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# Of Banks, Federalism and Clear Statements: Comment on Bank of Montreal v. Marcotte

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# Of Banks, Federalism and Clear Statement Rules: *Bank of Montreal v. Marcotte*

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## I. INTRODUCTION

The *Constitution Act, 1867*[1] gives Parliament "exclusive" legislative power over "Banking" and the "Incorporation of Banks" (section 91(15)). Banks in Canada have regularly made division of powers arguments invoking this federal legislative power in an attempt to avoid provincial laws.[2] In earlier cases, their efforts were often (but not always) successful.[3] However, the tide recently seems to have turned against

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1 30 & 31 Vict., c. 3.

2 Bradley Crawford, *The Law of Banking and Payment in Canada* (Aurora, ON: Canada Law Book, 2008) [hereinafter "Crawford"], 8.10 (noting banks have claimed "exemption from many provincial laws").

3 See, *e.g.*, *Tennant v. Union Bank of Canada*, [1893] J.C.J. No. 1, [1894] A.C. 31 (P.C.) (federal law permitting banks to take security by way of "warehouse receipts" constitutionally valid; provincial law limiting their legal effect not given effect); *Canada (Attorney General) v. Quebec (Attorney General)*, [1947] Q.C. 33 (P.C.) (bank and Attorney General of Canada successfully invoking constitutional argument against a Quebec law confiscating all deposits in "credit institutions" — mostly banks — that had not been claimed for 30 years); *Bank of Montreal v. Hall*, [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121 (S.C.C.) (bank successfully invoking constitutional argument to avoid a provincial law regulating the enforcement of a security interest); *Bank of Nova Scotia v. Canada (Superintendent of Financial Institutions)*, [2003] B.C.J. No. 92, 11 B.C.L.R. (4th) 206 (B.C.C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 229, [2003] 3 S.C.R. viii (bank successfully invoking constitutional argument to avoid a provincial law imposing requirements on promotion of insurance). See also *Reference re: Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.) (banks intervening in a reference striking down Alberta legislation creating a new form of credit); and *Alberta (Attorney General) v. Canada (Attorney General)*, [1938] J.C.J. No. 3, [1939] A.C. 117 (Alta. P.C.) (banks intervening in a reference striking down Alberta legislation levying a heavy tax on banks).

For cases *sustaining* provincial laws in relation to banks, see, *e.g.*, *Bank of Toronto v. Lambe* (1887), 12 A.C. 575 (P.C.) (bank subject to provincial taxation); *Royal Bank of Canada v. Nova Scotia (Workers/Workmen's Compensation Board)*, [1936] S.C.J. No. 36, [1936] S.C.R. 560

them. In *Canadian Western Bank v. Alberta* (2007),[4] the Supreme Court of Canada held that the promotion of insurance by banks is subject to the consumer protection requirements in Alberta's insurance legislation. And most recently, in *Bank of Montreal v. Marcotte* (2014),[5] the Court extended its reasoning in *Canadian Western Bank*, holding that the credit card activities of banks are also subject to provincial consumer protection requirements. The decisions, taken together, seem to give the provinces broad scope to regulate the activities of banks.

The loss in *Marcotte* seems especially striking, because the Court gave short shrift to a new preamble that had been added to the federal *Bank Act*[6] by the Harper government in 2012.[7] The preamble provides that "it is desirable and is in the national interest to provide for clear, *comprehensive*, *exclusive national* standards applicable to banking products and banking services offered by banks".[8] The preamble was lobbied for by the banks,[9] at least in part in response, it would seem, to the decision of the trial judge in *Marcotte*,[10] which ordered nine banks to pay restitution and (in some cases) punitive damages of almost $200 million for breaching the credit card disclosure requirements in Quebec's *Consumer Protection Act*.[11] The trial judge had rejected the banks' arguments that the CPA was constitutionally inapplicable under the doctrine of interjurisdictional immunity (because its application would

(S.C.C.) (property assigned to a bank as security subject to provincial taxation); and *Gregory Co. v. Imperial Bank of Canada*, [1960] C.S. 204 (Que. C.S.) (bank subject to provincial securities laws).

[4] [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Canadian Western Bank*"].

[5] [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55 (S.C.C.) [hereinafter "*Marcotte*"]. *Marcotte* was one of three companion cases. The other two cases are: *Amex Bank of Canada v. Adams*, [2014] S.C.J. No. 56, [2014] 2 S.C.R. 787, 2014 SCC 56 (S.C.C.); and *Marcotte v. Fédération des caisses Desjardins du Québec*, [2014] S.C.J. No. 57, [2014] 2 S.C.R. 805, 2014 SCC 57 (S.C.C.). This article will focus on the Court's decision in *Marcotte*, because it is the lead decision, including on the constitutional analysis.

[6] S.C. 1991, c. 46 [hereinafter "*Bank Act*"].

[7] The preamble was added to the Act by the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, s. 525 [hereinafter "Preamble"], the Harper government's 452-page 2012 omnibus budget bill. For further discussion of the Court's treatment of the preamble, see Part III(2), below.

[8] *Id*. (emphasis added).

[9] See, *e.g.*, Senate, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce* (June 7, 2012) (comments of Senators Céline Hervieux-Payette and Carolyn Stewart-Olsen) (noting the Canadian Bankers Association lobbied for the amendment), online: <http://www.parl.gc.ca/content/sen/committee/411%5CBANC/20EV-49618-e.HTM>. The Canadian Bankers Association intervened in the Supreme Court to argue against the constitutional applicability and operability of the CPA to the banks.

[10] In yet another twist, the trial judge was Gascon J., who was later appointed by the Harper government to the Quebec Court of Appeal, then to the Supreme Court of Canada.

[11] CQLR, c. P-40.1 [hereinafter "CPA"].

impair the "core" of the "exclusive" federal banking power) or constitutionally inoperative under the doctrine of federal paramountcy (because its operation would conflict with a federal purpose to create exclusive federal standards for banks).[12] The preamble's call for "exclusive national standards" was rebuffed in the decisions of the Quebec Court of Appeal and the Supreme Court, both of which held that banks were required to comply with the relevant federal *and* provincial "standards".[13]

This article explores the Supreme Court's decision in *Marcotte*. It argues that the Court was right to reject the banks' argument that the CPA "standards" were constitutionally inapplicable under the doctrine of interjurisdictional immunity or constitutionally inoperative under the doctrine of federal paramountcy. However, it challenges aspects of the reasoning provided for this result. It argues the weaknesses in the Court's reasoning could be addressed (or mitigated) by a federalism-based clear statement rule. A federalism-based clear statement rule, a concept described in more detail below, requires a government to use clear language when it pursues initiatives with certain implications for the division of powers.[14]

The article is organized in two parts. Part II describes the basic issues and decisions in *Marcotte*, with an emphasis on the decision of the Court. Part III engages critically with the Court's decision in *Marcotte*, beginning with its discussion of the doctrine of interjurisdictional immunity, then turning to its discussion of the doctrine of federal paramountcy. The discussion of each doctrine considers how, and why, a federalism-based clear statement rule might be utilized to modify the Court's current analysis.

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[12] The number of banks held liable was reduced on appeal, as was the dollar amount of their liability. For further discussion of the various decisions, see Part II(2) & (3), below.

[13] The decision joins a growing list of recent decisions in which the Court has rejected constitutional arguments advanced by the Harper government that would have permitted it to proceed unilaterally with initiatives that implicate the federal system: see *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837 (S.C.C.) [hereinafter "*Securities Reference*"] (rejecting proposed national securities regulator opposed by various provinces); *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433 (S.C.C.) (rejecting unilateral federal reform of the Court); and *Reference re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704 (S.C.C.) (rejecting proposed unilateral federal reforms of the Senate).

[14] See the text accompanying note 139, below.

## II. OVERVIEW OF *MARCOTTE*

### 1. Background

The Supreme Court's decision in *Marcotte* was the culmination of a hard fought Quebec class action that began 11 years earlier. The original representative plaintiff in the class action was Réal Marcotte.[15] The defendants in the class action were a group of nine banks.[16] The focus of the class action was the "conversion charge" that the banks charge their cardholders when they use their credit cards to make purchases in foreign currencies.[17] The primary allegation was that the banks had violated the requirements that Quebec's consumer protection law, the CPA, imposed on the calculation, collection and disclosure of these sorts of charges. The class action was for restitution of the conversion charges and punitive damages, remedies available under the CPA, but not the federal banking scheme.[18]

The plaintiffs made essentially three main allegations. First, they alleged that the banks breached the CPA by failing to calculate, collect and disclose the conversion charges as "credit charges". Under the CPA, "credit charges" must be folded into the "credit rate" (the interest rate),

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[15] A second representative plaintiff, Bernard Laparé, was added for standing reasons.

[16] The nine banks were: Bank of Montreal ("BMO"), Amex Bank of Canada ("Amex"), Royal Bank of Canada ("RBC"), Toronto-Dominion Bank ("TD"), Canadian Imperial Bank of Commerce ("CIBC"), Bank of Nova Scotia ("Scotiabank"), National Bank of Canada ("NBC"), Laurentian Bank of Canada ("Laurentian") and Citibank Canada ("Citibank").

The first class action (*Bank of Montreal v. Marcotte*, the focus of this article) initially included a claim against Desjardins, Quebec's largest credit union. A separate second class action was later initiated against Desjardins (*Marcotte v. Fédération des caisses Desjardins du Québec*), and the claim against Desjardins in the first class action dropped, after the banks indicated that they would challenge the constitutional applicability and operability of the CPA; the first class action and second class action were heard jointly (by Gascon J.). A third (but related) class action was later commenced against Amex (*Amex Bank of Canada v. Adams*). The third class action was heard shortly after the hearing of the other two class actions (also by Gascon J.). The decisions in all three class actions were released on the same day. The appeals of the three class actions — which dealt with similar issues — were heard together, in both the Quebec Court of Appeal and the Supreme Court of Canada.

[17] When credit card holders make purchases in foreign currencies, the payment amount is converted from the foreign currency into Canadian dollars using "interbank rates", which are rates that are generally not available to cardholders. The issuer of the credit card then charges an additional "conversion charge" that is added to the converted amount in the form of a percentage of the converted amount (typically 1.5 per cent to 2.5 per cent of this amount).

[18] See the *Bank Act*, *supra*, note 6, above; the *Cost of Borrowing (Banks) Regulations*, SOR/2001-101. See also the *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9.

and disclosed as an annual percentage.[19] The federal regulatory regime requires separate disclosure of conversion charges. Second, the plaintiffs alleged that, as "credit charges", the conversion charges levied by the banks were subject to a 21-day grace period, meaning that they could not be claimed from cardholders who paid off their monthly balance during the grace period. The federal regulatory scheme allows banks to collect conversion charges without a grace period. Finally, the plaintiffs alleged that in some cases there was not only a failure to respect the specific CPA requirements relating to "credit charges", but also a failure to disclose the conversion charges at all, a breach of the CPA's general disclosure requirement (section 12).

The banks made various arguments in response.[20] The most salient for the purposes of this article are their constitutional arguments. The banks argued that the relevant consumer protection requirements in the CPA were constitutionally *inapplicable* in relation to bank-issued credit cards due to the doctrine of interjurisdictional immunity. The banks also argued that, even if applicable, the consumer protection requirements in the CPA were constitutionally *inoperative* in relation to bank-issued credit cards due to the doctrine of federal paramountcy.[21] The constitutional arguments of the banks (and the plaintiffs' response to them) are described in more detail below, in the description of the Supreme Court's decision.

The constitutional arguments of the banks intersected with one of the other key points of disagreement in the case. This was whether the conversion charges were properly characterized as "credit charges" for the purposes of the CPA. The CPA draws a distinction between "credit charges" and "net capital", imposing distinct requirements on each. The plaintiffs, as noted, argued that the conversion charges were properly characterized as "credit charges", and therefore must be included in the disclosed "credit rate", and subjected to a 21-day grace period. The banks argued that the conversion charges were properly characterized as "net capital", and therefore were not subject to the CPA requirements relating to "credit charges".[22] This article will not analyze the various

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[19] There is a possible exception for conversion charges included in an annual fee: see *Fédération des caisses Desjardins du Québec c. Marcotte*, [2012] J.Q. no 7427, 2012 QCCA 1395, at para. 24 (Que. C.A.).

[20] The banks also made a standing argument, resulting in an important statement from the Supreme Court on the issue. This article will not analyze this aspect of the case.

[21] For further discussion of both doctrines, including their role, see Part II(3), below.

[22] The Court summed up the distinction between the two concepts as follows: "If the conversion charge qualifies as a credit charge, then according to the CPA it would have to be

decisions as they relate to this issue in any detail; the distinction between "credit charge" and "net capital" is technical and complex. However, it is important to note that the characterization of the conversion charges did have implications for the constitutional analysis. This is because the federal and provincial requirements differ much more if the conversion charges are characterized as "credit charges" under the CPA, in the least increasing the odds of finding a conflict sufficient to trigger the federal paramountcy doctrine.[23]

### 2. The Lower Court Decisions

The Quebec Superior Court found for the plaintiffs.[24] The trial judge (Gascon J.) held that the conversion charges were properly characterized as "credit charges" under the CPA. He then rejected the banks' argument that the CPA requirements were constitutionally inapplicable due to the doctrine of interjurisdictional immunity, or constitutionally inoperative due to the doctrine of federal paramountcy. Applying the CPA, he held that all nine banks failed to respect the CPA requirements relating to "credit charges" in calculating, collecting and disclosing the conversion charges, and that five banks also failed to disclose the conversion charges at all during certain periods, breaching the CPA's general disclosure requirement.[25] He ordered the nine banks to reimburse the conversion charges collected in breach of the CPA requirements; he also ordered the five banks that failed to disclose the conversion charges during certain periods to pay punitive damages. The total amount ordered (re)paid by the nine banks was close to $200 million.

The banks appealed to the Quebec Court of Appeal. The Court reversed the trial judge's decision in part, but sustained his conclusion rejecting the banks' constitutional arguments.[26] The Court rejected the

disclosed on its own, included in the disclosed credit rate, and be subject to the 21-day grace period. If the conversion charge qualifies as net capital, it would not be included in the credit rate or be subject to the 21-day grace period, but would still have to be disclosed under the general s. 12 disclosure provision of the CPA.": *Marcotte*, *supra*, note 5, at para. 50.

[23] This point was made by the Court of Appeal: see the text accompanying note 27, below. The Supreme Court hinted at a similar idea: *Marcotte*, *supra*, note 5, at paras. 74-76, 80.

[24] *Marcotte c. Banque de Montréal*, [2009] J.Q. no 5771, 2009 QCCS 2764 (Que. C.S.).

[25] The result was that five banks (BMO, NBC, Citibank, TD and Amex) were held to have breached both the CPA's specific requirements relating to "credit charges" *and* its general disclosure requirement, while four banks (RBC, CIBC, Scotiabank and Laurentian) were held only to have breached the CPA's specific "credit charge" requirements.

[26] *Banque de Montréal c. Marcotte*, [2012] J.Q. no 7428, 2012 QCCA 1396 (Que. C.A.).

banks' argument that the relevant CPA requirements were constitutionally inapplicable due to the doctrine of interjurisdictional immunity. It suggested that it might have accepted the banks' argument that the relevant CPA requirements were constitutionally inoperative due to the doctrine of federal paramountcy, if the conversion charges were properly characterized as "credit charges", since the federal and provincial schemes would then have conflicted.[27] However, it held that the conversion charges were properly characterized as "net capital", not as "credit charges", and so it rejected this argument as well, concluding that the federal and provincial schemes then did not conflict, but "work[ed] together harmoniously".[28] The Court's conclusion that the conversion charges were not "credit charges" led it to a different outcome than the trial judge. The Court dismissed the claims entirely against four banks (which had disclosed the conversion charges, and so had been held only to have breached the CPA requirements relating to "credit charges"), but affirmed the finding against four banks (which had not disclosed the conversion charges at all during the relevant period, breaching the CPA's general disclosure requirement).[29] It also reduced the amount of the order, to reflect its conclusion that the conversion charges were not "credit charges", and reversed the order for punitive damages.[30]

### 3. The Supreme Court Decision

The banks appealed again to the Supreme Court. The plaintiffs also appealed, primarily to have the trial judge's original remedy restored. Justices Rothstein and Wagner, writing for the Court, denied the banks' appeal,[31] affirming the Court of Appeal's decision that the banks did not need to comply with the CPA requirements relating to "credit charges", since the conversion charges were "net capital", but that five of the nine banks had nonetheless still breached the CPA's general disclosure

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[27] *Id*., paras. 104-106. The Court also noted another potential conflict in paras. 107-109, between the federal provision requiring consumer complaints against banks to be filed with the Financial Consumer Agency of Canada, and the CPA provisions allowing them to be filed with the Quebec equivalent — the Office de la protection du consommateur.

[28] *Id*., at para. 106.

[29] The Court also dismissed the claim against Amex, but only because it was already covered by its decision in *Adams v. Amex Bank of Canada*, [2012] Q.J. No. 7426, 2012 QCCA 1394 (Que. C.A.) [hereinafter "*Adams*"].

[30] However, the punitive damages award against TD was affirmed.

[31] *Marcotte*, *supra*, note 5.

requirement.[32] However, the Court allowed the plaintiffs' appeal in part, restoring the trial judge's punitive damages award against the five banks. In reaching this result, the Court joined both of the lower courts in rejecting the banks' arguments that the relevant CPA requirements were constitutionally inapplicable under the doctrine of interjurisdictional immunity, or constitutionally inoperative under the doctrine of federal paramountcy.

I will now explore the Court's reasoning about both doctrines.

### *(a) The Doctrine of Interjurisdictional Immunity*

A law that is in "pith and substance" within the jurisdiction of the legislature that enacted it may validly have an "incidental" impact on matters that fall within the jurisdiction of the other order of government.[33] One exception is where the doctrine of interjurisdictional immunity applies. It operates to prevent a law that is otherwise valid under the pith and substance doctrine from applying if the law has an impermissible impact on matters that fall within a core of jurisdiction reserved for the other order of government. Where the doctrine applies, the relevant law is not struck down as invalid; rather, it is "read down", meaning it is interpreted so as not to apply to the extrajurisdictional matter. The Court has developed a two-step test that it applies in determining whether the doctrine is engaged: the first step determines whether the impugned law engages the protected "core" of a legislative power allocated to the other order of government; the second step determines whether applying the impugned law would "significantly trammel" or "impair" the manner in which this "core" can be exercised.[34]

The banks argued that the relevant CPA requirements were constitutionally inapplicable, under the doctrine of interjurisdictional immunity, because lending and foreign currency conversion by banks (including by credit card) lie at the core of Parliament's "exclusive" jurisdiction over "banking", and the application of the CPA requirements

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[32] The Court reversed the Court of Appeal's decision that the claim against Amex in this case should be dismissed since it overlapped with the claim against Amex in *Adams*, *supra*, note 29, so it partly restored the order against Amex: *id*., at paras. 114-116.

[33] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007), c. 15 [hereinafter "Hogg"].

[34] *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at paras. 27, 43-45 (S.C.C.) [hereinafter "*COPA*"]. This two-step test was affirmed by the Court in *Marcotte*, *supra*, note 5, at para. 63. There are uncertainties about the contours of the test, which are discussed below, in Part III(1).

would impair "Parliament's power to regulate a national banking system under exclusive federal control".[35] The application of the relevant CPA requirements would, they argued, "submit the core of Parliament's banking power and its unified regulatory authority over the national banking system to comprehensive provincial regulatory oversight and control",[36] impairing Parliament's banking power, by narrowing its legislative options, and "requiring it to specifically override provincial laws across Canada".[37] The banks relied heavily on the Court's recent decision in *Canadian Owners and Pilots Assn.* (2010),[38] which, they said, clearly established that the "impairment" test would be satisfied if the "application of provincial law would … '*narrow Parliament's legislative options*'".[39]

The plaintiffs argued that the relevant CPA requirements were not constitutionally inapplicable under the doctrine of interjurisdictional immunity. They argued that lending and foreign currency conversion by banks (including by credit card) did not lie at the protected core of Parliament's power over banking, and that, even if they did, the application of the CPA requirements would not impair this protected core. They accused the banks of attempting to reargue *Canadian Western Bank*[40] — a case, also involving a group of banks, and discussed in more detail below, in which the Court explicitly discouraged "intensive reliance on the doctrine", and embraced several changes aimed at restricting its role.[41]

Justices Rothstein and Wagner, as noted earlier, rejected the argument of the banks that the doctrine of interjurisdictional immunity was engaged by the CPA requirements. They confirmed that "interjurisdictional immunity remains an extant constitutional doctrine".[42] However, invoking *Canadian Western Bank*, they suggested that "[a] broad application of the doctrine is in tension with the modern cooperative approach to federalism which favours, where possible, the application of statutes enacted by both levels of government", and thus

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35 *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55 (S.C.C.) (Appellant banks' factum) [hereinafter "*Marcotte* (Appellant banks' factum)"], at para. 4.

36 *Id.*, at para. 64.

37 *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55 (S.C.C.) (Respondent banks' factum) [hereinafter "*Marcotte* (Respondent banks' factum)"], at para. 67.

38 *COPA*, *supra*, note 34.

39 *Marcotte* (Respondent banks' factum), *supra*, note 37, at paras. 66-67 (emphasis added).

40 *Canadian Western Bank*, *supra*, note 4.

41 *Id.*, at paras. 35-44. For more discussion of the decision, see Part III(1), below.

42 *Marcotte*, *supra*, note 5, at para. 63.

that the "doctrine must be applied 'with restraint' and 'should in general be reserved for situations already covered by precedent'".[43]

Justices Rothstein and Wagner then affirmed and applied the two-step interjurisdictional immunity test described earlier. They did not provide a conclusive answer as to whether lending and foreign currency conversion by banks in the credit card context fall within the core of the federal banking power, the first step of the test.[44] Rather, they focused on the second step, concluding that applying the CPA requirements to banks would "not impair the federal banking power".[45] They suggested that "[r]equiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks' abilities to dictate the terms of that relationship or otherwise limit their activities", and that "even if foreign currency conversion is accepted as being part of the core of the federal banking power, imposing a broad disclosure requirement for charges relating to currency conversion in no way impairs that power".[46] They chided the banks for arguing "for exactly the type of amorphous, sweeping immunity that was rejected in *Canadian Western Bank*", stating that "banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion".[47]

### *(b) The Doctrine of Federal Paramountcy*

The doctrine of federal paramountcy applies where overlapping and otherwise valid federal and provincial laws conflict. Where the doctrine applies, the provincial law is not struck down; rather, it is rendered inoperative to the extent of the conflict. There are two forms of conflict that engage the doctrine: operational conflicts and conflicts of purpose. There is an operational conflict (the first form of conflict) where it is not possible to comply simultaneously with both the federal and provincial laws — where "compliance with one is defiance of the other".[48] There is a conflict of purpose (the second form of conflict) where compliance

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[43] *Id.*, at paras. 66-67 (citing *Canadian Western Bank*, *supra*, note 4).

[44] They did note that "lending, broadly defined, is central to banking and has been recognized as such by this Court in previous decisions", but also said "there is no precedent for the doctrine's application to the credit card activities of banks": *Id.*, at paras. 63, 66.

[45] *Id.*, at para. 66.

[46] *Id.*

[47] *Id.*, at para. 68.

[48] *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161, at 191 (S.C.C.).

with the provincial law would, in effect, frustrate the purpose of the overlapping federal law.

The banks argued that allowing the CPA requirements to operate in relation to the banks would frustrate the purpose of the federal banking scheme — the second form of conflict. Justices Rothstein and Wagner rejected this argument. They emphasized that "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose", and that "[t]he mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area".[49]

The banks argued that two different federal purposes would be frustrated by the operation of the CPA requirements. First, they argued that the CPA requirements would frustrate Parliament's general purpose to subject "bank-issued credit cards ... to one and only one set of consumer protection rules".[50] As noted, they pointed, in support of this argument, to the preamble to the federal *Bank Act*, which refers to "*exclusive*, national standards".[51] Justices Rothstein and Wagner cast doubt on the banks' argument that the preamble could be used to help establish a federal purpose to provide for exclusive federal standards; they noted that the preamble was added to the Act in 2012, before the Court of Appeal issued its decision, and the "proposition that it [could] be used retroactively as an interpretative aid" was, they suggested, "dubious".[52] However, they insisted that a federal purpose to provide for "exclusive national standards" — even if it was a federal purpose — "would still not be frustrated" by the operation of the CPA requirements.[53] The reason was that the CPA requirements "do not provide for 'standards applicable to banking products and banking services offered by banks', but rather articulate a contractual norm in Quebec" — just like the "substantive rules of contract found in the [*Civil Code of Quebec*], the operation of which the

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[49] *Marcotte*, *supra*, note 5, at para. 72.

[50] *Marcotte* (Appellant banks' factum), *supra*, note 35, at para. 6.

[51] *Bank Act*, *supra*, note 6 (emphasis added). The banks also invoked other materials to support their argument that a federal purpose was to provide for exclusive national standards: *Marcotte* (Appellant banks' factum), *supra*, note 35, at para. 79. The Attorney General of Canada supported the banks' argument as to a federal purpose to provide for exclusive national standards, also invoking the preamble and other materials in support: *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55 (Attorney General of Canada's factum), at paras. 90-101 (S.C.C.) [hereinafter "*Marcotte* (Attorney General of Canada's factum)"].

[52] *Marcotte*, *supra*, note 5, at para. 78 (citing *United States of America v. Dynar*, [1997] S.C.J. No. 64, [1997] 2 S.C.R. 462, at paras. 45-46 (S.C.C.) [hereinafter "*Dynar*"]).

[53] *Id.*, at para. 78.

Banks do not dispute".[54] They accepted that the result might have been different if the federal and provincial requirements varied,[55] but maintained that the requirements here were "the same"; and mere "duplication is not, on its own, enough to trigger paramountcy".[56]

Second, the banks also argued that the CPA requirements would frustrate a more specific federal purpose: "to ensure that bank contracts are not nullified even if a bank breaches its disclosure obligations", and to provide for administrative and criminal remedies instead of civil remedies in the event of a breach.[57] The CPA provides consumers "with various civil remedies for breaches of the Act, including specific performance, reduction of the consumer's obligation and rescission or annulment of the contract, as well as for punitive damages".[58] The federal scheme, in contrast, expressly rules out contract nullification as a remedy for breach, and provides for administrative and criminal remedies in the event of a breach, but is silent as to civil remedies. Justices Rothstein and Wagner suggested that it was "enough" to dismiss the banks' argument about nullification "to note that the remedy sought by the Plaintiffs is a reduction of how much they paid to the Banks, not [contract] nullification".[59] They dismissed the banks' argument about administrative and criminal remedies by noting that "[t]he silence of the *Bank Act* on civil remedies cannot be taken to mean that civil remedies are inconsistent with the *Bank Act*, absent a conflict".[60]

## III. ANALYSIS

The Court, in my view, was right to reject the constitutional arguments of the banks in *Marcotte*. As the Court has acknowledged in a variety of recent decisions, including in *Marcotte*, the courts should

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[54] *Id.*, at para. 79.

[55] They suggested that the doctrine of federal paramountcy might be engaged, due to an operative conflict or a conflict of purpose, if it was a "provincial requirement that conversion charges be calculated or disclosed in a different manner than that required by federal law"; if "the province provided for a different grace period"; or if the province provided for a "different method of interest computation or disclosure": *id*., at para. 80. However, they suggested that none of these conflicts existed on the facts of the case.

[56] *Id*., at para. 80.

[57] *Id*., at para. 82.

[58] *Id*., at para. 76.

[59] *Id*., at para. 83. However, they noted that the doctrine of federal paramountcy might be engaged in a future case if the CPA "is applied to nullify a contract on the basis of a breach of a CPA provision that is similar to a provision of the *Bank Act*": *id.*

[60] *Id*., at para. 84.

"favour, where possible, the application [and operation] of statutes enacted by both levels of government".[61] It was "possible" here to "favour … the application [and operation] of [the consumer protection laws] of both levels of government", leaving potential conflicts to be worked out in future cases.

It is noteworthy that many banks had already been complying with provincial consumer protection laws for many years, at least to some extent, including, it seems, in the credit card context.[62] It is also noteworthy that the preamble invoked by the banks and the federal government in arguing for "exclusive national standards" was added to the *Bank Act* by the federal government only in 2012, decades after the first consumer protection legislation was enacted[63] — and only then, it would seem, after lobbying by the banks.[64] The practice of dual compliance by the banks, a practice that the federal government did not seem inclined to disrupt until recently,[65] suggests that the two schemes can operate in

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[61] *Id.*, at para. 63. See also *Canadian Western Bank*, *supra*, note 4, at para. 37; *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624, at para. 2 (S.C.C.) [hereinafter "*Chatterjee*"]; *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453, at para. 107 (S.C.C.), *per* Deschamps J., dissenting [hereinafter "*Lacombe*"]; *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, at para. 50 (S.C.C.) [hereinafter "*Ryan Estate*"]; and *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, 2014 SCC 44, at para. 149 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

[62] Bradley Crawford, a leading authority on banking law in Canada, suggests that the ability of the provinces to apply their consumer protection laws to the banks was disputed, but that the federal and provincial governments and banks chose not to seek a judicial resolution, opting instead for an "informal truce" that "prevailed for about 40 years": "the banks adhered to the federal requirements, *but used their best efforts to comply with local variations in disclosure obligations as well*; and the provincial attorneys general refrained from complaint". This "informal truce", he suggests, collapsed after the trial decision in *Marcotte*. See Crawford, *supra*, note 2, 8.20.30(1)(d) (emphasis added), and 8.20.30 (noting the parties worked out a "workable solution, rather than litigating the issues").

See also Canada, *Task Force on the Future of the Canadian Financial Services Sector: Change Challenge Opportunity* (Ottawa: Department of Finance, 1998), 122 (noting that the "constitutional authority [of the provinces] to regulate consumer protection for banks is not fully defined, *but many banks comply with provincial regulations*") (emphasis added).

[63] For a brief history of consumer protection law in Canada, see Jacob Ziegel, "Consumer Law and Policies Forty Years Later: A Mixed Report Card" (2011) 50 Can. Bus. L.J. 259.

[64] For more discussion of the preamble, see notes 7 and 9, above, and Part III(2), below.

[65] The federal government did work with the provinces in an attempt to harmonize the federal and provincial regimes. There was disagreement about whether this reflected an understanding that *only* the federal scheme would apply to banks, or might have reflected an implicit acknowledgment that the federal *and* provincial regimes did or could apply: *compare, e.g.*, *Marcotte* (Attorney General of Canada's factum), *supra*, note 51, at para. 95 (Attorney General of Canada asserting initiative premised on only the federal scheme applying to banks); and *Marcotte* (Appellant banks' factum), *supra*, note 35, at paras. 79, 82 (similar argument); with *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55, at paras. 71-74

relation to banks without — as the banks implied — unduly compromising the "integrity of the national banking system".[66] The attempt by the banks to invoke the division of powers to avoid provincial consumer protection laws is an understandable response to the claim in *Marcotte* — which, after all, included a sizeable monetary claim, and threatened to open the banks to similar cases in other provinces. However, the Court was correct, I think, to reject their attempt.

And yet, while I agree with the result in *Marcotte* on the constitutional issues, I do take issue with aspects of the reasoning provided by the Court for this result. This Part will explore the aspects of the Court's reasoning in *Marcotte* with which I take issue, beginning with the Court's discussion of the doctrine of interjurisdictional immunity, and then turning to its discussion of the doctrine of federal paramountcy. I will argue that the problems that I identify could be addressed (or at least mitigated) by a federalism-based clear statement rule.[67] The role that federalism-based clear statement rules could play in addressing (or mitigating) these problems warrants an article-length treatment, and so I will only sketch my argument in broad outline, leaving the details to be addressed in future work. I also leave for another day whether a federalism-based clear statement rule should be applied in cases involving the federal power over "Indians, and Lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867*.

### 1. Interjurisdictional Immunity and Clear Statement

#### *(a) Pre-Marcotte: Conflicting Signals*

The parties in *Marcotte* presented very different accounts of the scope of the doctrine of interjurisdictional immunity. This might seem unsurprising; the banks were hoping to invoke the doctrine to avoid the application of the relevant provisions of the CPA, while the plaintiffs, whose case rested on the CPA, were arguing that the doctrine was not

(S.C.C.) (Respondent plaintiffs' factum) [hereinafter "*Marcotte* (Respondent plaintiffs' factum)"] (record "does not reveal that the federal government sought to exert exclusive jurisdiction over consumer protection for banks"). This tracked a broader disagreement about the jurisdictional and regulatory status quo pre-*Marcotte*.

[66] *Marcotte* (Appellant banks' factum), *supra*, note 35, at paras. 3-4 (banks implying in written argument that failing to allow banks to avoid the application of provincial consumer protection laws would undermine "the integrity of the national banking system").

[67] For a definition of the term, see the text accompanying note 139, below.

engaged. However, these different accounts were not the simple by-product of the cut and thrust of litigation; they both presented credible accounts of the Supreme Court's recent cases defining and applying the doctrine.

The parties were able to offer these accounts because the Court's recent decisions have sent conflicting signals about the scope of the doctrine of interjurisdictional immunity. In 2007, in *Canadian Western Bank*, the Court revisited the scope of the doctrine.[68] A number of commentators — me included — suggested that the decision heralded a much more restricted role for the doctrine.[69] However, the Court's decisions about the doctrine have long had a "shifting and unpredictable character".[70] And so, it perhaps should not have come as a surprise that just three years later, in 2010, the Court released another decision (*COPA*)[71] that seemed to herald a much less restricted role for the doctrine.[72] Or that more recently, the Court released two more decisions — one in 2011 (*Canada (Attorney General) v. PHS Community Services*

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[68] *Canadian Western Bank*, *supra*, note 4.

[69] For my discussion of the decision, see Wade K. Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (3d) 625, 629-50 [hereinafter "Wright"]. See also, *e.g.*, Carissima Mathen & M. Plaxton, "Developments in Constitutional Law: The 2006-2007 Term" (2007) 38 S.C.L.R. (2d) 111, 131-36; Peter W. Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" in J. Cameron & B. Ryder, eds. (2008) 42 S.C.L.R. (2d) 623 [hereinafter "Hogg & Godil"]; John G. Furey, "Interjurisdictional Immunity: The Pendulum Has Swung" in J. Cameron & B. Ryder, eds. (2008) 42 S.C.L.R. (2d) 597 [hereinafter "Furey"]; E. Edinger, "Back to the Future with Interjurisdictional Immunity: *Canadian Western Bank v. Alberta; British Columbia v. Lafarge Canada Inc*." (2008) 66 Adv. 553. 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 [hereinafter "Elliot, 2008"] (criticizing the doctrinal modifications introduced).

The decision was released with *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.) [hereinafter "*Lafarge*"], which also heralded a restricted role for the doctrine. See also *Chatterjee*, *supra*, note 61, at para. 2 (affirming the rejection of "proliferating jurisdictional enclaves" in both decisions).

[70] Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307, 340 [hereinafter "Weiler"]. For a characteristically succinct account of the twists and turns in the Court's treatment of the doctrine over the years, see Hogg, *supra*, note 33, at 15.8.

[71] *COPA*, *supra*, note 34.

[72] The decision was released concurrently with *Lacombe*, *supra*, note 61. For a detailed discussion of both decisions, see Robin Elliot, "*Quebec (Attorney General) v. Lacombe* and *Quebec (Attorney General) v. C.O.P.A.*: Ancillary Powers, Interjurisdictional Immunity and 'The Local Interest in Land Use Planning against the National Interest in a Unified System of Aviation Navigation'" (2011) 55 S.C.L.R. (2d) 403 [hereinafter "Elliot, 2011"].

See also *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.) (majority, *per* Abella J., and concurrence, *per* McLachlin C.J.C. and Fish J., disagreeing about whether to synthesize the labour relations and interjurisdictional immunity tests).

*Society*),[73] the other in 2013 (*Marine Services International Ltd. v. Ryan Estate*)[74] — that appeared to retreat to the more restricted approach to the doctrine set out in *Canadian Western Bank*.[75] These decisions send conflicting signals about the scope of the doctrine.

The conflicting signals sent by the Court's recent decisions about the scope of the doctrine of interjurisdictional immunity can be illustrated by comparing the Court's decisions in *Canadian Western Bank* and *COPA*. The basic issue in *Canadian Western Bank* was whether banks that promoted insurance in Alberta were required to comply with the consumer protection requirements in Alberta's *Insurance Act*. A group of banks argued that the provisions were constitutionally inapplicable due to the doctrine of interjurisdictional immunity.[76] Justices Binnie and LeBel, writing for the majority, rejected this argument.[77] They took the opportunity in their decision to reflect at some length on the main division of powers doctrines, including the doctrine of interjurisdictional immunity. In doing so, they laid out a restricted role for the doctrine, limiting its scope in several ways.

First, they raised the threshold to engage the doctrine. They said that the doctrine would now be engaged only if the "basic, minimum and unassailable core" of a legislative power of one order of government (or a "vital or essential part of an undertaking it duly constitutes") would be *impaired* by the application of the law enacted by the other order of government. Previously, the courts applied a lower *affects* threshold.[78]

Second, they said that the doctrine should generally "be reserved for situations already covered by precedent".[79] They did not clarify precisely what this meant, but earlier in the decision, they reviewed the

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[73] [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*PHS*"] (dispute involving the operation of Insite, a safe-injection clinic in Vancouver; Court rejecting an argument invoking the doctrine based on the alleged impairment of a protected core of *provincial* jurisdiction over health). See also *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5, at paras. 49-53 (S.C.C.) [hereinafter "Carter"] (involving a similar argument, with a similar result).

[74] *Ryan Estate*, *supra*, note 61 (statutory bar of action in provincial workers' compensation legislation *not* constitutionally inapplicable). For discussion, see Jena McGill, "Developments in Constitutional Law: The 2013 Term" (2015) 68 S.C.L.R. (2d) 137, 141-52.

[75] The Court's decision in *Tsilhqot'in*, *supra*, note 61, released post-hearing but pre-release of *Marcotte*, also confirms a more restricted role for the doctrine (at paras. 128-152).

[76] The banks also invoked the doctrine of federal paramountcy.

[77] Justice Bastarache wrote a concurring opinion disagreeing with aspects of their analysis.

[78] *Canadian Western Bank*, *supra*, note 4, at para. 48. They also rejected a distinction that had been drawn in an earlier case between direct and indirect application: *id*., at para. 49.

[79] *Id*., at para. 77.

"evolution" of the doctrine, suggesting that it originated in cases involving "federally incorporated companies", and was later applied to federal "undertakings",[80] and then "things (*e.g.*, Aboriginal lands) or persons (*e.g.*, Aboriginal peoples ... )".[81] They noted that there were cases in which "the Court acknowledged that the doctrine could potentially apply to all 'activities' within Parliament's jurisdiction",[82] an extension that, they argued, is supported by "the text and logic of our federal structure".[83] However, they suggested "a broad application of the doctrine to 'activities' creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined".[84]

This more restrictive approach to the doctrine of interjurisdictional immunity was appropriate, Binnie and LeBel JJ. said, because it was in line with the "dominant tide" of judicial review, which allows "for a fair amount of interplay and indeed overlap between federal and provincial powers", and "favour[s], where possible, the ordinary operation of statutes enacted by both levels of government".[85] They suggested a less restrictive approach would thwart "the flexibility and co-ordination required by contemporary Canadian federalism",[86] harkening back to an idea expressed earlier in the decision, and affirmed regularly in later cases, that "constitutional doctrine must facilitate, not undermine … 'co-operative federalism'"[87] — a model of federalism that embraces allocations and exercises of jurisdiction that are worked out through federal-provincial negotiation and agreement.[88]

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[80] The term "Undertaking" is used in the *Constitution Act, 1867*, s. 92(10). The term refers to businesses that Parliament has the jurisdiction to regulate. Examples include interprovincial "bus and truck lines, radio and television broadcasters, banks, airlines, shipping companies and [nuclear energy] companies": Elliot, 2008, *supra*, note 69, at 436.

[81] *Canadian Western Bank*, *supra*, note 4, at paras. 39-41.

[82] *Id.*, at para. 41 (citing, *e.g.*, *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437 (S.C.C.)).

[83] *Id.*, at paras. 41-42.

[84] *Id.*, at para. 42. See also *id.*, at para. 67 ("[a]lthough the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings").

[85] *Id.*, at paras. 36-37.

[86] *Id.*, at paras. 42, 45.

[87] *Id.*, at para. 24. For later references to "facilitating" "co-operative federalism", see, *e.g.*, *Securities Reference*, *supra*, note 13, at para. 60; *PHS*, *supra*, note 73, at para. 63; *Tsilhqot'in*, *supra*, note 61, at para. 149; and *Marcotte*, *supra*, note 5, at para. 84.

[88] I have explored this facilitative theory of judicial review (including what the Court seems to mean by "cooperative federalism") in detail elsewhere: see Wright, *supra*, note 69; and Wade Kenneth Wright, "Beyond Umpire and Arbiter: Courts as Facilitators of Intergovernmental Dialogue

There was disagreement among commentators about the merits of the Court's decision, but there was general agreement that the decision heralded a more restricted role for the doctrine of interjurisdictional immunity.[89] And yet, just three years later, the Court's decision in *COPA*[90] seemed to give the doctrine a much more "robust application".[91]

At issue in *COPA* was a Quebec law that designated areas of the province as agricultural zones, prohibiting the use of land in the zones for non-agricultural purposes without prior approval from a provincial body. An aerodrome was built on private land in a designated agricultural zone without prior approval, and the provincial body, upon learning about the aerodrome, ordered it removed. (The federal *Aeronautics Act*,[92] the federal regulatory scheme, did not require regulatory approval to establish or operate a private aerodrome.) The owners of the land challenged this decision on constitutional grounds, including by raising an argument that the provincial law could not apply to regulate the location of an aerodrome, by virtue of the doctrine of interjurisdictional immunity, because it encroached impermissibly on federal jurisdiction over "aeronautics".[93]

Chief Justice McLachlin, writing for a seven-judge majority of the Court, accepted this argument, holding the provincial law was "inapplicable to the extent that it prohibits aerodromes in agricultural zones".[94] She acknowledged that it was the "prevailing view [following *Canadian Western Bank*] that the application of interjurisdictional immunity is generally limited to the cores of every legislative head of power *already identified in the jurisprudence*".[95] She then proceeded to set out a two-step test that must be satisfied for the doctrine to be engaged: the first step determines whether "the provincial law … trenches on the protected 'core' of a federal competence"; the "second step is to determine whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the

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in Division of Powers Cases in Canada" (J.S.D. Dissertation, Columbia Law School, 2014), online: <http://dx.doi.org/10.7916/D87D2S7R> [hereinafter "Wright, 'Beyond'"].

89 See the sources listed in note 69.

90 *COPA*, *supra*, note 34.

91 Hogg, *supra*, note 33, at 15.8(c).

92 R.S.C. 1985, c. A-2.

93 They also argued that the provincial law was constitutionally invalid, under the pith and substance doctrine, or inoperative, under the doctrine of federal paramountcy.

94 *COPA*, *supra*, note 34, at para. 4. She rejected the invalidity and operability arguments raised: see previous note.

95 *Id.*, at para. 26 (emphasis added).

doctrine".[96] The manner in which she framed and applied this test suggested a broader scope for the doctrine.

Chief Justice McLachlin said that the first step was satisfied by precedent; aeronautics had clearly been held to fall within federal jurisdiction, and the Court had, she suggested, "repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power".[97] The second step (a "sufficiently serious" impact) was also satisfied because the provincial law would "impair the exercise of the federal competence"; if the law applied, she said, Parliament would be forced "to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand".[98] She rejected the province's argument that there was no impairment because it remained open to Parliament to regulate the location of aerodromes, displacing any contrary provincial law under the doctrine of federal paramountcy. Accepting this argument would "*narrow Parliament's legislative options* and impede the exercise of its core jurisdiction".[99]

The decision in *COPA* seemed to adopt a much less restrictive approach to the doctrine of interjurisdictional than *Canadian Western Bank*. The Court in *Canadian Western Bank* had not provided a clear indication of precisely *what* must be impaired for the doctrine to be engaged. However, the decision seemed to suggest that the focus of the impairment analysis was to be on the concrete impact of the impugned law on the protected aspects of actual (generally federal) undertakings, persons, things and activities, not the impact of the impugned law on legislative freedom or choice in the protected "core".[100] The decision in *COPA*, in contrast, placed the focus of the impairment analysis squarely on Parliament's legislative freedom or choice in the protected "core".[101]

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96 *Id*., at para. 27.

97 *Id*., at paras. 28-40.

98 *Id*., at para. 60.

99 *Id*., at para. 53 (emphasis added).

100 See Elliot, 2008, *supra*, note 69, at 477; Elliot, 2011, *supra*, note 72, at 430-31. Further evidence that the Court in *Canadian Western Bank* took this to be the focus of the impairment analysis can be found in *Lafarge* (*supra*, note 69), a companion case to *Canadian Western Bank*. In *Lafarge*, Bastarache J., writing separately, criticized the majority decision (also by Binnie and LeBel JJ.) for focusing the impairment analysis on the impugned law's impact on the federal undertaking rather the federal power (para. 109).

101 *COPA*, *supra*, note 34, at para. 46 ("The question is whether applying [the impugned law] would impair the exercise of the core of a federal power, in this case Parliament's ability to decide when and where aerodromes should be built"); see also *id*., at paras. 44-48.

This seems an easier approach to satisfy, turning an analysis that appeared to require evidence of concrete adverse consequences for actual (typically federal) undertakings, persons, things or activities into an abstract, non-evidence-based assessment about legislative freedom or choice. In addition, as noted, the decision seemed to suggest that this new impairment test would be satisfied any time (typically federal) "legislative options" might be "narrowed" in a protected area. This seemed to reduce "impairment" to an analysis of whether the two orders of government might want to pursue a different regulatory path (including, perhaps, by leaving the area unregulated). And since the conclusion would invariably seem to be yes, this effectively seemed to render the impairment requirement redundant[102] — a result that is hard to square with *Canadian Western Bank*, which treated it as a way to *limit* the reach of the doctrine.[103]

Two members of the Court (both from Quebec) dissented in *COPA*. Justice Deschamps, writing with the support of LeBel J., rejected the argument that the provincial law could not apply to private aerodromes due to the doctrine of interjurisdictional immunity.[104] In doing so, she invoked her dissent in *Quebec v. Lacombe*, a companion case that

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[102] For a similar (although not identical) suggestion, see Elliot, 2011, *supra*, note 72, at 433. Elliot suggests that the impairment requirement should be "jettisoned" entirely, a solution that, he argues, is consistent with the "purpose of the interjurisdictional immunity doctrine" — "to protect the principle of exclusivity": *id*., 434. This proposal would expand the reach of the doctrine, unless the protected "core" was contracted to offset the elimination of the impairment requirement. Elliot has suggested elsewhere that the test used to define the protected cores cannot be any narrower: Elliot, 2008, *supra*, note 69, at 497.

See also Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 565, at 588-92 [hereinafter, "Ryder, 2011"] (highlighting the tensions between *COPA* and *Canadian Western Bank*).

[103] A more generous reading of *COPA* is possible. On this reading, the language of "narrowing" legislative options must be read narrowly, and in the context of the particular case; it should not be read as altering the approach to the doctrine of interjurisdictional immunity articulated in *Canadian Western Bank*, but as a response to an argument that the doctrine should not be held to be triggered, because it remained open to the federal government to override provincial land use laws under the federal paramountcy doctrine by legislating the location of particular aerodromes. And yet, while *Canadian Western Bank* is cited regularly in *COPA*, the majority in *COPA* does seem to rely on the potential narrowing of legislative options to justify its conclusion that the doctrine is triggered — a move picked up and criticized by the dissent (see the text accompanying notes 104 to 107). It is also noteworthy that the Court refined, but did not altogether abandon, its concern for legislative options in its decision in *Marcotte* (see the text accompanying notes 114 to 115).

[104] *COPA*, *supra*, note 34, at para. 91. Justice LeBel wrote a brief decision concurring with Deschamps J.'s analysis on the doctrine of interjurisdictional immunity: *id*., at para. 76.

involved similar (but not identical) facts and arguments.[105] There, she openly took issue with the Chief Justice's impairment analysis, criticizing her for focusing on the "effect of the impugned provincial rule on the federal power" rather than its "concrete effects" on the "activities of the federal undertaking".[106] She suggested that such an approach was "antithetical" to *Canadian Western Bank*, and effectively rendered the "impairment test … superfluous".[107]

### *(b) Marcotte: More Conflicting Signals*

By the time the Court heard the appeal in *Marcotte*, it had, as noted earlier, released two more decisions — *PHS* and *Ryan Estate* — that are easier to reconcile with the restrictive role accorded the doctrine of interjurisdictional immunity in *Canadian Western Bank*.[108] However, in those cases, the Court did not disclaim the reasoning or result in *COPA*. And so, not surprisingly, the parties in *Marcotte* presented very different accounts of the scope of the doctrine in support of their positions, emphasizing different decisions in support of their respective positions.

The banks, unsurprisingly, relied heavily on the Court's decision in *COPA*. The trial judge had found that the impairment requirement was not satisfied because, among other things, complying with the CPA would involve a "minor inconvenience" for the banks. The banks dismissed "such 'facts'" as irrelevant, arguing that "the issue is not whether banks could operate with provincial regulation of their core functions", but whether the application of the CPA "would involve 'a substantial restriction of Parliament's legislative freedom' or 'narrow Parliament's legislative options' in respect of a core part of banking".[109] They suggested that the impairment requirement was satisfied here because Parliament would be forced to legislate if it wanted to supplement, or pre-empt, the CPA and similar provincial requirements.

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[105] *Lacombe*, *supra*, note 61. *Lacombe* involved a municipal by-law that regulated the location of private aerodromes. Chief Justice McLachlin, for the same seven-judge majority, held that the by-law was invalid, under the pith and substance doctrine, and even if valid, inapplicable, under the doctrine of interjurisdictional immunity. The same two members of the Court dissented. However, in *Lacombe*, Deschamps J. held — as she had in *COPA* — that there was no division of powers impediment to the municipal by-law, while LeBel J. held that the municipal by-law was rendered inoperative under the federal paramountcy doctrine.

[106] *Id.*, at paras. 116, 160. See also *COPA*, *supra*, note 34, at para. 91.

[107] *Id.*, at paras. 116, 158.

[108] *PHS*, *supra*, note 73, at, paras. 57-70; and *Ryan Estate*, *supra*, note 61, at paras. 50-64.

[109] *Marcotte* (Respondent banks' factum), *supra*, note 37, at paras. 66-67.

The banks found support for this argument in a broad, but plausible, reading of the Court's decision in *COPA*.

The plaintiffs, in contrast, relied heavily on the Court's decision in *Canadian Western Bank*, and paid less attention to the Court's decision in *COPA*. They defended the trial judge's finding that the impairment requirement was not satisfied because the activities of the banks would not be impaired, implicitly affirming an impairment analysis that focused on the impact that applying the CPA requirements here would have on the banks, not on Parliament's legislative freedom.[110] And they also accused the banks of attempting to reargue the Court's decision in *Canadian Western Bank*.[111]

The Court's decision, rejecting the argument of the banks that the CPA requirements were constitutionally inapplicable to the credit card activities of banks under the doctrine of interjurisdictional immunity, seems more in keeping with the restrained approach to the doctrine adopted in *Canadian Western Bank*, as well as more recent cases like *PHS* and *Ryan Estate*. Justices Rothstein and Wagner emphasized that the doctrine will apply in only "rare circumstances", and — citing *Canadian Western Bank* — that it "must be applied 'with restraint' and 'should in general be reserved for situations covered by precedent'".[112] And they chided the banks for arguing "for exactly the type of amorphous, sweeping immunity that was rejected in *Canadian Western Bank*", stating that "banks cannot avoid the application of all provincial statutes that in any way touch on their operations".[113]

In addition, their decision takes the opportunity to address the apparent tension between the Court's decision in *Canadian Western Bank* and *COPA*. They suggest that the Court found an impairment sufficient to trigger the doctrine in *COPA* because the legislation imposed a "blanket ban, under certain conditions, on an activity that fell within the core of the federal aeronautics power", and so applying it "would force Parliament to pass legislation to countermand the provincial rules, *failing which the activity could not occur at all*".[114] They distinguished this from the CPA requirements, which, they said,

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[110] *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725 2014 SCC 55, at para. 63 (S.C.C.) (Appellant plaintiffs' factum) [hereinafter "*Marcotte* (Appellant plaintiffs' factum)"] (suggesting that this finding was based on "a careful review of the evidence" and "proof").

[111] *Id.*, at para. 65.

[112] *Marcotte*, *supra*, note 5, at paras. 63-64.

[113] *Id.*, at para. 68.

[114] *Id.*, at para. 69 (emphasis added).

"affect how banks carry out a certain aspect of their activities", but do not ban them altogether.[115] This is a narrow reading of *COPA*, which could, as noted, be read to suggest that simply *narrowing* legislative freedom was enough to satisfy the "impairment" requirement. But again, it seems more in keeping with the restrained approach to the doctrine adopted in *Canadian Western Bank* and later cases.

And yet, conflicting signals remain. The Court's decision continues to send conflicting signals about the focus of the impairment analysis. As noted, in *Canadian Western Bank*, the Court seemed to suggest that the focus of the impairment analysis should be the concrete impact of the impugned law on the protected aspects of the actual undertaking, person, thing, or activity involved, while in *COPA*, the Court focused, more abstractly, on the impact of the impugned law on legislative freedom in relation to the protected core of jurisdiction — a focus that was criticized by the two dissenting members of the Court.[116] In *Marcotte*, Rothstein and Wagner JJ. seemed to adopt an analysis that focuses on both. For example, they suggest in one sentence that the CPA provisions "do not in any way impair any activities that are 'vital or essential to banking' such that Parliament might be forced to specifically legislate to override the provincial law";[117] this seems to place the focus squarely on Parliament's legislative freedom. Then, in the very next sentence, they suggest that "[r]equiring banks to inform customers of how their relationship will be governed or be subject to certain remedies does not limit banks' abilities to dictate the terms of that relationship or otherwise limit their activities";[118] this seems to place the focus squarely on the activities of the banks, not Parliament's legislative freedom. It is thus unclear whether either can now be used to establish an impairment, or if both must now be established.

In addition, the decision does not provide clear guidance about how much legislative freedom must be restricted to (help) establish impairment. The discussion of *COPA* seems to suggest that an impugned

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[115] *Id.* See also *id*., at para. 68 ("the provisions of the CPA *do not prevent* banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers") (emphasis added).

[116] See the text accompanying notes 104 to 107, above.

[117] *Marcotte*, *supra*, note 5, at para. 66. See also *id*., at para. 69 ("The disclosure and remedy provisions do affect *how banks carry out a certain aspect of their activities*, but as discussed above that effect does not amount to impairment") (emphasis added).

[118] *Id.* See also *id*., at para. 69 ("It is hard to imagine how these provisions would force Parliament to pass legislation to countermand them, failing which it would be impaired in its ability to achieve the purpose for which exclusive jurisdiction over banking was conferred").

law that imposes a "blanket ban" on an activity that falls within a protected core of jurisdiction conferred on the other order of government will be sufficient. It also seems to suggest that a mere narrowing of legislative freedom will be insufficient. But the decision fails to provide clear guidance about whether something between a "blanket ban" and a mere narrowing is sufficient.[119]

This might seem like mere doctrinal quibbling. And yet, the issues I have highlighted have implications, as noted, for the scope and application of the doctrine of interjurisdictional immunity. More fundamentally, they also engage broader debates about the proper balance of power, the nature of the federal system, and the role of the courts in safeguarding it.[120]

### *(c) Moving Forward*

What should become of the doctrine of interjurisdictional immunity? The doctrine has been a source of controversy for decades, both inside and outside of the courts. Some have argued that the doctrine has an important role to play in a division of powers analysis, and have limited themselves, at most, to offering recommendations for how it might best be reformed.[121] Others have argued that the doctrine should be abandoned — or, failing that, at least significantly curtailed.[122] The key

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[119] The idea that a "blanket ban" is sufficient is also not entirely clear. Legislation often uses conditional "bans" to achieve different regulatory goals. It is unclear from *Marcotte* whether the impairment requirement will be satisfied in all such cases; if so, the Court's narrow reading of *COPA* might not be so narrow after all. The Court in *Marcotte* noted that the provincial law imposed a "blanket ban, under certain conditions", suggesting that at least some conditional bans will satisfy the impairment requirement: *id*., at para. 69.

[120] For an exploration of these links, see Wright, *supra*, note 69, at 327-35.

[121] One of the staunchest defences of the doctrine *inside* the courts can be found in Beetz J.'s decision, for the Court, in *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*"].

The doctrine has been defended *outside* the courts by, *e.g.*, Robin Elliot ((Comment) (1988) 67 Can. Bar Rev. 523; Elliot, 2008, *supra*, note 69; Elliot, 2011, *supra*, note 72; Joseph Magnet, "Research Note: The Difference Between Paramountcy and Interjurisdictional Immunity", in *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. (2001), vol. 1, 341; and, more recently, but in a limited way, Hogg, *supra*, note 33, at 15.8(c), fn. 141, noting his earlier criticism of the doctrine, but suggesting that he has been "persuaded by Beetz J. and Professor Elliot that some degree of interjurisdictional immunity is entailed by the Constitution of Canada's dual list of exclusive powers".

[122] One of the staunchest criticisms of the doctrine *inside* the courts can be found in the decision of Dickson C.J.C. (Lamer J. concurring) in *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 16-22 (S.C.C.) [hereinafter "*OPSEU*"].

arguments that have been offered in support of these views were outlined in *Canadian Western Bank*.[123]

The defenders of the doctrine have offered two main arguments in support of it. First, they have argued that the doctrine is grounded in the references to exclusivity in the text of sections 91 and 92 of the *Constitution Act, 1867*.[124] The argument is that the doctrine safeguards the Constitution's grants of exclusive jurisdiction, by ensuring that the heads of power operate defensively to some extent, not only granting power to one order of government, but also denying it to the other order of government.[125]

Second, the defenders of the doctrine have also argued that it provides an essential doctrinal tool to address unconstitutional applications of otherwise valid laws. In doing so, it is argued, it ensures that an order of government that lacks the jurisdiction to regulate a matter directly in a narrowly-framed law (because the law would be invalid as a law in pith and substance in relation to an extrajurisdictional matter) does not have the jurisdiction to regulate the same matter indirectly in a broadly-framed law of "general application" (because the law as drafted is *not* invalid, by virtue of its valid applications, but can nonetheless still be applied to the extrajurisdictional matter).[126] In addition, it is argued, it protects against the risk that "provincial regulators will not have thought about the impact of their laws on federal undertakings", and might "lack the expertise that the federal regulators possess by virtue of being the primary regulator".[127]

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The doctrine has been criticized *outside* of the courts by, *e.g.*, Dale Gibson, ("Interjurisdictional Immunity in Canadian Federalism" (1969) 47 Can. Bar Rev. 40; and Comment (1990) 69 Can. Bar Rev. 339); Weiler (*supra*, note 70, at 340-42); Bruce Ryder ("The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990-1991) 36 McGill L.J. 308, 334-39, 352-54 [hereinafter "Ryder, 1990"]; and Ryder, 2011, *supra*, note 102, at 579-94); and Peter Hogg, in a previous edition of *Constitutional Law of Canada* (Toronto: Carswell, 1985), at 329-32 [hereinafter "Hogg, 1985"]; as noted in note 121, above, Professor Hogg has since softened his criticism of the doctrine.

[123] *Canadian Western Bank*, *supra*, note 4, at paras. 33-47; see also *Lafarge*, *supra*, note 69, at paras. 99-111.

[124] See, *e.g.*, *Bell*, *supra*, note 121, at 839-40; and Elliot, 2008, *supra*, note 69, at 483-84.

[125] Hogg, *supra*, note 33, at 15.8(e).

[126] *Id.*, 15.8(c), fn. 141 (embracing "some degree of interjurisdictional immunity" because "[o]therwise, what would be incompetent to a legislative body in a narrowly framed law would be permitted if the law were framed more broadly"); and *Lafarge*, *supra*, note 69, at para. 103, *per* Bastarache J. (suggesting the doctrine is necessary to prevent the "impermissible application of an otherwise valid provincial law to a federal matter").

[127] Hogg & Godil, *supra*, note 69, at 636. The assumption underlying this argument is that the doctrine operates to protect *federal* powers/undertakings from *provincial* laws.

The critics of the doctrine have offered several arguments against it. First, they have argued that the doctrine is a source of considerable legal uncertainty, and raises concerns about judicial competence.[128] This is because the doctrine requires the courts to define the "protected core" of (typically) federal powers, a protected core that is "of indeterminate scope" and thus "difficult to define".[129] It is also because the approach of the courts to the doctrine has been unstable and unpredictable, making it difficult for courts, governments and litigants to anticipate how it will be applied.[130]

Second, the critics have also argued that the doctrine is undesirable, because it runs counter to the "dominant tide" of Canadian federalism, legally and in practice — a "federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers", and "favour[s], where possible, the ordinary operation of statutes enacted by both levels of government".[131] The doctrine runs counter to this "dominant tide" because it protects an exclusive "core" of power from the "statutes enacted by [one] level of government" regardless of whether or how it has been exercised.[132]

Third, the critics have also argued that the doctrine has been applied "asymmetrically", and thus is "perverse".[133] This is because, even though the courts have said the doctrine is reciprocal, it has, in practice, primarily — some have suggested (almost) exclusively — been applied to favour federal power and federal undertakings at the expense of provincial laws.[134]

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[128] See, *e.g.*, Weiler, *supra*, note 70, at 340-42; and Furey, *supra*, note 69, at 603-607.

[129] See, *e.g.*, *Canadian Western Bank*, *supra*, note 4, at paras. 42-43.

[130] For a response to this criticism, see Elliot, 2008, *supra*, note 69, at 484-85.

[131] See *Canadian Western Bank*, *supra*, note 4, paras. 36-37 (citing *OPSEU*, *supra*, note 122, at 17-18, *per* Dickson C.J.C.). See also Hogg 1985, *supra*, note 122, at 330-31.

[132] For an attempt to answer this criticism, see *Bell*, *supra*, note 121, at 839-840 *per* Beetz J.; and Elliot, 2008, *supra*, note 69, at 482-484.

[133] Hogg, 1985, *supra*, note 122, at 331-32; see also Ryder, 2011, *supra*, note 102, at 581-94. On the idea of provincial (or "reciprocal") interjurisdictional immunity, see Dwight Newman, "Canada's Re-Emerging Division of Powers and the Unrealized Force of Reciprocal Interjurisdictional Immunity" (2011) 20 Const. Forum 1; and Michelle Biddulph, "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-*Canadian Western Bank* Era" (2014) 77 Sask. L. Rev. 45.

[134] For acknowledgment from the Court that the doctrine is reciprocal in theory, but asymmetrical in practice, see, *e.g.*, *Canadian Western Bank*, *supra*, note 4, at paras. 34-35, 43; see also *PHS*, *supra*, note 73, at para. 65. For disagreements about the extent to which the doctrine has been applied asymmetrically by the courts, compare Elliot, 2008, *supra*, note 69, at 468-69 (arguing there are "a number of cases in which federal legislation has been read down in order to protect from enroachment an area assigned exclusively to the provincial legislatures"); and Hogg, *supra*, note 33,

Finally, the critics have also argued the doctrine is unnecessary. This is because the "exclusivity of federal jurisdiction is adequately protected" by the pith and substance doctrine, which precludes one order of government from validly enacting laws that in pith and substance relate to a matter that is allocated to the other.[135] It is also because "the rule of federal paramountcy already limits the ability of provincial legislatures to intrude into federal jurisdiction, as long as there is federal regulation in place that creates a conflict with the provincial law" — or, failing that, "Parliament chooses to legislate to create a conflict with the provincial law".[136]

I am inclined to agree with the critics of the doctrine of interjurisdictional immunity. The Court's recent decisions — including *Marcotte* — do little to quell the criticism that the scope and application of the doctrine has had a shifting and unpredictable character. And there is, I think, a good deal of merit in the arguments that the doctrine is largely undesirable, perverse and unnecessary. The best argument for the doctrine, in my view, is that it provides a tool to deal with the unconstitutional application of otherwise valid laws, precluding governments from accomplishing indirectly what they cannot accomplish directly. However, it is not obvious to me that a separate doctrine is needed to address this issue; on the contrary, I am inclined to think that it may be possible to utilize the pith and substance doctrine and ancillary doctrine[137] to address it, assimilating the analysis of validity and the analysis of applicability.[138]

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at 15.8(f) (agreeing with Elliot); with Ryder, 2011, *supra*, note 102, at 581-82 (challenging Elliot's reading of the cases). For two recent cases in which the Court rejected interjurisdictional immunity arguments aimed at protecting a core of provincial power, see *PHS*, *supra*, note 73; and *Carter*, *supra*, note 73.

[135] Ryder, 1990, *supra*, note 122, at 352-54.

[136] See Hogg & Godil, *supra*, note 69, at 635-36 (but see *id*., 637, qualifying this argument). See also Hogg, 1985, *supra*, note 122, at 331-32; *OPSEU*, *supra*, note 122, at 18, *per* Dickson C.J.C.; and *Canadian Western Bank*, *supra*, note 4, at para. 46.

For an attempt to answer this criticism, see *Bell*, *supra*, note 121, at 843 *per* Beetz J. (dismissing this "policy" argument); and Elliot, 2008, *supra*, note 69, at 489-90.

[137] The ancillary powers doctrine is now used to assess the validity of part of a legislative scheme: see Wright, *supra*, note 69, at 640-41.

[138] There are a few cases where a federal law seems to have been "read down" in the context of an invalidity analysis to avoid unconstitutional applications of the law: see, *e.g.*, *Clark v. Canadian National Railway Co.*, [1988] S.C.J. No. 90, [1988] 2 S.C.R. 680 (S.C.C.); and *Isen v. Simms*, [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349 (S.C.C.).

Robin Elliot, a strong advocate of the interjurisdictional immunity doctrine, has noted that the "essential claim being made [under the ancillary doctrine and the doctrine of interjurisdictional immunity] is the same — that one order of government is attempting to extend the reach of

And yet, the courts in Canada seem committed to the use of the doctrine of interjurisdictional immunity to address issues of applicability. Accordingly, rather than simply call, yet again, for the doctrine to be abandoned, it seems more worthwhile to consider other ways to reform the doctrine, taking into account the various arguments offered in favour of and against it. There have been various proposals for the reform of the doctrine over the years, both inside and outside the courts, but the focus of such proposals has tended to be on attempting to clarify the test or standard used to trigger the doctrine, as it has been traditionally understood. My inclination is to take a different approach, which shifts the manner in which the doctrine has traditionally been understood, by treating it as a federalism-based clear statement rule, rather than an absolute limit on jurisdiction.

What are federalism-based clear statement rules? The term may be unfamiliar.[139] Federalism-based clear statement rules are a form of soft jurisdictional limit that requires an order of government to speak clearly when it pursues an initiative with certain division of powers implications. They are a *soft* jurisdictional limit because they do not preclude an order of government from pursuing an initiative altogether. Rather, where they apply, they require the use of clear statutory language. Where an initiative is held by a court to lack sufficiently clear statutory language, it

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legislation that looks to be within its power to enact into an area of exclusive legislative jurisdiction assigned by our Constitution to the other order, either by including in that legislation a provision that arguably over-reaches (ancillary powers) or by applying that legislation in a manner that arguably over-reaches (interjurisdictional immunity)": Elliot, 2011, *supra*, note 72, at 437. He has argued that the analysis under the two doctrines should be assimilated, partly by making the ancillary doctrine analysis look more like a doctrine of interjurisdictional immunity analysis, in particular by incorporating the notion of core areas of jurisdiction into the ancillary analysis: *id*., at 438-39.

My inclination is to move the courts away from this sort of interjurisdictional immunity analysis, and so I am skeptical of this proposal. I favour exploring ways to synthesize an interjurisdictional immunity analysis into a (perhaps slightly reformulated) ancillary analysis. I leave the contours of how this might occur to future work. The courts in the United States distinguish between challenges to the validity of a law itself ("facial challenges") and the validity of particular applications of a law ("as-applied challenges"): see Gillian E. Metzger, "Facial Challenges and Federalism" (2005) 105 Colum. L. Rev. 873.

[139] There is a large body of scholarship in the United States exploring clear statement rules, in the federalism context and more generally. On federalism-based clear statement rules, see, *e.g.*, Ernest A. Young, "Two Cheers for Process Federalism" (2001) 46 Vill. Law Rev. 1349; and Gillian Metzger, "Administrative Law as the New Federalism" (2008) 57 Duke L.J. 2023, 2091-2101. More generally, see, *e.g.*, Dan T. Coenen, "A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue" (2001) 42 Wm. & Mary L. Rev. 1575. For criticism, see, *e.g.*, John F. Manning, "Clear Statement Rules and the Constitution" (2010) 110 Colum. L. Rev. 399; and Dan T. Coenen, "The Pros and Cons of Politically Reversible 'Semisubstantive' Constitutional Rules" (2009) 77 Fordham L. Rev. 2835 (identifying the key criticisms and providing responses to them).

remains open to the relevant order of government to pursue the initiative, provided that any legislative response includes sufficiently clear statutory language.

How would an approach that treats the doctrine of interjurisdictional immunity as a federalism-based clear statement rule work? Such an approach could proceed in two stages. At the first stage, the courts would apply the standard two-step analysis that is already now used to determine whether the doctrine is triggered.[140] The change would be the introduction of a second stage to the analysis, which would be considered only where the doctrine is triggered at the first stage of the analysis.[141] At this second stage, the courts would consider whether the impugned law includes clear statutory language applying it to the extrajurisdictional matter. If it did not include clear statutory language, the impugned law would be read down so as not to apply. But, if it did include clear statutory language, the impugned law would not be read down; rather, it would be held to apply.[142]

This new approach to the doctrine of interjurisdictional immunity would open up the possibility for a legislative response overriding a judicial decision invoking the doctrine to read down an impugned law. Take the standard case where the doctrine is applied to preclude a provincial law from applying to a federal undertaking. The relevant

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[140] See the text accompanying note 34.

[141] The ordering of the two stages warrants additional thought. There is an argument for shifting the order of the two stages of the analysis, considering clear statement first; this might limit the situations in which the courts need to make the sorts of decisions called for by a conventional interjurisdictional immunity analysis. I have put the clear statement analysis second, because I think it might be difficult to conduct such an analysis without a clear sense of the extrajurisdictional matter that is being protected, and in relation to which a clear statement is required. The first stage would help bring this into better focus.

[142] The doctrine is usually applied to provincial laws of general application — broadly-framed provincial laws that do not include language explicitly applying them to a potentially extrajurisdictional matter. The extent to which the doctrine applies outside this context is unclear, although the doctrine has been discussed in cases involving broadly-framed laws that include language explicitly applying them to an allegedly extrajurisdictional matter: see, *e.g.*, Elliot, 2008, *supra*, note 69, at 469, fn. 157 (discussing *Canadian Western Bank*, *supra*, note 4, and arguing the doctrine should not have been applied because the impugned provincial law included language explicitly applying it to banks, the allegedly extrajurisdictional matter). The approach I have outlined assumes that the doctrine does not apply only to laws of general application; otherwise, the inclusion of explicit statutory language applying the law to an extrajurisdictional matter would render the doctrine (and the approach I describe) irrelevant from the outset. (The inclusion of explicit language *would* be relevant to a clear statement analysis.) The approach I have outlined also does not assume that a validity and applicability analysis will lead to the same result; otherwise, in those cases where a statute includes language explicitly applying it to an allegedly extrajurisdictional matter, making it subject to a validity challenge, an applicability (interjurisdictional immunity) challenge would simply be redundant.

provincial legislature could revisit the decision under this new reformulated version of the doctrine. If it decided not to amend the law to incorporate clear statutory language applying it to the federal undertaking, the law would continue not to apply. But, if it did decide to amend the law to include clear statutory language applying it to the federal undertaking, the law would then apply (unless a future court found that the language used was not sufficiently clear). The result would be to make the decision about the application of the law a joint project of the courts and political branches, not the courts alone.

What would be the benefits of an approach that treats the doctrine of interjurisdictional immunity as a federalism-based clear statement rule?[143] First, this approach would address (or mitigate) the criticisms about legal uncertainty and judicial competence that have been directed against the doctrine, in effect by lowering the stakes of judicial decision-making and dispersing responsibility, decreasing the risk and impact of judicial error. This is because court decisions applying the doctrine would not be final; rather, they would be provisional, subject to legislative override, in the form of a law including clear language applying it to the extrajurisdictional matter. To be sure, there is no general agreement about whether, and how much, the doctrine is open to criticisms about legal uncertainty and judicial competence.[144] And yet, where these criticisms have been accepted as legitimate, the response, among those not calling for the doctrine to be abandoned, has generally been to criticize the courts' decision-making, or to offer refinements to the test used to trigger it.[145] A clear statement approach would acknowledge that the problem might be at least in part the task itself. It would lower the stakes of the tough choices that the doctrine requires the courts to make, and decrease the risk and impact of judicial error, in effect by opening up the judicial decisions that apply it to legislative reversal.

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[143] I draw here on the discussion in Wright, "Beyond", *supra*, note 88, at 436-440.

[144] Compare, *e.g.*, Weiler, *supra*, note 70, at 340-42 (highlighting the "unstable and unpredictable character" of the Court's decisions as one of several reasons to eschew judicial review of the division of powers); with Elliot, 2008, *supra*, note 69, at 484 (disputing the claim that the doctrine causes the courts "any real difficulty", and calling a concern about legal uncertainty an "exceedingly weak reason not to apply a constitutional doctrine in novel contexts"). I agree that claims doctrines should be abandoned because they are unstable and unpredictable and should be approached with caution; we see such claims in all areas of constitutional law, and if this were a sufficient basis for abandoning a doctrine, we might have to do away with much of constitutional law altogether. However, it is, I think, one concern *among many* that properly is and should be taken into account.

[145] See, *e.g.*, *Lafarge*, *supra*, note 69, at para. 108, *per* Bastarache J. (agreeing with "some critics" that the application of the doctrine "is often difficult", and offering refinements).

Second, and relatedly, a clear statement approach to the doctrine would facilitate deliberation, between the courts and political branches, and the political branches themselves, about the division of powers. It would do so by providing notice to the two orders of government that an impugned law raises the division of powers concerns implicated by the doctrine, and presenting the chance for debate and compromise, within and between them, about whether the law should still be applied. It would thus address the concern, identified earlier, that an order of government that drafts a broadly-worded law may not have thought about the impact of applying the law to an extrajurisdictional matter.[146] It would also be consistent with the facilitative approach evident in the Court's recent federalism decisions, an approach that casts the courts as facilitators of "cooperative federalism", and limits their conventional role in imposing substantive outcomes.[147]

Third, and relatedly, a clear statement approach to the doctrine would be more in keeping with the "dominant tide" of Canadian federalism than the current approach. By opening up judicial decisions applying the doctrine to legislative reversal, this approach would be more in line with a "federalism that puts greater emphasis on the legitimate *interplay* between federal and provincial powers", and that "favour[s], where possible, the ordinary operation of statutes enacted by both levels of government".[148]

Fourth, a clear statement approach to the doctrine would "minimize concerns about democratic accountability, by permitting and to some extent encouraging federalism-related decision-making to occur in forums (like elected legislatures) that are accountable to the federal and provincial electorates — and … leaving the final word to the political branches".[149]

Finally, a clear statement approach to the doctrine would mitigate the criticism that the doctrine has been applied asymmetrically, and thus is perverse. It would give the provinces the power to override decisions applying the doctrine to limit the application of otherwise valid provincial laws, indirectly safeguarding provincial autonomy, and allowing them to counter the "unintentional centralizing tendency" of the current approach.[150]

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[146] See the text accompanying note 127.

[147] I have discussed this approach in detail elsewhere: see notes 69, 88.

[148] *Canadian Western Bank*, *supra*, note 4, at paras. 36-37 (emphasis added).

[149] Wright, *supra*, note 88, at 435. For a discussion of the democratic accountability concerns raised by judicial review of the division of powers, see *id*., at 335-42.

[150] *Canadian Western Bank*, *supra*, note 4, at para. 45.

A major criticism that is likely to be directed at a clear statement approach to the doctrine is that it would fail to protect an *exclusive* core of jurisdiction, undermining the very purpose of the doctrine.[151] After all, the doctrine would not be engaged where the impugned law contained sufficiently clear statutory language applying it to the extrajurisdictional matter. And yet, it is unclear how much the doctrine actually now operates to protect an "exclusive" core of jurisdiction, since it is engaged only where the impact is "sufficiently serious" to reach the level of "impairment", not where an impugned law has any impact at all on a matter falling within this exclusive core. In addition, the ability of the legislative branches to override a judicial decision holding the doctrine to be engaged does not necessarily mean that whatever "exclusive" core of jurisdiction the doctrine does actually protect will be lost. It simply means that the protection of this exclusive core of jurisdiction would fall, ultimately, to the political safeguards of Canadian federalism. As I have argued elsewhere, the federal and provincial governments have a greater ability to protect their own jurisdiction than many seem to imagine — an ability that they can, and do, use to limit, or block, perceived jurisdictional encroachments.[152] The federal government (the chief benefactor of the doctrine) could summon these political safeguards to protect whatever "exclusive" core of jurisdiction the doctrine now protects — including by threatening to invoke (and actually invoking, if necessary) its power to displace conflicting provincial laws under the doctrine of federal paramountcy. Finally, a clear statement approach would not abandon the political branches to their own devices altogether. The doctrine would still be engaged in the absence of clear statutory language, shifting the *status quo* against the application of the impugned law. And, while a judicial decision invoking the doctrine could be overridden legislatively, the

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[151] The textual argument for the doctrine (see note 124) is mixed. It is true the *Constitution Act, 1867* refers several times, in ss. 91 and 92, to "exclusive" legislative power, but, of course, it also includes federal declaratory and disallowance powers, which are hard to square with "exclusive" *provincial* legislative power. These might be dismissed as historical artifacts, since neither has been invoked in decades, but this then begs the question — why not the references to exclusivity as well? It might be argued that it is not possible to have a federal system without some degree of jurisdictional exclusivity, at least provincially, but this is not a textual argument — and the argument itself is open to debate.

In addition, even if one accepts that the text *requires* exclusive federal and provincial legislative power, it is by no means obvious that it *requires* the doctrine of interjurisdictional immunity. It might be argued, for example, that the pith and substance doctrine provides all the protection that is needed to safeguard exclusive legislative power, and thus that the text's call for exclusive legislative power would be answered without it.

[152] See Wright, *supra*, note 88, at 177-270.

decision would increase the "legislative enactment costs" required to achieve this result, and also provide notice of, and the chance to oppose, its application to an extrajurisdictional matter, triggering the political safeguards of federalism mentioned.[153] The result might be to impose real obstacles for the political branches to overcome.

Another criticism that might be directed at a clear statement approach to the doctrine is that it would not address the concerns raised about legal uncertainty and judicial competence — and might even exacerbate them. After all, the status of the doctrine would change, with implications for existing situations covered by precedent, and the courts would also have to decide how, and how clearly, the relevant legislature would have to speak to override its application. It is true that the change might introduce a new element of legal uncertainty, at least for a time. But this is true of any change in judicial approach — and, as noted, the impact of this would be offset, since the decisions of the courts applying the doctrine could be legislatively overridden. In addition, the change may actually promote legal certainty in the long run, encouraging a practice of legislative drafting that better addresses the application of laws to extrajudicial matters.

Another criticism that might be directed at a clear statement approach to the doctrine is that it would be counterproductive, because the inclusion of sufficiently clear statutory language applying a law to an extrajurisdictional matter would, perversely, render the law invalid under the pith and substance doctrine (where the validity of the entire law was at issue) or ancillary doctrine (where the validity of only part of the law was at issue).[154] Again, such an objection would, I think, be unfounded. The inclusion of statutory language applying a law to an extrajurisdictional matter will not invariably lead to a finding of invalidity.[155] Indeed, there

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[153] For example, where an initiative was found to speak with insufficient clarity, governments would need to revisit the initiative, and figure out how to respond with sufficient clarity to secure judicial approval; this would require time and effort, both of which have enactment costs, since other initiatives might be delayed, even sacrificed. In addition, responding would provide an opportunity for opponents to try to delay, even obstruct, the initiative, perhaps increasing the political capital required to pursue it. See further Matthew C. Stephenson, "The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs" (2008) 118 Yale L.J. 2, 41-42.

[154] As noted *supra*, in note 142, an assumption underlying a clear statement approach to the doctrine is that the doctrine does not apply only to provincial laws of general application, and that a validity and applicability analysis will not invariably lead to the same result.

[155] See, *e.g.*, *Canadian Western Bank*, *supra*, note 4, at paras. 80-82 (rejecting a challenge to the validity of Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, which included a provision explicitly applying it to banks; upheld as valid provincial law under the pith and substance doctrine).

are a number of cases that have sustained provincial laws that single out federal matters *for special treatment*.[156] And yet, while I think this objection is unfounded, it does, I think, highlight the need for further reflection about the function of the doctrine of interjurisdictional immunity, and its relationship to the pith and substance doctrine and the ancillary doctrine.

Finally, another criticism that might be directed at a clear statement approach to the doctrine is that it would be inconsistent with our constitutional arrangements, because it would introduce a legislative override into the division of powers, without the clear textual authority found in the *Canadian Charter of Rights and Freedoms*[157] context in the section 33 notwithstanding clause. Here again, such an objection would, I think, be unfounded. It is important to note that I am not advancing an argument that would subject all judicially-patrolled division of powers constraints to override; those constraints that flow from an application of the pith and substance doctrine would be untouched. In addition, this objection to the potential for override contemplated by a clear statement approach to the doctrine loses much, if not all, of its force if the courts and the political branches are understood to play a shared role in interpreting and enforcing the Constitution, including the division of powers. It is beyond the scope of this article to defend this shared role. For now, I will stop at saying that I view it as entirely in keeping with our constitutional arrangements, both legally and in practice — more so than an approach, implicit in this objection, that casts constitutional interpretation and enforcement by the political branches as exceptional, and thus in need of clear textual support. A clear statement approach to the doctrine is consistent with such a shared approach to the division of powers.

To be sure, a clear statement approach to the doctrine is unlikely to satisfy those who think it should be abandoned altogether, as well as those who think it plays a vital role in protecting judicially-enforced exclusive jurisdictional enclaves. However, it is, I think, worth exploring whether there is an alternative approach to the doctrine that speaks to the reasons for it, but addresses (or at least mitigates) the valid arguments against it. A clear statement approach to the doctrine presents just such an alternative.

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[156] Hogg, *supra*, note 33, at 15.5(b) ("[t]he singling out of undertakings within federal jurisdiction is not conclusive of pith and substance", listing various cases in support).

[157] Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

## 2. Federal Paramountcy and Clear Statement

A federalism-based clear statement rule could also play a valuable role in the context of the federal paramountcy doctrine, which is applied to deal with overlapping, but conflicting, federal-provincial laws. The Court's decision in *Marcotte* illustrates how and why it might also have a role here.

In *Marcotte*, as noted earlier, Rothstein and Wagner JJ. rejected the banks' argument that the CPA requirements should be held to be inoperative under the doctrine because they would frustrate Parliament's purpose to subject "bank-issued credit cards ... to one and only one set of consumer protection rules".[158] Their conclusion that there was no frustration of federal purpose sufficient to trigger the doctrine is sound, but the reasoning provided for this conclusion is not entirely convincing.

Take first the argument that it was "dubious" that the new preamble to the *Bank Act* could be used as an interpretative aid, because it was added to the Act only in 2012. The preamble, recall, provides that "it is desirable and is in the national interest to provide for clear, *comprehensive, exclusive, national* standards applicable to banking products and banking services offered by banks".[159] Justices Rothstein and Wagner devoted only one sentence to this argument. In doing so, they referred only to the Court's earlier decision in *Dynar*, a case that cautions against the use of post-enactment legislative history and amendments to cast light upon the enacting legislature's purpose.[160] Yet, the Court has also accepted that Parliament and the provincial legislatures can add "declaratory provisions" to legislation that offer binding interpretations of the legislation, "with the effect that the legislation in question is deemed to have always included this provision".[161] Justices Rothstein and Wagner failed to address whether a preamble generally — and *this* preamble specifically — might constitute a declaratory provision in this sense, declaring a federal purpose to provide for exclusive federal standards.[162] There was significant disagreement in the case about the jurisdictional *status quo* prior to the

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158 *Marcotte* (Appellant banks' factum), *supra*, note 35, at para. 6.

159 Preamble, *supra*, note 7 (emphasis added).

160 *Dynar*, *supra*, note 52, at paras. 45-46 (cited in *Marcotte*, *supra*, note 5, at para. 78).

161 See, *e.g.*, *Régie des rentes du Québec v. Canada Bread Company Ltd.*, [2013] S.C.J. No. 46, [2013] 3 S.C.R. 125, at paras. 26-35 (S.C.C.) (citing *Western Minerals Ltd. v. Gaumont*, [1953] S.C.J. No. 15, [1953] 1 S.C.R. 345 (S.C.C.)).

162 The argument was before the Court: see, *e.g.*, *Marcotte* (Respondent plaintiffs' factum), *supra*, note 65, at paras. 86-97 (arguing that the preamble was not declaratory in this sense).

addition of the preamble to the Act; the banks claimed that the preamble merely confirmed Parliament's original, and unbroken, intention to create exclusive national standards for the banks, while the plaintiffs claimed that there was no such original intention. But, if the conclusion was that the preamble did constitute a declaratory provision in this sense, it is difficult to see why the *status quo* pre-enactment would make a difference. Moreover, even if the conclusion was that the preamble did not constitute a declaratory provision in this sense, Rothstein and Wagner JJ. simply failed to address whether various other materials referred to by the parties were sufficient to establish a federal purpose to provide for exclusive federal standards.[163]

Take next Rothstein and Wagner JJ.'s argument that the operation of the CPA requirements would not frustrate a federal purpose to establish exclusive national standards, because they "do not provide for 'standards applicable to banking products and banking services offered by banks', but rather articulate a contractual norm in Quebec".[164] As Peter Hogg has noted, "this was an implausible characterization of the complex disclosure provisions of the CPA".[165] The argument is, in essence, that the preamble is under-inclusive — that its language does not sweep broadly enough to capture the consumer protection requirements of the CPA. But, even a cursory review of the legislative history of the preamble reveals that the "federal purpose" was to preclude *at least* the operation of the consumer protection requirements imposed by the CPA and similar provincial laws. As noted, the preamble was lobbied for by the banks, after — and, it seems, at least partly in response to — the trial judge's decision in *Marcotte*, rejecting the banks' argument that the operation of the CPA requirements would frustrate a federal purpose to provide for exclusive national standards.[166] The fact that the preamble's purpose — or its effect — was to preclude at least the application of provincial consumer protection laws like the CPA was acknowledged several times during parliamentary debate.[167]

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163 See note 51.

164 *Marcotte*, *supra*, note 5, at para. 79.

165 Hogg, *supra*, note 33, at 16.5(a) (2014 Update).

166 See notes 7 and 9, above.

167 This was highlighted several times during debate in the House of Commons: see *House of Commons Debates* (May 2, 2012), 1510 (L. Plamondon) (suggesting "the Conservatives are … trying to exempt their friends, the banks, from consumer protection legislation"); *House of Commons Debates* (May 4, 2012), 1125 (G. Caron) (similar comment), 1200, 1250 (J.-F. Fortin) (similar comment); *House of Commons Debates* (May 8, 2012), 1135-1140 (A. Bellavance) (similar

There was a different — and, in my view, better — argument that could have been invoked against the banks' assertion that the operation of the CPA requirements would frustrate a federal purpose to provide for exclusive national standards. This argument keys in on the *over*-inclusiveness, rather than the supposed under-inclusiveness, of the preamble. The argument is that there was no frustration of federal purpose sufficient to engage the doctrine of federal paramountcy because the federal Act did not include sufficiently clear language, either in the preamble or elsewhere in the Act, to show that Parliament intended to override the particular sorts of provincial "standards" imposed by the CPA (and similar provincial legislation).[168] On the contrary, the preamble speaks in vague, general terms about "exclusive national standards applicable to banking products and banking services offered by banks", language that would seem capable of capturing *all* provincial "standards" that operate *in any way* in relation to "banking products and banking services offered by banks".[169]

This argument invokes a clear statement rule, effectively making clear statutory language that shows that Parliament intended to pre-empt

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comment); *House of Commons Debates* (June 11, 2012), 1355 (J.-F. Fortin) (similar comment), 1930 (G. Caron) (similar comment).

It was also acknowledged during Senate proceedings: see, *e.g.*, Senate, *Proceedings of the Standing Committee on National Finance* (June 19, 2012) (C. Hervieux-Payette).

Jean-Marc Fournier, then Quebec's Minister of Justice, also directed a letter to the federal Minister of Finance — referred to in the Senate proceedings — expressing concerns that the preamble would exempt banks from the CPA requirements: see *id*.

The fact that this was the purpose or effect of the preamble was never openly acknowledged by a member of the federal government, but the federal Minister of Finance, the sponsor of the budget implementation bill containing the preamble, did state that its purpose was to confirm that "all banking activities throughout Canada are governed exclusively … by federal standards", and to "avoid the creation of local and potentially inconsistent rules that threaten the uniform application of the federal banking regulatory framework" (see Government of Canada, *Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012* (March 29, 2012), at 130); and a representative from the federal Department of Finance did acknowledge openly that the purpose of the change was to ensure that "bank customers should *only* receive disclosure as required under the *Bank Act*" (see House of Commons, Standing Committee on Finance (May 28, 2012), at 10-11 (testimony of J. Pearse, Director, Financial Sector Policy Branch, Department of Finance).

[168] It is a nice question whether courts should be suspicious of the use of preambles to preclude the operation of provincial laws. Certainly, the courts often treat preambles cautiously in the ordinary statutory interpretation context: see, for discussion, Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

[169] For example, the preamble would seem capable of capturing fundamental provincial laws or "standards" like the laws of contract. The response of the banks was to argue that they were not arguing that banks are immune from contract law: *Marcotte* (Respondent banks' factum), *supra*, note 37, at para. 81. They did not provide a convincing explanation of why provincial contract law might not be caught by the preamble as well.

provincial law in the particular regulatory context a pre-condition to finding a frustration of federal purpose sufficient to invoke the doctrine of federal paramountcy. There is support in the Court's decisions for this sort of clear statement argument in the federal paramountcy context. For example, in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), a case involving overlapping federal and provincial tobacco laws, the Court said that the courts should not "impute to Parliament … an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect".[170] Nevertheless, this sort of clear statement argument has been invoked in the federal paramountcy context sporadically at best — and even where invoked, often seems to play a secondary role in the Court's paramountcy analysis.

The Court's decision in *Marcotte* is illustrative. Justices Rothstein and Wagner cited with approval the suggestion that a court should not "impute to Parliament … an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect".[171] And they were dismissive of any suggestion that Parliament intended to "occupy the field" in this context, responding that "[i]f the Banks' argument amounts to claiming that the federal scheme was intended to be a complete code to which no other rules at all can be applied, that argument must also fail as the federal scheme is dependent on fundamental provincial rules such as the basic rules of contract".[172] However, they did not link the requirement for "very clear statutory language" with this complete code argument, opting instead, as noted, to emphasize the claim that the preamble was *under*-inclusive.

How might a clear statement rule be incorporated into a federal paramountcy analysis?[173] The Court's current analysis puts the burden of

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[170] [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188, at para. 21 (S.C.C.) [hereinafter "*Rothmans*"]. See also *Canadian Western Bank*, *supra*, note 4, at para. 74 (citing this passage from *Rothmans* with approval).

A federalism-based clear statement rule is also implicit in the idea, expressed in several cases, that it is a "fundamental rule of constitutional interpretation 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'": *Canadian Western Bank*, *supra*, note 4, at para. 75 (citing *Canada (Attorney General) v. Law Society of British Columbia*, [1982] S.C.J. No. 70, [1982] 2 S.C.R. 307, at 356 (S.C.C.)); see also, *e.g.*, *Ryan Estate*, *supra*, note 61, at para. 69 (citing this passage from *Canadian Western Bank*).

[171] *Marcotte*, *supra*, note 5, at para. 72.

[172] *Id.*, at para. 79.

[173] There is some support in the academic literature in Canada for importing a clear statement rule into the federal paramountcy analysis. For example, Robin Elliot has argued that a

proof on the party seeking to invoke the doctrine; in order to establish that a provincial law is rendered inoperative due to a frustration of federal purpose, that party "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose".[174] A clear statement rule would become a new pre-condition, to be considered before a court undertakes this analysis. The courts would look for clear statutory language that shows that Parliament intended to pre-empt provincial regulation in the field. In the absence of clear statutory language, the doctrine of federal paramountcy would not be triggered, and the court would not need to go on to determine whether the purpose of the federal statute would be frustrated by the operation of the provincial law. The clarity of the language required might vary with the circumstances, depending, for example, on the extent to which provincial regulatory authority was at risk of federal override; the greater the potential impact, the greater the clarity that might be required to meet a clear statement threshold.

What would be the benefits of such an approach? The benefits would be similar to those discussed earlier in relation to the doctrine of interjurisdictional immunity.[175] Such an approach would help safeguard provincial autonomy, by providing governments notice of, and the chance to voice concerns about, the possible pre-emptive effects of federal laws, and increasing the enactment costs required to achieve that result. This would ensure that provincial laws are not "overridden by stealth", requiring federal legislators to confront the possible pre-emptive effects of their laws, and to internalize the risks consequent upon pursuing such a course of action.[176] It would also mitigate the risks that federal paramountcy poses to provincial autonomy in the many — and

"federal intention to cover the field" should be a "necessary but not a sufficient condition for the application of the paramountcy doctrine": "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 S.C.L.R. (2d) 629, 660 [hereinafter "Elliot, 2007"].

There is also judicial and academic support in the United States for a "presumption against pre-emption" (the equivalent in the United States of federal paramountcy): see, *e.g.*, *Wyeth v. Levine* 129 S. Ct. 1187, 1195 (2009) (U.S.S.C.) ("In all preemption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*'" (emphasis added)); and Young, note 139, above.

174 *Marcotte*, *supra*, note 5, at para. 73 (citing *COPA*, *supra*, note 34, at para. 66).

175 See Part III(1)(c), above. See also Wright, *supra*, note 88, at 436-40.

176 Elliot, 2007, *supra*, note 173, at 664.

growing — areas where jurisdiction is now shared.[177] In addition, such an approach would facilitate deliberation, within and between governments, about the potential pre-emptive effect of federal laws, capitalizing on the capacity they have to determine whether federal pre-emption of provincial law is desirable and necessary. Finally, such an approach might mitigate the concerns raised about the democratic accountability of judicial review, by making the space for, and encouraging, democratically accountable deliberation about the division of powers.

True, the importation of this sort of clear statement rule might pose real obstacles for the federal government, given the difficulties that would accompany any attempt to override provincial law explicitly. In addition, it would require the courts to make hard choices, about how, and how clearly, the federal government would have to speak to override provincial law. But, these are already issues encountered by the federal government and the courts. In addition, it would remain open to the federal government to override provincial law, by including the necessary clear language in the federal law — and increasing the enactment costs required to achieve this result is part of the point of a clear statement rule. Finally, if we think that the courts have a role to play in division of powers cases, including by safeguarding provincial autonomy, hard choices may go with the territory.

## IV. CONCLUSION

The Court has tended, in recent years, to adopt an approach in division of powers cases that favours overlapping federal and provincial laws. However, it has not eschewed jurisdictional limits altogether.[178] The challenge for governments and litigants has been to predict when the Court will be inclined to abandon its general preference for jurisdictional overlap and enforce jurisdictional limits. In *Marcotte*, the banks urged the Court to embrace an exclusive jurisdictional enclave in relation to "banking", while the plaintiffs urged the Court to embrace jurisdictional overlap, allowing for federal and provincial regulation of "banking". The plaintiffs won the day. The Court's decision is a ringing statement of an approach that welcomes jurisdictional overlap, and thus "favours, where

[177] Wright, *supra*, note 88, at 309-11 (discussing the rise in shared jurisdiction).

[178] For discussion, see *id*., at 278-97.

possible, the application [and operation] of statutes enacted by both levels of government".[179]

This article has explored the Court's decision in *Marcotte*. It has argued that the Court was right to reject the banks' argument that this was not a case where it was "possible" to "favour … the application [and operation] of [the consumer protection laws] of both levels of government", leaving potential conflicts to be worked out in future cases. It thus defends the Court's decision to reject the banks' argument that the relevant requirements in Quebec's consumer protection legislation were constitutionally inapplicable under the doctrine of interjurisdictional immunity or constitutionally inoperative under the doctrine of federal paramountcy. However, it has challenged aspects of the reasoning provided by the Court in relation to both doctrines. It has argued that these weaknesses could be addressed (or mitigated) by a federalism-based clear statement rule, which requires a government to use clear language when it pursues initiatives with certain implications for the division of powers.

The role that federalism-based clear statement rules might play in safeguarding Canada's federalism system has not been adequately explored. The focus of the debate for decades, inside and outside of the courts, has been on whether, and when, the courts should enforce hard jurisdictional limits. This article has attempted to illustrate — in broad outline only — why it might be worthwhile if more of the attention now shifted to discussing the potential role of federalism-based clear statement rules.

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[179] *Marcotte*, *supra*, note 5, at para. 63.