental constitutional principles, and to adjust the jurisprudence to align with those fundamental principles when departures from them are detected, are common and generally accepted features of Canadian constitutional scholarship, legal argument and judicial practice. This paper seeks to contribute to this tradition by arguing that several doctrinal features of Canadian constitutional jurisprudence are at odds with the superordinate normative significance the Court has accorded to the principle of federalism and are therefore in need of judicial revision to achieve better alignment or coherence in the jurisprudence as a whole, and, more importantly, to better safeguard the basic objectives of our constitutional design.

### III. THE FEDERAL PRINCIPLE AND EQUAL AUTONOMY

According to the federal principle, federal and provincial governments are coordinate (or equal in status) and autonomous within their respective spheres of jurisdiction.<sup>45</sup> Thus, judicial interpretation of the division of powers that is faithful to the federal principle will give equal weight and consideration to the respective claims of provincial legislatures and the federal Parliament when they seek to exercise their autonomy to pursue distinct policy objectives within their respective spheres of guaranteed and exclusive legislative jurisdiction. In other words, implicit in the federal principle is the principle of equal autonomy.

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<sup>44</sup> See Jean Leclair, "Canada's Unfathomable Constitutional Principles" (2002) 27 Queen's L.J. 389; Jamie Cameron, "The Written Word and the Constitution's Vital Unstated Assumptions", in Pierre Thibault, Benoit Pelletier & Louis Perret, eds., *Essays in Honour of Gérard A. Beaudoin* (Yvon Blais, 2002), at 89. See also the dissent of La Forest J. in the *Provincial Judges Reference*, *supra*, note 40, at paras. 314-319.

<sup>45</sup> This is a widely accepted definition. See, e.g., Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, looseleaf), c. 5.1(a) [hereinafter "Hogg"], quoting Kenneth Clinton Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), at 10 [hereinafter "Wheare"].

This principle of equal autonomy is apparent in many features of Canadian federalism jurisprudence. For example, the principle of equal autonomy generates a symmetrical application of basic principles of interpretation (such as the living tree, pith and substance, double aspect and ancillary powers doctrines)<sup>46</sup> to both federal and provincial heads of powers. These principles give generous, flexible and dynamic scope to federal and provincial powers alike.<sup>47</sup> The principle of equal autonomy is reflected in the courts' long-standing rejection of a hierarchical conception of federalism, one that would accord superior status or significance to federal as compared to provincial powers, or *vice versa*.<sup>48</sup> Instead, when interpreting the division of powers, the courts conceive of Parliament and the provincial legislatures as being in a coordinate or horizontal relationship. They are equal in status; neither is subordinate to the other.<sup>49</sup>

Consider, for example, the carefully constructed symmetry of Lord Sankey's famous dictum in the "Persons" case that the *Constitution Act, 1867* (as it is now known) should be given "a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great

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<sup>46</sup> Whether the courts' commitment, in theory, to applying these doctrines symmetrically to federal and provincial powers is reflected in practice is open to debate that should be informed by sustained examinations of the pattern of results in the case law. Justice Deschamps, for one, is not convinced: in *Lacombe*, *supra*, note 24, at para. 104, she stated that "in practice" the ancillary powers doctrine has "tended to benefit mainly the central government, and to such an extent that it has upset the balance of Canadian federalism" (citing Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, QC: Éditions Yvon Blais, 2008), at 452-54).

<sup>47</sup> See Ryder, *supra*, note 4.

<sup>48</sup> One of the best-known formulations is Lord Watson's in *Maritime Bank of Canada (Liquidators of) v. New Brunswick (Receiver-General)*, [1892] J.C.J. No. 1, [1892] A.C. 437, at 441 (P.C.):

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.

<sup>49</sup> This conception of Canadian federalism is imperfectly embodied in the constitutional text, which contains a number of important features (such as the declaratory, disallowance and reservation powers) that are inconsistent with the federal principle. These features led K.C. Wheare to describe the Canadian Constitution as "quasi-federal": Wheare, *supra*, note 45, at 19. However, other elements of the constitutional text are faithful to the federal principle as equal autonomy, and, more importantly, Canadian political practice has evolved in a strongly federalist direction, calling into question the continued legitimacy of the quasi-federal elements of the constitutional text. See Hogg, *supra*, note 45, at c. 5.3.

extent, but within certain fixed limits, are mistresses in theirs”.<sup>50</sup> Consistent with the identity of language Lord Sankey used to describe federal and provincial jurisdiction, the courts aim to give equal weight and consideration to federal and provincial claims to autonomy.

The courts’ frequent references to the need to preserve “balance” in the division of powers are likewise a reflection of their concern to protect and promote the federal principle understood as the protection and promotion of equal autonomy.<sup>51</sup> For example, in the 1993 *Ontario Hydro*<sup>52</sup> ruling, Iacobucci J., in his dissenting opinion for three members of the Court, concluded that the federal declaratory power in section 92(10)(c) of the *Constitution Act, 1867*, which enables the federal Parliament to enact legislation unilaterally lifting local works out of provincial and into federal jurisdiction, should be interpreted narrowly in light of its conflict with modern conceptions of federalism. The principle of equal autonomy inherent in the federal principle animated his opinion. As he put it:

[A narrow approach to the declaratory power is] consistent with the traditional approach to division of powers questions which has been one of balancing federal and provincial powers through the application of doctrines such as mutual modification, double aspect and pith and substance. The *Constitution Act, 1867* set up a federalist system of government for Canada and should be interpreted so as not to allow the powers of either Parliament or the provincial legislatures to subsume the powers of the other.<sup>53</sup>

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<sup>50</sup> *Reference re British North America Act, 1867*, [1929] J.C.J. No. 2, [1930] A.C. 124, at 136 (P.C.).

<sup>51</sup> For example, in *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.), Dickson C.J.C. repeatedly invoked the need to maintain balance when interpreting federal and provincial powers in relation to the regulation of trade. He emphasized the need “to maintain a delicate balance between federal and provincial power” (at para. 32) and noted that “[b]oth provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government’s sphere of power” (at para. 45). Concerns about preserving balance in the division of powers have likewise figured prominently in many of the major rulings on the federal division of legislative powers: for notable examples, see the opinion of Beetz J. in *Reference re Anti-Inflation Act (Can.)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 (S.C.C.), as well as the opinions in *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401 (S.C.C.); *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.); and *AHRA Reference*, *supra*, note 29. See also *Fastfrate*, *supra*, note 9, *per* Rothstein J., at para. 30: “Federalism exists as a fine balance between local governance and centralized decision making.”

<sup>52</sup> *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.).

<sup>53</sup> *Id.*, at para. 138.

Justice La Forest's opinion, also for three members of the Court, disagreed with Iacobucci J.'s use of the federal principle to restrict a federal power, like the declaratory power, that is explicitly conferred by the constitutional text and that reflects a hierarchical or colonial conception of federalism (he noted that the disallowance and reservation powers are other examples of powers inconsistent with contemporary understandings of federalism as equal autonomy). Notwithstanding the judges' disagreement regarding exceptional unilateral powers like the declaratory power, La Forest J. outlined common ground with the majority when he asserted that

[generally courts] 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.<sup>54</sup>

Despite the courts' emphasis on balance and a symmetrically generous approach to the interpretation of federal and provincial powers, some of the doctrinal features of Canadian federalism jurisprudence are in tension with the modern conception of federalism founded on equal respect for the autonomy of federal and provincial legislative bodies. The paramountcy doctrine, for example, holds that in the case of conflicts between valid federal and provincial laws, the federal law will prevail by rendering the provincial law inoperative to the extent of the inconsistency. Insofar as the catalogues of legislative powers in sections 91 and 92 of the *Constitution Act, 1867* are concerned, this rule is a product of judicial interpretation, as these constitutional provisions are silent on how to resolve conflicts between overlapping exercises of federal and provincial legislative powers. The equal autonomy principle would not give primacy as a general rule to either federal or provincial legislation, as to do so is to accord greater weight to the autonomy of one level of government. Instead, the equal autonomy principle might give primacy to federal jurisdiction in some contexts and to provincial jurisdiction in others, depending on the relative importance of the national or provincial interests at stake. Or, it might give primacy, on a case-by-case basis, to whichever law is most closely connected to the constitutional role and policy objectives of the enacting legislature. However, a strong argument

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<sup>54</sup> *Id.*, at para. 73.

can be made that practical considerations related to predictability and promoting compliance with the rule of law require us to choose between a general rule of federal paramountcy or a general rule of provincial paramountcy. And, if we are so forced to choose, the interests of the whole will generally be greater than the interests of a part; hence the common adoption of a rule of federal paramountcy in federations. For this reason, in the context of the paramountcy rule, concerns in Canada about equal autonomy are most often expressed not as a frontal attack on the judicially created rule that gives primacy to federal legislation in cases of conflict, but as a demand that the rule be given a narrow scope to avoid unduly limiting provincial autonomy.<sup>55</sup>

While previously the Court had limited the paramountcy doctrine to situations where it was impossible to comply with overlapping federal and provincial laws, the Court has expanded the occasions on which the doctrine will be invoked to include situations where provincial laws are incompatible with federal legislative purposes.<sup>56</sup> A valid provincial law will be rendered inoperative, therefore, even if it is possible to comply with it without violating federal law, and even if the provincial law expresses an important local concern vital to a matter within the province's constitutionally guaranteed exclusive areas of jurisdiction, so long as the provincial law frustrates a federal legislative purpose, no matter how trivial. The result of this expansion of the occasions on which the federal paramountcy rule can be invoked is that the exercise of provincial autonomy in areas of shared jurisdiction is rendered dependent upon the will of the federal Parliament. If one of Parliament's policy objectives is to oust provincial legislation entirely from an area of shared jurisdiction, then apparently all it has to do is say so.<sup>57</sup>

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<sup>55</sup> See, e.g., *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161 (S.C.C.), per Dickson J. (as he then was), at 188, quoting Professor Hogg:

The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy.

See also *Lacombe*, *supra*, note 24, at para. 119, per Deschamps J.:

The unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity favour a strict definition of the concept of conflict. The decision to limit the scope of the doctrine of interjurisdictional immunity must mean that there is more room to apply the rules of governments at both levels, but the achievement of this objective can easily be compromised by a lax or vague definition of the concept of conflict.

<sup>56</sup> See, e.g., *Rothmans*, *supra*, note 2, at paras. 11-14.

<sup>57</sup> See the discussion in *Ryder*, *supra*, note 4, at 369-77.

Because the federal paramountcy rule appears to be premised on a general rule that it is of greater importance to uphold the operation of valid federal legislation than it is to uphold the operation of valid provincial legislation, the rule does not obviously square with the federal principle or its corollary, the principle of equal autonomy. Since that departure can be justified by reference to other important values, along the lines briefly sketched above, and because the paramountcy rule did not figure prominently in the 2010 rulings that are the focus of this volume, we will leave further exploration of the paramountcy doctrine *per se* to another occasion. But let us not lose sight here of the significance of the judicial adoption of a rule of federal paramountcy when it operates in conjunction with other features of Canadian federalism jurisprudence. In particular, when coupled with the trend towards expansion of areas subject to *de facto* concurrent power that results from the liberal deployment of the living tree, pith and substance, double aspect and ancillary powers doctrines, the rule of federal paramountcy poses a serious threat to provincial autonomy. We will return to this significant concern below. Before, though, let us turn to a consideration of another doctrinal feature of Canadian federalism that is seriously at odds with the federal principle: the interjurisdictional immunity doctrine.

#### IV. EQUAL AUTONOMY AND THE INTERJURISDICTIONAL IMMUNITY DOCTRINE

The interjurisdictional immunity doctrine holds that provincial laws that are in pith and substance in relation to matters within exclusive provincial jurisdiction, and therefore valid, must nevertheless be read down, or restricted in their application, to the extent necessary to prevent them from impairing matters at the core of federal heads of power. The doctrine is premised on a strong interpretation of the meaning of “exclusivity” — as a bubble of immunity from impairment — at least insofar as the core of federal heads of power is concerned.

The federal and provincial heads of power in sections 91 and 92 of the *Constitution Act, 1867* are both described in the text as “exclusive”. Most of the time, the courts employ the pith and substance, double aspect and ancillary powers doctrine to interpret the meaning of exclusivity in a weaker manner: exclusivity means the exclusive ability to pass laws that deal predominantly with a subject matter allocated to the enacting



legislature's jurisdiction. According to the pith and substance doctrine, so long as the dominant or most important characteristic of a law falls within a class of subjects allocated to the jurisdiction of the enacting legislature, the law will be held to be *intra vires*, even if it has spillover, or incidental effects, in areas outside of its jurisdiction.<sup>58</sup> Overlap and interplay between federal and provincial laws is to be expected and welcomed in a modern federal state. The Court has characterized this approach as the "dominant tide" of constitutional interpretation.<sup>59</sup> The Court takes this dominant, liberal approach to the pith and substance doctrine, one that is tolerant of spillover effects on the other level of government's exclusive legislative jurisdiction, when assessing the constitutional validity of either federal or provincial laws.<sup>60</sup>

The interjurisdictional immunity doctrine, on the other hand, is premised on a stronger understanding of exclusivity, one that does not tolerate any spillover effects if they would have the effect of impairing a matter at the core of the other level of government's legislative powers.<sup>61</sup> In contrast to the pith and substance, double aspect and ancillary powers doctrines, which lean in the direction of expansive interpretations of federal and provincial legislative powers alike, the interjurisdictional immunity doctrine operates only in favour of federal heads of power. If Parliament's legislative powers set out in section 91 are truly exclusive, the reasoning goes, they cannot be impaired at their core by provincial legislation. This is so even if the federal power remains unexercised, because the doctrine protects the strong sense of exclusivity at the core of the power, not the manner of its exercise.<sup>62</sup> As Beetz J. explained in his defence of the interjurisdictional immunity doctrine in *Bell Canada* (1988),<sup>63</sup> if a "power is exclusive, it is because the Constitution, which

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<sup>58</sup> 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, at 325 [hereinafter "Ryder, 'Demise and Rise'"] (describing this approach to exclusivity and its implications as the "modern paradigm").

<sup>59</sup> *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 17 (S.C.C.); *Canadian Western Bank*, *supra*, note 2, at paras. 35-37.

<sup>60</sup> See, e.g., the case discussed in Ryder, *supra*, note 4.

<sup>61</sup> *Id.*, at 322, describing this approach to exclusivity and its implications as the "classical paradigm".

<sup>62</sup> *Canadian Western Bank*, *supra*, note 2, at para. 34.

<sup>63</sup> *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 (S.C.C.) [hereinafter, "*Bell Canada* 1988"].

could have been different but is not, expressly specifies this to be the case”<sup>64</sup>.

A glaring omission in Beetz J.’s reasoning is his failure to grapple with the fact that provincial heads of power in section 92 of the *Constitution Act, 1867* are, like the section 91 heads of power, described as “exclusive” in the text. The Constitution could have been different, but it is not. The federal principle and its corollary, the equal autonomy principle, combined with Beetz J.’s reasoning, leads to the conclusion that the interjurisdictional immunity doctrine should be employed in a reciprocal or symmetrical fashion: valid federal legislation must be read down so as not to impair matters at the core of provincial jurisdiction. Yet the doctrine has never been applied to protect the core of provincial heads of power from federal impairment. It has operated in a decidedly one-way fashion to protect only federal heads of power from provincial impairment. As Binnie and LeBel JJ. acknowledged in *Canadian Western Bank*:

In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, it would appear that the jurisprudential application of the doctrine has produced somewhat “asymmetrical” results. Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of “reading down” the federal enactment or federal power without too much doctrinal discussion, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In general, though, the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation: Hogg, at p. 15-34.<sup>65</sup>

The suggestion that the doctrine has produced “somewhat” asymmetrical results is a gross understatement. It has served *only* to place limits on the application of valid provincial laws, and it has done so in a wide range of significant contexts. I am not aware of any Supreme Court or

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<sup>64</sup> *Id.*, at para. 251. The weaknesses of Beetz J.’s position have been thoroughly explored in *Canadian Western Bank*, *supra*, note 2, at paras. 42-47, *per* Binnie and LeBel JJ. See also Ryder, “Demise and Rise”, *supra*, note 58, at 351-52 and 356-58.

<sup>65</sup> *Canadian Western Bank*, *id.*, at para. 35.

other appellate level ruling (apart from the ruling of the B.C. Court of Appeal recently reversed on this point by the Supreme Court)<sup>66</sup> that has cited the interjurisdictional immunity doctrine, or discussed cores of provincial heads of power that are immune from federal impairment, as a reason to restrict the application of valid federal statutes. To say, as Binnie and LeBel JJ. did in the above quoted passage, that there was not “too much doctrinal discussion” in the three cases they cite as examples of instances where federal laws were read down similarly depicts the situation too mildly. There was no discussion of the interjurisdictional immunity doctrine in those cases. Nor was there any discussion of the appropriateness of using “reading down” as a remedy to limit the encroachment of federal statutes on areas of exclusive provincial jurisdiction.

Let us briefly examine the three cases cited by Binnie and LeBel JJ. in support of what they see as some traces of reciprocity or symmetry in the Court’s approach to exclusivity, and thus of at least some consistency in this area of the Court’s jurisprudence with the federal principle as equal autonomy.

First, in *Canada (Attorney General) v. Law Society of British Columbia* (commonly known as the *Jabour* case),<sup>67</sup> at issue was whether the federal *Combines Investigation Act*<sup>68</sup> could apply to disciplinary proceedings initiated by the Law Society of British Columbia against a lawyer, Donald Jabour, who had advertised his practice contrary to the Law Society’s rules at the time. Justice Estey, writing for the Court, rejected the argument made by counsel for the appellant (who was, coincidentally, the future Binnie J.) that the federal statute applied to the provincial proceedings. Justice Estey reached this conclusion as a matter of statutory interpretation. He wrote that

[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.<sup>69</sup>

For that reason, he concluded that the challenged provision of the federal Act “does not apply to the Law Society in the circumstances of this

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<sup>66</sup> *Supra*, note 38.

<sup>67</sup> [1982] S.C.J. No. 70, [1982] 2 S.C.R. 307 (S.C.C.) [hereinafter “*Jabour*”].

<sup>68</sup> R.S.C. 1970, c. C-23.

<sup>69</sup> *Supra*, note 67, at 356.

appeal<sup>70</sup> and, as a result, it was not necessary to answer the question regarding the constitutional validity of the statute.<sup>71</sup>

In the second case cited by Binnie and LeBel JJ., *Dominion Stores*,<sup>72</sup> at issue was whether a grocery store could be convicted for using a grade name (“Canada Extra Fancy”) without complying with the stipulations set out in federal legislation. Writing for the majority opinion in a 5-4 ruling, Estey J. found the statute invalid as an invasion of provincial jurisdiction in relation to intra-provincial trade. He thus acquitted *Dominion Stores*, for reasons he summarized in the following passage:

It is not necessary to determine, in my view, whether Part I [of the challenged legislation] is *ultra vires* the Parliament of Canada *in toto* and we are not invited by the appellant to do so. It is sufficient if it is found to be inapplicable to the events as alleged in the charge laid against the appellant under the federal statute. It may be that Part I has at least a partial validity in that the grading program of s. 3 is integrated with the international and interprovincial trade program which is the subject of Part II of the statute, but in my view, s. 3 has no validity in relation to purely intraprovincial transactions and in that respect is *ultra vires*.<sup>73</sup>

In his dissent in *Dominion Stores*, Laskin C.J.C. would have upheld the validity of the federal legislation, and its application to the intra-provincial transactions at issue, as a logical extension of Parliament’s jurisdiction over interprovincial and international trade. The majority and

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<sup>70</sup> *Id.*, at 359.

<sup>71</sup> *Id.*, at 362. Robin Elliot argues that the *Jabour* ruling “bears a very close resemblance to” interjurisdictional immunity cases. See Robin Elliot, “Constitutional Law — Division of Powers — Interjurisdictional Immunity, Reading Down and Pith and Substance: *Ontario Public Service Employees Union v. Attorney-General for Ontario*” (1988) 67 Can. Bar Rev. 523, at 542 [hereinafter “Elliot 1988”]. See also Robin Elliot, “Interjurisdictional Immunity after *Canadian Western Bank and Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters — Again” (2008) 43 S.C.L.R. (2d) 433, at 473, n. 175 [hereinafter “Elliot 2008”]. With respect, any resemblance of the reasoning in *Jabour* to existing interjurisdictional immunity doctrine is difficult to discern.

<sup>72</sup> *R. v. Dominion Stores Ltd.*, [1979] S.C.J. 131, [1980] 1 S.C.R. 844 (S.C.C.).

<sup>73</sup> *Id.*, at 865-66. Robin Elliot cites the quoted passage as evidence that the *Dominion Stores* ruling bears a close resemblance to interjurisdictional immunity cases that found provincial statutes to be inapplicable to core elements of federal legislative powers: Elliot 1988, *supra*, note 71, at 542, n. 72 and accompanying text. With respect, the use by Estey J. of the word “inapplicable” in tailoring a minimalist remedy sufficient to meet the appellant’s interest in escaping prosecution does not transform a case about validity into a case about restricting the application of otherwise valid statutes. More recently, Professor Elliot has acknowledged that *Dominion Stores* is a case about validity and “therefore should not have been cited” by Binnie and LeBel JJ. in *Canadian Western Bank* as an example of “reading down” otherwise valid federal statutes to protect exclusive provincial jurisdiction. See Elliot 2008, *supra*, note 71, at 473, n. 175.

dissenting opinions thus disagreed about the *validity* of the challenged federal legislation.

Finally, in *Labatt*,<sup>74</sup> at issue was whether Parliament had jurisdiction to enact legislation establishing compositional standards for foods and beverages. The majority opinion of Estey J. found the challenged provisions of the *Food and Drugs Act* invalid. Parliament did not have jurisdiction to adopt detailed “legal recipes”<sup>75</sup> regulating a single trade or industry. The dissenting opinions would have upheld the challenged provisions as a valid exercise of the federal trade and commerce power. Thus, as in the Court’s ruling in *Dominion Stores*, the disagreement between the majority and the dissenting opinions in *Labatt* related to the *validity* of the challenged legislation.<sup>76</sup>

In summary, the three cases cited by Binnie and LeBel JJ. do not provide support for the proposition that federal laws have been read down to avoid encroachment on provincial legislative authority. None of the opinions in *Jabour*, *Dominion Stores* or *Labatt* made any mention of using constitutional principles to limit the applicability of otherwise valid federal legislation, or of the interjurisdictional immunity doctrine, or of using the reading down remedy to protect a core of provincial jurisdiction from impairment by a valid federal statute. Rather, one of these cases used statutory interpretation principles to read down a federal statute to avoid a conflict with provincial legislation (*Jabour*) and the other two found federal legislation invalid as an invasion of provincial jurisdiction in relation to intra-provincial trade (*Labatt* and *Dominion Stores*). Thus, one must look elsewhere for evidence of symmetry or reciprocity in the courts’ use of the interjurisdictional immunity doctrine, or of related reasoning restricting the application of federal statutes to prevent encroachments on matters assigned by the Constitution to the exclusive jurisdiction of the provinces.

In fairness to Binnie and LeBel JJ., the results in *Jabour*, *Dominion Stores* and *Labatt* provide evidence of the fact that the courts have legal tools at their disposal that can be used to protect exclusive provincial legislative powers from encroachment by federal legislation, even if they

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<sup>74</sup> *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914 (S.C.C.).

<sup>75</sup> *Id.*, at 943.

<sup>76</sup> Robin Elliot agrees that the *Labatt* ruling was based on a finding of invalidity rather than a finding of restricted applicability of an otherwise valid federal statute. See Elliot 2008, *supra*, note 71, at 473, n. 175.

eschew any reliance on, or mention of, concepts of constitutional inapplicability or interjurisdictional immunity to accomplish that objective. Nevertheless, these same tools are also available to protect exclusive federal legislative powers from encroachment by provincial legislation. The problem remains that another powerful tool frequently resorted to by the courts, namely the interjurisdictional immunity doctrine, is used only to protect the exclusivity of federal powers in a strong sense. Treating provincial legislative powers as less exclusive is not consistent with the federal principle or its corollary, the principle of equal autonomy.

Like Binnie and LeBel JJ., Robin Elliot is of the view that some case law supports “reading down” federal legislation to protect the exclusivity of provincial jurisdiction, even if those cases do not use the language of interjurisdictional immunity *per se*. In several articles that undertake a careful and detailed review of the case law,<sup>77</sup> Elliot defends the interjurisdictional immunity doctrine from its critics, essentially agreeing with Beetz J. that the doctrine is necessary to give meaning to the exclusivity of constitutional powers. Unlike Beetz J., and like Binnie and LeBel JJ., Elliot acknowledges that the federal principle requires that the doctrine operate in a reciprocal or symmetrical manner to protect the core of both federal and provincial powers from impairment. Thus, he applauds “the reaffirmation of the doctrine’s legitimacy” in *Canadian Western Bank* and “the recognition that, as a matter of principle, the doctrine should operate to protect core areas of provincial as well as federal jurisdiction”.<sup>78</sup>

In his account of the cases and the jurisprudence, Elliot strains to minimize the doctrine’s incompatibility, in theory and practice, with the federal principle. Like Binnie and LeBel JJ., he notes that a number of cases have employed the reading down remedy to limit the application of federal statutes to prevent encroachment on exclusive provincial jurisdiction.<sup>79</sup> Even if these cases do not refer to the interjurisdictional immunity doctrine, he argues, the effect is the same.<sup>80</sup> The problem is that the number and significance of the cases that Elliot cites in support of the

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<sup>77</sup> Elliot 1988, *supra*, note 71; Elliot 2008, *supra*, note 71.

<sup>78</sup> Elliot 2008, *id.*, at 481.

<sup>79</sup> Elliot 1988, *supra*, note 71, at notes 70-75 and accompanying text; Elliot 2008, *id.*, at 468-69.

<sup>80</sup> The reading down doctrine and the interjurisdictional immunity doctrine, Elliot contends, “seem simply to be different ways of describing the same phenomenon”. Elliot 1988, *id.*, at 536.

reciprocal invocation of the interjurisdictional immunity doctrine (or equivalent lines of reasoning) to restrict the application of valid federal statutes is slim indeed. In his 1988 article, he cites only a handful of cases,<sup>81</sup> two of which, *Jabour* and *Dominion Stores*, as discussed above, do not read down federal statutes to protect the exclusivity of provincial areas of jurisdiction. Twenty years later, in a 2008 article, Elliot was able to provide two additional examples:

One is *Clark v. Canadian National Railway Co.*, in which the Court interpreted a limitation period in the federal *Railway Act* to be applicable only to civil causes of action created by the Act itself in order to protect from federal incursion what the Court saw as exclusive provincial jurisdiction over the barring of common law tort actions. And more recently, in *Isen v. Simms*, the Court read down a provision of the *Canada Shipping Act* that limited the quantum of damage awards in tort actions involving ships in order to protect what it saw as exclusive provincial jurisdiction over liability in such actions.<sup>82</sup>

Elliot's excavation of the case law helps provide some building blocks on which the courts can build to make the interjurisdictional immunity doctrine operate in a truly reciprocal manner consistent with the federal principle. The *Clark* case in particular is a better example, compared to those cited by Binnie and LeBel JJ. in *Canadian Western Bank*, of the use of the language of applicability and reading down to protect exclusive provincial powers from federal invasion.

Still, one cannot help but be struck by the paltry sum and significance of the examples provided by Elliot, especially when contrasted with the much larger number of cases explicitly invoking the interjurisdictional immunity doctrine to restrict the application of otherwise valid provincial statutes in a wide range of significant contexts.<sup>83</sup> The fact remains that the courts have developed a significant body of jurisprudence defining core elements of federal heads of power and restricting the application of otherwise valid provincial laws to prevent impairment of those core matters. The courts have simply not engaged in the tasks of defining core elements of provincial heads of power and restricting the application of otherwise valid federal laws to prevent impairment of

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<sup>81</sup> Elliot 1988, *supra*, note 71, at n. 70-75.

<sup>82</sup> Elliot 2008, *supra*, note 71, at 469 (footnotes omitted).

<sup>83</sup> The case law is thoroughly canvassed in Elliott 1988, *supra*, note 71; Elliot 2008, *supra*, note 71; Hogg, *supra*, note 45, c. 15.8; *Bell Canada* 1988, *supra*, note 63; *Canadian Western Bank*, *supra*, note 2, at paras. 33-66.

those core matters. Indeed, on a number of occasions, when expressly invited to invoke the interjurisdictional immunity doctrine in a reciprocal manner to protect exclusive heads of provincial power from federal encroachment, the Supreme Court has refused to do so.<sup>84</sup>

In light of the courts' consistently one-sided invocation of the interjurisdictional immunity doctrine, it would more accurately reflect judicial practice if it were renamed the "doctrine of greater federal exclusivity".<sup>85</sup> We should not shirk from this reality or mince words about it. From the perspective of the federal principle, the one-sided invocation of the interjurisdictional immunity doctrine is a significant problem that needs to be confronted openly and honestly. The doctrine, in judicial practice, by treating federal powers as being more strongly exclusive than provincial powers, runs blatantly counter to the federal principle (and its corollary, the principle of equal autonomy), an underlying principle of the Constitution that the Court has granted superordinate interpretive importance.

The Court could bring the interjurisdictional immunity doctrine into line with the federal principle in one of two ways. First, it could abandon the doctrine altogether, given that it runs counter to the "dominant tide" of the modern flexible approach to federalism promoted by other constitutional doctrines. Second, it could commit itself to invoking the doctrine reciprocally to protect the core of provincial heads of power from being impaired by the application of valid federal laws. Either of these options would involve significant departures from settled jurisprudence, giving rise to the usual concerns about the creation of uncertainty and the disruption of expectations and arrangements built up in reliance upon the existing state of the law.<sup>86</sup>

The joint opinion of Binnie and LeBel JJ. in *Canadian Western Bank* did not embrace either of these drastic options for aligning the interjurisdictional immunity doctrine with the federal principle. They favoured an

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<sup>84</sup> See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.); *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.); *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] S.C.J. No. 84, [1989] 2 S.C.R. 225 (S.C.C.); *Insite*, *supra*, note 38, at paras. 53-70.

<sup>85</sup> Elliot suggests that it be renamed "the doctrine of exclusivity". Elliot 2008, *supra*, note 71, at 495.

<sup>86</sup> See Wade Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" in Jamie Cameron & Bruce Ryder, eds. (2010) 51 S.C.L.R. (2d) 625, at 648-49.



incremental approach.<sup>87</sup> They narrowed the doctrine's scope by defining the protected core of federal powers restrictively<sup>88</sup> and by requiring "impairment" of, rather than a mere impact on, a core power.<sup>89</sup> They disfavoured "intensive reliance" on the doctrine.<sup>90</sup> They described it as "a doctrine of limited application"<sup>91</sup> or "very restricted scope".<sup>92</sup> In general, they wrote, the doctrine should

be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.<sup>93</sup>

By implying that precedent favours the doctrine's reciprocal invocation, this passage obscures the contradiction between confining the doctrine to precedent and ensuring that it applies reciprocally to protect provincial powers, as demanded by the federal principle. The truth is that, apart from the ruling of the majority of the British Columbia Court of Appeal in the *Insite* case currently on appeal to the Supreme Court,<sup>94</sup> the doctrine has never been considered, to use the formulation of Binnie and LeBel JJ. in *Canadian Western Bank* quoted above, "absolutely indispensable or necessary to enable a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred".

With hindsight, we can now imagine that Binnie and LeBel JJ., who have since emerged in the Court's more recent federalism rulings as leaders of the centralist and decentralist blocs respectively, might have been able to achieve agreement on the text of their joint opinion in *Canadian Western Bank* by burying in ambiguities some disagreements about the pace and direction of needed doctrinal reform. Several recent

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<sup>87</sup> *Id.*, at 649.

<sup>88</sup> *Supra*, note 2, at paras. 50-52.

<sup>89</sup> *Id.*, at para. 48.

<sup>90</sup> *Id.*, at para. 47.

<sup>91</sup> *Id.*, at para. 33.

<sup>92</sup> *Id.*, at para. 38.

<sup>93</sup> *Id.*, at para. 77.

<sup>94</sup> *Supra*, note 38.

cases involving the interjurisdictional immunity doctrine have landed squarely on the uncertain terrain produced by these ambiguities embedded in *Canadian Western Bank*.

The *Lacombe* and *COPA* cases provided the Court with an opportunity to restrict the interjurisdictional immunity doctrine by permitting the challenged municipal and provincial laws regulating land use to apply to the location of aerodromes in the province. A number of commentators on the *Canadian Western Bank* ruling anticipated that it heralded a more restricted role for the interjurisdictional immunity doctrine in the future.<sup>95</sup> However, the rulings in *Lacombe* and *COPA* leave one wondering whether that will turn out to be the case. The majority opinions of McLachlin C.J.C. in both cases invoked the doctrine in less than compelling circumstances with surprisingly little hesitation. The spirit of *Canadian Western Bank* is not evident in the Chief Justice's opinions.

In *COPA*, at issue was whether Quebec's *Act respecting the preservation of agricultural land and agricultural activities*<sup>96</sup> could restrict the location of aerodromes authorized by the federal *Aeronautics Act*.<sup>97</sup> All members of the Court agreed that the provincial Act was valid and that precedent established that the location of aerodromes is a matter that falls within the core of Parliament's exclusive jurisdiction in relation to aeronautics.<sup>98</sup> The issue, then, was whether the application of the Act would impair federal jurisdiction in relation to aeronautics. The Chief Justice defined impairment as "a serious or significant intrusion on the exercise of the federal power".<sup>99</sup> She then found that this test was met because the application of the Quebec legislation would force Parliament to enact its own legislation if it wanted to have the final say on the location of aerodromes:

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<sup>95</sup> Peter W. Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" in Jamie Cameron, Patrick Monahan & Bruce Ryder, eds. (2008) 42 S.C.L.R. (2d) 623; John G. Furey, "Interjurisdictional Immunity: The Pendulum Has Swung" in *id.*, 597; Elizabeth Edinger, "Back to the Future with Interjurisdictional Immunity: *Canadian Western Bank v. Alberta*; *British Columbia v. Lafarge Canada Inc.*" (2008) 66 Adv. 553; Carissima Mathen & M. Plaxton, "Developments in Constitutional Law: The 2006-2007 Term" (2007) 38 S.C.L.R. (2d) 111, at 131-36. See also Elliot 2008, *supra*, note 71.

<sup>96</sup> R.S.Q., c. P-41.1.

<sup>97</sup> R.S.C. 1985, c. A-2, s. 4.9(e).

<sup>98</sup> *COPA*, *supra*, note 24, at paras. 37-40, *per* McLachlin C.J.C.; *Lacombe*, *supra*, note 24, at para. 154, *per* Deschamps J.

<sup>99</sup> *COPA*, *id.*, at para. 45.

Instead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes. Such a substantial restriction of Parliament's legislative freedom constitutes an impairment of the federal power.<sup>100</sup>

In *Lacombe*, the Chief Justice found the by-law prohibiting water aerodromes on recreational lakes to be invalid as an invasion of exclusive federal jurisdiction in relation to aeronautics. This conclusion followed a surprisingly tortuous reading of the by-law that disconnected it from the municipality's other by-laws dealing with land use, and thus denied it validity through the ancillary powers doctrine. Even if she had found the by-law to be valid, she stated that

[it] would be inapplicable to the extent [it prohibited water aerodromes], under the doctrine of interjurisdictional immunity. A prohibition on aerodromes, even as part of a broad class of land uses, would result in an unacceptable narrowing of Parliament's legislative options. As in *COPA*, this would have the effect of impairing the core of the federal power over aeronautics.<sup>101</sup>

Treating a narrowing of Parliament's legislative options as sufficient to amount to an impairment of the exercise of its core jurisdiction, thus requiring the reading down of a valid provincial law, turns the reasoning in *Canadian Western Bank* on its head. One of the reasons Binnie and LeBel JJ. gave for restricting the interjurisdictional immunity doctrine is that it risks creating undesirable legal vacuums.<sup>102</sup> In *COPA* and *Lacombe*, the Chief Justice stated that avoiding legal vacuums by permitting valid provincial laws to apply to core federal subject matters is problematic because it forces Parliament to legislate if it wishes to overcome or supplement the rules set out in provincial law. In other words, the Chief Justice would rather risk legal vacuums than risk interference with Parliament's legislative agenda.

While the Chief Justice's opinions in the aerodrome cases are sensitive to the need to respect Parliament's autonomy, they do not evince the same sensitivity to why it might be important to enable local citizens to have a say in the location of aerodromes. Justice Deschamps' opinions in *Lacombe* and *COPA*, in contrast, emphasized the principle of subsidiarity as a way of ensuring that provincial claims to exercise their autonomous

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<sup>100</sup> *Id.*, at para. 48.

<sup>101</sup> *Lacombe*, *supra*, note 24, at para. 66.

<sup>102</sup> *Canadian Western Bank*, *supra*, note 2, at para. 44.

powers are treated with equal respect,<sup>103</sup> concluded that the municipal by-law and provincial statute at issue fell short of impairing Parliament's ability to regulate the location of aerodromes,<sup>104</sup> and closed with a plea for the preservation of space for local democratic institutions to express local concerns:

There is something fundamentally incoherent in the interpretation of the rules of our federalist system if a municipality is unable to establish reasonable limits to ensure that uses of its territory are compatible with one another where no activities falling under the core of a protected federal power are actually impaired and there is no inconsistency with federal legislation. Whether in the case of a pilot training school that is authorized to operate in an urban environment (more than 500 aircraft movements a day) or in one involving low-level float plane takeoffs over a public beach, the governments that are closest to citizens and have jurisdiction over land use planning should have reasonable latitude to act where the central government fails to do so or proves to be indifferent.<sup>105</sup>

The "something fundamentally incoherent" is the failure to accord equal weight and consideration to the importance of provincial claims to autonomy, grounded in valid local concerns falling squarely within exclusive provincial jurisdiction, pursuant to section 92(13), to enact laws in relation to the use of real property. The majority took the position that provinces and municipalities must be denied any constitutional capacity whatsoever to regulate the location of aerodromes through the valid exercise of their exclusive jurisdiction, because allowing the provinces to do so would require Parliament to legislate on the matter if it wishes to assert the primacy of its policy objectives in its area of exclusive jurisdiction. The provincial exercise of exclusive jurisdiction is denied so that potential future federal deliberations about whether to exercise its exclusive jurisdiction can be made in an unoccupied field, unhindered by any concerns about provincial rules. By according a remarkable degree of solicitude to the need to protect the exclusivity of federal jurisdiction in relation to the location of aerodromes, and demonstrating nothing approximating the same degree of concern for protecting the exclusivity of provincial jurisdiction overlapping with the same

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<sup>103</sup> *Lacombe, supra*, note 24, at para. 109.

<sup>104</sup> *Lacombe, id.*, at paras. 156-168; *COPA, supra*, note 24, at paras. 87-91.

<sup>105</sup> *Lacombe, id.*, at para. 185.

subject matter, the majority opinions in *Lacombe* and *COPA* are inconsistent with the federal principle and its corollary, the principle of equal autonomy.

The aerodrome cases were a missed opportunity to close the gap between the interjurisdictional immunity doctrine and the federal principle. Rather than building on the apparent change of direction signalled in *Canadian Western Bank*, and restricting the invocation of the doctrine to protect federal heads of power, the Chief Justice's majority opinions appear to have headed in the opposite direction.

The Court had an opportunity to close the gap between the interjurisdictional immunity doctrine and the federal principle from the other direction: that is, by invoking it to protect a matter at the core of provincial jurisdiction from impairment through the application of federal law. In *Insite*,<sup>106</sup> a majority of the British Columbia Court of Appeal held that the possession and trafficking offences in the federal *Controlled Drugs and Substances Act*<sup>107</sup> had to be read down, or restricted in their application, to avoid impairing the operation of *Insite*, a provincially authorized safe injection site operating in the Downtown Eastside of Vancouver. The majority opinion of Huddart J.A. picked up on the suggestion in *Canadian Western Bank* that the interjurisdictional immunity doctrine should be reciprocal. She noted:

*It would be difficult to envisage anything more at the core of a hospital's purpose, than the determination of the nature of the services it provides to the community it serves. Indeed, it would be difficult to envisage anything more at the core of the province's general jurisdiction over health care than decisions about the nature of the services it will provide ...*<sup>108</sup>

Applying the CDSA to *Insite*'s activities would make it impossible for the facility to deliver safe injection services, which ought to qualify as impairment of exclusive provincial jurisdiction in relation to hospitals, the medical profession and health care. As Huddart J.A. wrote, "[i]f interjurisdictional immunity is not available to a provincial undertaking on the facts of this case, then it may well be said the doctrine is not reciprocal and can never be applied to protect exclusive provincial

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<sup>106</sup> *Supra*, note 38.

<sup>107</sup> S.C. 1996, c. 19 [hereinafter "CDSA"].

<sup>108</sup> *Supra*, note 38, at para. 157 (emphasis in original).

powers.”<sup>109</sup> That appeared to be the view of Smith J.A. in her dissent. Quoting from *Canadian Western Bank*, she endorsed “a limited application of the doctrine ... to circumstances in which previous case law has already relied on its use.”<sup>110</sup>

Based on the 2010 rulings, it was difficult to predict which view would prevail on appeal to the Supreme Court in *Insite*. Would it be the novel invocation of interjurisdictional immunity by Huddart J.A. relying on *Canadian Western Bank*'s support of reciprocity, at least in theory? Or would it be Smith J.A.'s refusal to invoke interjurisdictional immunity based on the restriction of the doctrine to situations already covered by precedent? One would have expected that Deschamps and LeBel JJ. would be sympathetic to Huddart J.A.'s approach. In *Lacombe*, Deschamps J. expressed the view that “the recognition of new provincial cores of power” should not be precluded by *Canadian Western Bank*.<sup>111</sup> While McLachlin C.J.C. did not directly address the possibility of the interjurisdictional immunity doctrine evolving in a reciprocal direction in the aerodrome cases, she described the doctrine in one-way terms, as aimed at the preservation of federal core competencies from provincial impairment.<sup>112</sup> Justice Deschamps picked up on this and accused the Chief Justice of “getting away from both the letter and the spirit of *Canadian Western Bank* when she suggests that the doctrine of interjurisdictional immunity is limited to the protection of federal powers”.<sup>113</sup>

The Court ended up siding with Smith J.A., thus continuing its tradition of giving a cold shoulder to provincial attempts to invoke interjurisdictional immunity. In her opinion on behalf of a unanimous Court, the Chief Justice noted that the proposed invocation of the interjurisdictional immunity doctrine to protect the exclusivity of the core of provincial health jurisdiction is not supported by precedent and runs against the courts' desire to restrict the doctrine's operation.<sup>114</sup> Moreover, the Chief Justice wrote, the argument rests on a broad and ill-defined definition of core health matters and risks creating legal vacuums.<sup>115</sup>

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<sup>109</sup> *Id.*, at para. 176.

<sup>110</sup> *Id.*, at para. 225.

<sup>111</sup> *Lacombe*, *supra*, note 24, at para. 111.

<sup>112</sup> For example, *COPA*, *supra*, note 24, at para. 43.

<sup>113</sup> *Lacombe*, *supra*, note 24, at para. 109.

<sup>114</sup> *Insite*, *supra*, note 38, at para. 67.

<sup>115</sup> *Id.*, at paras. 68-69.

The *Insite* ruling signals that all members of the Court are content to adhere to the doctrinal *status quo*, with its yawning gap between the federal principle and the interjurisdictional immunity doctrine. Not even LeBel and Deschamps JJ. — perhaps surprisingly given the strength of their opinions in the 2010 aerodrome cases — were willing to take steps to close the gap in *Insite*.

#### V. EQUAL AUTONOMY AND *DE FACTO* CONCURRENCY

A second way in which the doctrinal structure of division of powers jurisprudence poses a threat to the federal principle is through the substantial growth of *de facto* areas of concurrent jurisdiction. Large and liberal interpretations of federal and provincial heads of power, supplemented by the principle of dynamic interpretation (or the “living tree” principle), expand the possibilities for overlapping jurisdiction. Likewise, liberal resort to the pith and substance doctrine, the ancillary powers doctrine and the double aspect doctrine leave ample room for overlap and interplay between federal and provincial legislation.

While there is much to commend in the Supreme Court’s modern and flexible approach to federalism from a democratic perspective, it poses a real danger to the federal principle.<sup>116</sup> It is not just a win-win situation. The reason for this is the rule of federal paramountcy discussed above.<sup>117</sup> William Lederman expressed the concern well:

... there is still need to avoid over-extension of the definition of the scope of federal categories of power if balance is to be maintained in our constitution. Complete concurrency of federal powers with provincial ones, coupled with the doctrine of federal paramountcy, would mean the end of a balanced federal system in Canada. The trend to increased concurrency then may have its dangers for the autonomy of the provinces, though so far [writing in the mid-1960s] the main effect of the trend has been to uphold provincial statutes.<sup>118</sup>

Because the rule of federal paramountcy renders conflicting provincial laws inoperative, areas subject to concurrent powers are in fact areas in

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<sup>116</sup> Ryder, *supra*, note 4, at 372-77.

<sup>117</sup> See *supra*, notes 55-57 and accompanying text.

<sup>118</sup> William Lederman, “The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada”, in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), at 278.

which Parliament is ultimately supreme and the provincial legislatures are subordinate. The provinces have only a conditional autonomy in areas of *de jure* or *de facto* concurrent jurisdiction. Rather than exercising guaranteed, exclusive jurisdiction, they are put in the position of supplicants to the federal government. To secure legislative space for the pursuit of distinct policy objectives, the provinces must negotiate with a national government that is holding the legal trump card — the federal paramountcy rule — in its hand. If the provincial pursuit of distinct policies in the growing areas of shared jurisdiction is conditional upon federal consent or forbearance, the provinces cannot be confident that their autonomy will be secured in the future.<sup>119</sup> For this reason, the combined effect of the federal paramountcy rule and the growth of areas of *de facto* concurrency poses a serious threat to the federal principle and its corollary, the principle of equal autonomy.

As long as the areas subject to *de facto* concurrent powers grow modestly and incrementally, the dangers to the federal principle may not be considered to be particularly serious, although over time they may become so. However, when the federal government seeks to persuade the courts to expand the scope of *de facto* concurrent jurisdiction more dramatically, especially in areas that have traditionally fallen within provincial jurisdiction, this is likely to provoke a defensive judicial response seeking to preserve balance in the division of powers. This is precisely what happened in the *AHRA Reference* when the federal Parliament sought to assert jurisdiction through the criminal law power, as Cromwell J. described it, over “virtually every aspect of research and clinical practice in relation to assisted human reproduction”.<sup>120</sup> Given that the controlled activities provisions of the *AHRA* would have enabled federal regulation of virtually all aspects of procedures such as donor insemination and *in vitro* fertilization, it is not surprising that Cromwell J. joined forces with Deschamps and LeBel JJ. to protect provincial jurisdiction over the regulation of these health services from being potentially eclipsed by federal paramountcy.

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<sup>119</sup> Ryder, *supra*, note 4, at 374, 377.

<sup>120</sup> *AHRA Reference*, *supra*, note 29, at para. 285, *per* Cromwell J. For a thorough description and analysis of the opinions in the *AHRA Reference*, see Graeme Mitchell, “Not A General Regulatory Power: A Comment on *Reference re Assisted Human Reproduction Act*” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 633. See also the comments on the *AHRA Reference* by Mark Carter, Dwight Newman, Thomas Posnyiak, Barbara von Tigerstrom & John Whyte (2011) 74 Sask. L. Rev. 1-57.



Similarly, the federal government is arguing that the validity of the proposed *Canadian Securities Act*, which is currently under consideration by the Supreme Court of Canada, can be upheld as an example of the flexibility permitted by a broad interpretation of the “general regulation of trade” power and by liberal interpretations of the pith and substance doctrine and the double aspect doctrine.<sup>121</sup> Provincial legislative jurisdiction in relation to securities will not be superseded, the federal government argues; it will simply be supplemented by concurrent or overlapping federal jurisdiction. The assertion of such a significant new area of concurrent federal jurisdiction, where federal laws would become paramount over any conflicting provincial laws, and long-established provincial jurisdiction thus would become subordinate, has been resoundingly rejected by the Alberta Court of Appeal (in a 5-0 opinion)<sup>122</sup> and the Quebec Court of Appeal (in a 4-1 opinion).<sup>123</sup>

Is the Supreme Court likely to agree with the appeal courts and find the proposed national securities legislation *ultra vires*? It is safe to predict that LeBel and Deschamps JJ. will not affirm the Act’s validity. Based on their recent rulings, there is a good chance that the Chief Justice and Binnie and Fish JJ. will find the proposed *Canadian Securities Act* valid. Justice Charron has retired and will not participate in the opinion. In predicting how the remaining three justices (Abella, Cromwell and Rothstein JJ.) will decide, the federal government is no doubt concerned by the ruling in the *AHRA Reference*. Justice Cromwell quoted LeBel and Deschamps JJ. (who were joined by Abella and Rothstein JJ.) to the effect that “recourse to the criminal law power cannot ... be based solely on concerns for efficiency or consistency, as such concerns, viewed in isolation, do not fall under the criminal law”.<sup>124</sup> While every head of power has different characteristics, it seems no more likely that the “general regulation of trade” power will support the assertion of federal jurisdiction over all aspects of securities regulation in the absence

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<sup>121</sup> For thoughtful discussions of the constitutional issues raised by the *Canadian Securities Act Reference*, see Jean Leclair, “Please Draw Me a Field of Jurisdiction’: Regulating Securities, Securing Federalism” in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 555; Jean-François Gaudreault-DesBiens & Noura Karazivan, “On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation” (2010) 49 Can. Bus. L.J. 1.

<sup>122</sup> *Reference re Securities Act (Can.)*, [2011] A.J. No. 228, 2011 ABCA 77 (Alta. C.A.).

<sup>123</sup> *Quebec (Procureure générale) c. Canada (Procureur générale)*, [2011] J.Q. no 2940, 2011 QCCA 591 (Que. C.A.) [hereinafter “*Quebec Securities Reference*”].

<sup>124</sup> *AHRA Reference*, *supra*, note 29, at para. 287 (translation).

of a reason more compelling than the desire for uniformity or efficiency that seems to underlie the initiative.

Pushing the courts to expand federal jurisdiction into broad new areas traditionally regulated by the provinces, thus creating new areas subject to *de facto* concurrent power, is not likely to be a winning constitutional strategy. The threat to the federal principle, to the balance of the division of powers, is too palpable.

Advocates of uniform schemes of national regulation in relation to assisted reproduction or securities need not despair. They may find comfort in knowing that a tried and true solution exists when Canadian legislatures seek to endow a single regulator with jurisdiction to address both provincial and federal aspects of a divided subject matter.<sup>125</sup> For example, divided jurisdiction over trade, a fundamental feature of Canadian federalism since *Parsons*,<sup>126</sup> can be overcome through a cooperative scheme of interlocking federal and provincial legislation, using techniques such as administrative delegation and incorporation by reference.<sup>127</sup> This is precisely the approach that the courts have encouraged and sanctioned in contexts such as the regulation of trucking and agricultural products marketing.<sup>128</sup> For example, in *Fédération des producteurs de volailles du Québec v. Pelland*, the Court upheld legislation that conferred jurisdiction over the intra- and extra-provincial marketing of chickens on a Quebec board. Justice Abella, writing for a unanimous Court, noted that “[e]ach level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme.”<sup>129</sup> In response to objections to the scheme, she held that its constitutional validity is supported by “a venerable chain of judicial precedent”.<sup>130</sup>

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<sup>125</sup> This paragraph draws on an exchange with Jean Leclair and the text of his article “‘Please Draw Me a Field of Jurisdiction’: Regulating Securities, Securing Federalism”, *supra*, note 121, at 584-85.

<sup>126</sup> *Citizen’s Insurance Co. of Canada v. Parsons*, [1881] J.C.J. No. 1, 7 App. Cas. 96 (P.C.) (finding that the provinces have jurisdiction in relation to intra-provincial trade pursuant to s. 92(13), and Parliament has jurisdiction in relation to extra-provincial trade and the “general regulation of trade affecting the whole dominion” pursuant to s. 91(2)).

<sup>127</sup> See Hogg, *supra*, note 45, at c. 14.3-14.5.

<sup>128</sup> *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.); *Coughlin v. Ontario (Highway Transport Board)*, [1969] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.); *Reference re Agricultural Products Marketing Act, 1970*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.); *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 (S.C.C.).

<sup>129</sup> *Pelland, id.*, at para. 38.

<sup>130</sup> *Id.*, at para. 52.

The federal government's proposed *Canadian Securities Act*, in contrast, chooses to assert federal jurisdiction over both the intra- and extra-provincial aspects of securities regulation, with no legislative support from the provinces. The proposed Act does provide, in section 250, that its key regulatory components will not come into force in a province without the written consent of the provincial Cabinet. While obtaining provincial executive consent to what is otherwise unilateral federal legislative action may be the wise and decent thing to do from a political perspective, from a constitutional perspective it is a very different beast from joint legislative action by a provincial legislature and Parliament, each acting within its protected exclusive sphere of jurisdiction. Executive agreement cannot alter the limits imposed on Parliament and the provincial legislatures by the constitutional division of powers. In other words, the proposed Act may be pursuing a kind of co-operative federalism in a political sense, but it chooses a mechanism that is different from the kinds of co-operative federalism sanctioned, and indeed celebrated, by the Supreme Court as a matter of constitutional law.

Rather than push the limits of the general regulation of trade power and strain the federal principle, if the federal government truly wants to pursue a constitutionally sound, cooperative approach to endowing a single regulator with jurisdiction over all aspects of securities regulation, it should follow the "well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism".<sup>131</sup> The facta of the British Columbia Attorney General and the Saskatchewan Attorney General in the federal reference urge just such a course.<sup>132</sup> It is also supported by the comments of Justice Michel Robert at the end of his opinion in *Quebec Securities Reference*:

The centralized approach advanced by the proposed securities legislation can be pursued by the governments of this country if they so desire. Possible avenues include a law passed by Parliament that would complement provincial laws and that would regulate the interprovincial,

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<sup>131</sup> *Id.*, at para. 55.

<sup>132</sup> Factum of the Attorney General for Saskatchewan, Canadian Securities Act Reference, File No. 33718, at paras. 71-77; Factum of the Attorney General of British Columbia, Canadian Securities Act Reference, File No. 33718, at paras. 90-104. Both facta note that a number of earlier proposals for a single national securities regulator relied on interlocking federal and provincial legislation and other constitutionally sound techniques that respect the division of powers. Given the availability of these valid means of establishing a single national securities regulator, the B.C. factum closes by noting that finding the proposed Act *ultra vires* would not be "the end of the matter; it is simply the beginning": *id.*, at para. 104.

international and criminal aspects of the trade in securities, an agreement putting in place a cooperative regime on the matter or a constitutional amendment.

Conversely, one cannot interpret the jurisprudence regarding s. 91(2) of the *Constitution Act, 1867* in a manner that would support such an initiative without the agreement of the provinces when their incapacity to regulate a sector of the economy has not been established. To do otherwise would be to assault the federal compromise made at the creation of our country and to threaten, all at the same time, the balance of powers between the two orders of government, the continued existence of the civil law of Québec and the existence of diverse common law approaches to private law in the other provinces and territories.<sup>133</sup>

The type of cooperative approach to regulating the entirety of a matter with intra- and extra-provincial dimensions through interlocking federal and provincial legislation that was endorsed by Abella J. in *Pelland*, and by Robert C.J. in the *Quebec Securities Reference*, could be pursued likewise by agreement between the federal government and any provinces that are content to leave regulation of assisted reproduction to the federal Assisted Human Reproduction Agency. To allow Parliament to assert jurisdiction over the regulation of all aspects of assisted human reproduction or all aspects of the trade in securities would not be consistent with contemporary Canadian understandings of the federal principle and its corollary, the principle of equal autonomy.

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<sup>133</sup> *Supra*, note 123, at paras. 228-229. My translation of:

L'approche centralisée que la Proposition avance en matière de réglementation du commerce des valeurs mobilières peut valablement être poursuivie par les gouvernements de ce pays s'ils le désirent. Les avenues possibles incluent une loi du Parlement qui serait complémentaire aux lois provinciales et qui réglerait les aspects interprovinciaux, internationaux et criminels du commerce des valeurs mobilières, un accord mettant en place un régime coopératif en la matière ou une modification constitutionnelle.

À l'inverse, on ne saurait interpréter la jurisprudence relative au paragraphe 91(2) de la *Loi constitutionnelle de 1867* de manière à légitimer une telle initiative sans l'accord des provinces dans des cas où leur incapacité à réglementer un secteur de l'économie n'a pas été établie. En faire autant porterait atteinte au compromis fédératif à l'origine de la création de notre pays et menacerait à la fois l'équilibre des pouvoirs entre les deux ordres de gouvernement, la pérennité du droit civil québécois et l'existence d'une *common law* de droit privé diversifiée dans les autres provinces et territoires.

## VI. CONCLUSION

Central to Canadian federalism jurisprudence is the principle of according equal weight and consideration to the claims of provincial legislatures and the federal Parliament when they seek to exercise their autonomy to pursue distinct policy objectives within their respective spheres of legislative jurisdiction. I have argued that the apparently sudden emergence of stark differences of opinion on the Supreme Court of Canada in recent federalism cases was a predictable result of its engagement with issues that invoke features of the jurisprudence inconsistent with this principle, namely the asymmetrical interjurisdictional immunity doctrine and the growth in areas subject to *de facto* concurrent power. Unfortunately, in its 2010 rulings in the aerodrome cases (*COPA* and *Lacombe*), and its 2011 ruling in *Insite*, the Court missed an opportunity to push forward the spirit of *Canadian Western Bank* and narrow the gap between the interjurisdictional immunity doctrine and the federal principle. In the *AHRA Reference*, a slim majority of the Court rejected the attempt by the federal government to establish that the regulation of all aspects of assisted reproductive health services is a double aspect matter subject to *de facto* concurrent legislative jurisdiction. The federal government is likely to face similar difficulties obtaining a positive opinion from the Court on the validity of the proposed *Canadian Securities Act*, although it seems likely that the issue will split the Court down the middle. As was the case in the *AHRA Reference*, the outcome may turn on a single justice's vote. This would not be a comfortable result for the Court or the federation. Rather than strain the limits of federal powers in a manner that threatens the federal principle, if federal and provincial governments are convinced of the value of a single national regulator in an area of shared jurisdiction, they would be well-advised to pursue that goal through a constitutionally sound "Plan B", namely, the enactment of a cooperative scheme of interlocking federal and provincial legislation endowing a single regulator with comprehensive jurisdiction.