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Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?

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Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?

Robin Elliot*

The Supreme Court of Canada has had occasion to consider the doctrine of federal paramountcy in a number of cases in the past few years, and it is clear from its decisions in those cases, particularly the most recent, *Rothmans, Benson & Hedges Inc. v. Saskatchewan*,[1] that its understanding of that doctrine has undergone an important change since its decision in *Multiple Access Ltd. v. McCutcheon* in 1982.[2] That change, which reflects a willingness on the Court's part to broaden the circumstances in which it is prepared to hold that the doctrine is applicable, has the potential to lead to significant inroads being made into provincial autonomy. That is particularly true in the Canada of today, in which federal legislation and provincial legislation have been allowed to overlap in a broad range of different areas. Preservation of a high degree of provincial

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* Professor of Law, University of British Columbia. The author is grateful to Joel Bakan, Bill Black, Richard Butler, Sujit Choudhry, Craig Jones and Margot Young for their many helpful comments on earlier drafts of this paper. He is also grateful to his research student, Mike Berger, for his assistance. Any errors that the paper is found to contain are, of course, the sole responsibility of the author.

1 [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188. The other recent cases examined in this article include *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1992] S.C.J. No. 4, [1999] 2 S.C.R. 961; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241; and *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113. These cases have already been considered by several constitutional scholars in the pages of this journal: see E. Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" (2006) 34 S.C.L.R. (2d) 307, at 325-32; P.W. Hogg, "Paramountcy and Tobacco" (2006) 34 S.C.L.R. (2d) 335; and B. Ryder, "The End of Umpire? Federalism and Judicial Restraint" (2006) 34 S.C.L.R. (2d) 345, at 369-72. Both Brouillet and Ryder express concern, as I do in this paper, about the implications for provincial autonomy of the change in the Court's approach to the paramountcy doctrine.

2 [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161.

autonomy has been a consistent theme of the federalism jurisprudence of both the Judicial Committee of the Privy Council and the Supreme Court of Canada throughout this country's history.[3] As a constitutional value, it was very much the beneficiary of the restrictive approach to the paramountcy doctrine that the Supreme Court took in the *Multiple Access* case. The more expansive approach to the doctrine embodied in these recent cases represents a very real threat to that value.

This paper has four objectives. The first is to trace the evolution of the paramountcy doctrine from 1982 to the present day through what I believe to be the most significant cases in which that doctrine has been considered by the Supreme Court of Canada. This objective is pursued in Parts I (covering the period 1982 to 1999) and II (covering the period 1999 to date) of the paper. The second is to summarize what I take to be the Court's current extended understanding of that doctrine's reach, and to examine some of the practical and theoretical implications of that understanding. That objective is pursued in Part III. The third objective, the focus of Part IV, is to subject that current understanding to critical scrutiny from the standpoint of both constitutional principle and constitutional policy. And the fourth, pursued in Part V, is to suggest a new way of thinking about the doctrine, one that accepts the validity of its recent extension, but attempts to mitigate the damage that that extension has the potential to cause to provincial autonomy.

I. THE FEDERAL PARAMOUNTCY DOCTRINE FROM 1982 TO 1999

I begin with a brief synopsis of the law relating to the paramountcy doctrine as it stood prior to the recent line of decisions, beginning with

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[3] A large number of cases could be cited in support of this proposition. Some of the more important ones are *Citizens Insurance Company of Canada v. Parsons* (1881), 7 A.C. 96 (P.C.); *A.G. Ontario v. A.G. Canada (Local Prohibition Reference)*, [1896] A.C. 348 (P.C.); *A.G. Canada v. A.G. Alberta (The Insurance Reference)*, [1916] 1 A.C. 589 (P.C.); *Reference re The Board of Commerce Act, 1919 & The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 (P.C.); *Canada v. Eastern Terminal Elevator Co.*, [1925] S.C.J. No. 20, [1925] S.C.R. 434; *A.G. Canada v. A.G. Ontario (Labour Conventions)*, [1937] A.C. 326 (P.C.); and *A.G. British Columbia v. A.G. Canada (The Natural Products Marketing Act)*, [1937] A.C. 377 (P.C.). While the Supreme Court of Canada has extended the reach of federal legislative jurisdiction somewhat since it took over as the court of last resort, it has done so only incrementally and with a careful eye on the need to protect provincial autonomy (see, for example, Beetz J.'s reasons for judgment for the majority on the national concern branch of the POGG power in *Reference re Anti-Inflation Act (Canada)*, [1976] 2 S.C.J. No. 12, [1976] 2 S.C.R. 373, and Dickson C.J.'s reasons for judgment for the Court in relation to the second branch of s. 91(2) in *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641).

Multiple Access Ltd. v. McCutcheon in 1982. The basic proposition for which the doctrine stands, and has always stood ever since it was initially formulated in the latter part of the 19th century,[4] is that valid provincial legislation that is found to conflict with valid federal legislation is inoperative to the extent of the inconsistency. The difficult question for the courts has been to determine what constitutes a conflict in this context.

That question was answered in *Multiple Access* in the following terms by Dickson J. (as he then was) on behalf of six members of the Supreme Court of Canada: "In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no, 'the same citizens are being told to do inconsistent things'; compliance with one is defiance with the other'."[5] In other words, the Court appeared to be saying, if it is possible for the citizenry to comply with both enactments — for example, by complying with the provisions of a provincial legislative regime that imposes stricter requirements than its federal counterpart, or by failing to take advantage of permission to engage in particular conduct granted explicitly or implicitly by a federal enactment in the face of a provincial prohibition against that same conduct — no conflict should be found to exist. This answer, which had its origins in several cases decided by the Court in the 1960s and 1970s,[6] effectively meant that the paramountcy doctrine was going to be reserved for a very narrow range of circumstances, and hence to pose a very limited threat to the value of provincial autonomy. Only when it was truly impossible for citizens to comply with both enactments would the provincial legislation have to give way to the federal. In *Multiple Access* itself, the Court refused to find that a provision of Ontario's *Securities Act*[7] creating a civil cause of action in respect of insider trading conflicted

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4 The origins of the doctrine are somewhat obscure (see the discussion of the paramountcy doctrine by Lamer C.J. in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at 71), but it is clear that it had been established at least by the time the *Local Prohibition Reference*, *id.*, was decided in 1896. It seems likely that the basis for it lay in the Privy Council's conviction, based on its reading of the opening and concluding paragraphs of s. 91, that, in the words of Sir Montague Smith in *Citizens Insurance Company v. Parsons*, *supra*, note 3, at 108, the drafters of the *British North America Act, 1867* had "endeavour[ed] to give pre-eminence to the Dominion Parliament in cases of a conflict of powers".

5 *Supra*, note 2, at 191.

6 These cases included *R. v. Smith*, [1960] S.C.J. No. 47, [1960] S.C.R. 776; *O'Grady v. Sparling*, [1960] S.C.J. No. 48, [1960] S.C.R. 804; *R. v. Stephens*, [1960] S.C.R. 823; *R. v. Mann*, [1966] S.C.J. No. 3, [1966] S.C.R. 238; and *Ross v. Ontario (Registrar of Motor Vehicles)*, [1975] S.C.J. No. 130, [1975] 1 S.C.R. 5.

7 R.S.O. 1970, c. 426.

with a virtually identical provision in the *Canada Corporations Act*.[8] It was the Court's view that "[t]he fact that a plaintiff may have a choice of remedies does not mean that the provisions of both levels of government cannot 'live together' and operate concurrently",[9] and that "[t]he courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions".[10]

Although the Supreme Court was called upon to consider the paramountcy doctrine in several cases between 1982 and 1999, when it decided the first of the recent cases that are the focus of this paper, only one, *Bank of Montreal v. Hall*,[11] was of any real doctrinal significance.[12]

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8 R.S.C. 1970, c. C-32.

9 *Supra*, note 2, at 189.

10 *Id.*, at 191.

11 [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121.

12 Other cases decided by the Court during this period include *Rio Hotel Ltd. v. New Brunswick (Liqour Licensing Board)*, [1987] S.C.J. No. 46, [1987] 2 S.C.R. 59 (provincial legislation prohibiting nude entertainment in the context of a regulatory regime governing taverns held not to conflict with *Criminal Code* prohibitions against various forms of public nudity); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (provincial legislation restricting advertising to young children held not to conflict with guidelines relating to television advertising to children under the federal *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 3(c)); and *Clarke v. Clarke*, [1990] S.C.J. No. 97, [1990] 2 S.C.R. 795 (provincial matrimonial property legislation requiring that a military pension form part of the property to be divided between spouses held not to conflict with a prohibition against alienation of such pensions under the *Canadian Forces Superannuation Act*, R.S.C. 1970, c. C-9). The Court also decided during this period a quartet of cases involving the ordering of priorities amongst creditors in bankruptcy proceedings governed by the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 in circumstances in which provincial legislation had the potential to affect that ordering. These cases are *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] S.C.J. No. 35, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] S.C.J. No. 44, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] S.C.J. No. 78, [1989] 2 S.C.R. 24; and *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 77, [1995] 3 S.C.R. 453. The issue in these cases was whether or not the provincial legislation in question should be allowed to affect the ordering of priorities in bankruptcy proceedings. The resolution of that issue ultimately turned on the Court's interpretation of the relevant provisions of the *Bankruptcy Act*, *i.e.*, on whether those provisions should be understood to recognize and accept the effects of the provincial legislation at issue. For example, in *Husky Oil*, the outcome turned on whether s. 97(3) of the *Bankruptcy and Insolvency Act*, which provides that the law of set-off is to apply in bankruptcy proceedings, should be understood to recognize the set-off effect of s. 133(1) and (3) of Saskatchewan's *Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1. Those provisions allow the provincial Workers' Compensation Board to seek payment of monies owed to its Injury Fund from the principal of a defaulting contractor (s. 133(1)), and that principal in turn to recover the amount paid on the contractor's behalf by setting it off against monies it owes the contractor (s. 133(3)). The Court divided 5:4 on that issue, with the majority, in an opinion authored by Gonthier J., holding that s. 97(3) should not be understood to give effect in bankruptcy proceedings to the set-off arrangement created by the provincial legislation. On the basis of that interpretation, Gonthier J. held the provincial legislation to be in conflict with the ordering of priorities prescribed by the *Bankruptcy and Insolvency Act* and therefore inoperative in the context of bankruptcy proceedings. The same holding was made in the

At issue in that case was the applicability[13] to a bank of provincial legislation requiring secured creditors to follow a set of onerous procedures if they wished to realize on their security interests, procedures that the bank in this instance had not followed. The claim that the provincial legislation was not applicable was based on the fact that the federal *Bank Act*[14] contained provisions that permitted banks to realize on their security interests by doing what the bank here had done, which was simply to seize the property in question and seek to sell it. Justice La Forest, who wrote for the panel of five members of the Court who sat in the case, held that the provincial legislation conflicted with the federal and was therefore inapplicable to banks seeking to take advantage of the realization regime established by the *Bank Act*.

Justice La Forest began his reasons for judgment by affirming the status of *Multiple Access* as the leading authority in the area and purported to apply the impossibility of dual compliance test that it prescribed. However, he applied that test in what can fairly be described as a very unusual manner. Instead of asking whether it was impossible for the Bank of Montreal to comply with both enactments — the question that the test seemed to call for and the question the majority of the Saskatchewan Court of Appeal had asked and answered in the negative — he posed a different question altogether. He extracted from the reasons for judgment in *Multiple Access* a brief passage in which Dickson J. suggested that his willingness to leave intact the provincial legislation there at issue was based at least in part on his view that the continuing operation of that legislation would not frustrate the purpose that Parliament had in mind when it enacted the federal legislation at issue. On the basis of that passage, La Forest J. said that "the question before me is thus reducible to asking whether ... the legislative purpose of Parliament stands to be displaced in the event that the appellant bank is required to defer to the provincial legislation in order to realize on its security".[15] His ultimate holding that there was a conflict was therefore based, not on a finding

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other three cases as well. None of these four cases, in my view, adds anything to our understanding of the meaning of conflict for the purposes of applying the paramountcy doctrine.

[13] The term generally used to describe what is at stake for provincial legislation when the paramountcy doctrine is at issue is "operability". However, that term sometimes works poorly as a descriptor of what is at stake for provincial legislation as a practical matter. The term "applicability", which is more often associated with the doctrine of interjurisdictional immunity, works much better. I have therefore used the latter term in this paper whenever (as here) it seems to me to be the better descriptor.

[14] R.S.C. 1985, c. B-1.

[15] *Supra*, note 11, at para. 55.

that both enactments could not be complied with by those to whom they were intended to apply, but on his view that application of the provincial legislation would frustrate the purpose underlying the federal; that purpose was, in effect, to grant banks the right simply to seize the secured property in question from the defaulting debtor, and application of the provincial legislation would, if not remove, at least qualify that right.[16] He went so far as to say that the fact that a bank seeking to realize on a security interest could comply with both enactments "can hardly be determinative of the question whether the provincial and federal acts are in conflict".[17]

Another feature of La Forest J.'s reasoning in *Bank of Montreal* also deserves mention. In the latter part of his judgment, he said that, in enacting the federal legislation at issue in this case, Parliament had intended that "the sole realization scheme applicable to [a bank's security interest under the *Bank Act*] be that contained in the *Bank Act* itself".[18] The implication for him of this interpretation of the legislative intent was that Parliament did not want any provincial (or presumably any other federal) legislation to interfere with the operation of that regime: Parliament, in other words, had intended to completely cover the field. Justice La Forest clearly considered that intent to be relevant to the resolution of the issue before him. In fact, he held that "this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation...".[19]

This element of La Forest J.'s reasoning raised questions about the status of an approach to the definition of conflict in this context — the "covering the field" or "negative implication" test — that had found favour with the Privy Council in 1896 in the *Local Prohibition* case,[20] but that, as a distinct test, had arguably been rejected by the Supreme Court in a

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16 Justice La Forest, says at one point, "I do not think it is open to a provincial legislature to qualify in this way a right given and defined in a federal statute." *Id.*, at para. 59.

17 *Id.*, at para. 63. I should acknowledge that there is a paragraph in La Forest J.'s reasons for judgment (also *id.*, at para. 64) that suggests that he relied on the doctrine of interjurisdictional immunity as well as the paramountcy doctrine in support of his conclusion that the provincial legislation at issue had no application in the circumstances of this case (he says at the end of this paragraph that the provincial legislation "should ... be construed as inapplicable to the extent that it trenches on valid federal banking legislation"). However, the bulk of his reasoning is very much in the language of the paramountcy doctrine.

18 *Id.*, at para. 62.

19 *Id.*, at para. 64.

20 *Supra*, note 3.

series of decisions in the 1960s and 1970s.[21] Was it his intention to revive that test as a distinct test? Or was he merely signalling that an intention to cover the field on Parliament's part is to be included in the mix of considerations that are to be brought to bear in the resolution of cases in which the doctrine of federal paramountcy is invoked?

If the law in this area appeared to be in a relatively stable state after the decision in *Multiple Access*, the decision in *Bank of Montreal v. Hall* introduced into it a significant dose of instability. No longer could it be said with confidence that a finding of conflict between provincial and federal legislation was contingent on it being impossible for those to whom the two enactments purported to apply to comply with both. Nor could it be said with confidence that a federal intention to cover the field was irrelevant to such a finding being made.

It is against the backdrop of this unsettled body of law that four recent cases will be examined. As will be seen, it is not until the last of them, *Rothmans, Benson & Hedges*, that a relative degree of stability returns.

II. THE RECENT CASES

The recent cases in which the Court has had occasion to consider the paramountcy doctrine are *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.* (1999), *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* (2001), *Law Society of British Columbia v. Mangat* (2001) and *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005).[22] In the first and third of these cases (*M & D Farm* and *Mangat*), the Court found that the provincial and federal enactments at issue were in conflict

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[21] See the discussion of these cases, and their relevance to the status of the federal intention to cover the field/negative implication test, in P.W. Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Thomson Carswell, 2006) ch. 16.4.

[22] The citations for these cases can be found *supra*, in note 1. It should be noted that the Court also considered the paramountcy doctrine in two other cases during this period. In one, *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21, [2004] 1 S.C.R. 629, its only comment in relation to the doctrine was to assert that orders made pursuant to provincial legislation by the Ontario Energy Board outlining the penalties for late payment of bills by consumers would be rendered inoperative to the extent they resulted in an interest rate so excessive that it offended s. 347 of the *Criminal Code*. In the other, *D.I.M.S. Construction Inc. (Trustee of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 52, [2005] 2 S.C.R. 564, the Court had occasion to again consider the operability of provincial legislation in the context of bankruptcy proceedings. In this instance, it held that the relevant provisions of the *Bankruptcy and Insolvency Act* should be read as giving effect in such proceedings to the provisions of the provincial legislation, with the result that no conflict between the two enactments was found. (See the cases discussed *supra*, in note 12.)

and therefore held the provincial enactments to be inoperative; in the second and fourth (*Spraytech* and *Rothmans, Benson & Hedges*), no conflict was found to exist and the provincial enactments (in fact, in the second case, a municipal by-law) were allowed to remain in force.

1. *M & D Farm Ltd. v. Manitoba Agricultural Credit Corporation* (1999)

This case arose out of an attempt by the Manitoba Agricultural Credit Corporation, operating on the basis of provincial legislation governing the recovery of debts owed by farmers in the province of Manitoba, to foreclose on the property of the plaintiff company, which had for some time been in arrears on its mortgage payments. The initial step in the foreclosure process prescribed by the provincial *Family Farm Protection Act*[23] was obtaining leave to foreclose from a provincial superior court. That step had been successfully taken by the Credit Corporation. However, a stay of proceedings imposed by a federal statute and triggered by the plaintiff company had been in place at the time that the company had made its application for leave. According to the relevant provision of the federal statute, called the *Farm Debt Review Act*,[24] once the triggering action has been taken by the debtor, "notwithstanding any other law ... no creditor of the farmer shall, for a period of thirty days... commence or continue any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property out of the possession of the farmer".[25] The Credit Corporation took no action on the basis of the leave it had obtained while that stay (the duration of which had been extended) had been in effect, but it did take such action on the basis of that leave after the stay had expired and eventually was granted a certificate of title to the property in question. The plaintiff company was now claiming that the initial granting of leave was a nullity, and that, in spite of the pause occasioned by the stay, all of the subsequent proceedings that had been taken on the basis of it were therefore themselves nullities, with the result that the transfer of title to the Credit Corporation was ineffective.

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23 C.C.S.M, c. F15.

24 R.S.C. 1985, c. 25 (2nd Supp.).

25 *Id.*, s. 23.

According to Binnie J., who wrote for a unanimous court, the main issue in this case was whether the application for leave made by the Credit Corporation pursuant to the provincial statute was caught by the stay of proceedings. The Court of Queen's Bench in Manitoba had concluded that it was,[26] but the Court of Appeal had decided otherwise, on the basis that such an application was in the nature of a mere "condition precedent" to the kind of proceeding caught by the federal legislation.[27] In the result, Binnie J. agreed with the court of first instance and held that the Credit Corporation's application was prohibited by the stay. On the basis of that holding, he then went on to address what he termed the "constitutional issue". That issue was whether the order under the provincial statute permitting the Credit Corporation to take foreclosure proceedings could stand in the face of the federal legislation imposing the stay. The argument that the provincial order could stand was based on the contention that, unless and until the Credit Corporation chose to take further action against the plaintiff company in reliance on that order, there was no real conflict between the provincial and federal enactments. "The leave order", the Credit Corporation argued, "was permissive, not mandatory", and "[b]y keeping the leave order 'in its back pocket' [until the stay had expired]..., [the Credit Corporation] satisfied both federal and provincial requirements".[28]

This argument was rejected by Binnie J. He began his analysis by citing *Multiple Access* as the governing authority on whether or not a conflict exists between provincial and federal legislation, and quoted the passage in which Dickson J. argued for the use of the impossibility of dual compliance test as the only basis for a finding of conflict. He then said that "the validity of the leave order has to be determined as of the date it was made and cannot depend on [the Credit Corporation]'s subsequent conduct".[29] Noting that the order "purports to give leave to commence immediately or continue without delay the sale, foreclosure and possession proceedings", while the federal legislation "prohibited the commencement or continuation of exactly these types of proceedings", he held that "[t]he legal system cannot simultaneously provide that [the Credit Corporation] is entitled to commence mortgage foreclosure proceedings (under provincial law) and that [the Credit Corporation] is

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26 Unreported reasons of Clearwater J., March 20, 1997.

27 [1997] M.J. No. 444, 118 Man. R. (2d) 174 (C.A.).

28 *Supra*, note 1, at para. 40.

29 *Id.*, at para. 41.

prohibited from commencing mortgage foreclosure proceedings (under federal law)".[30]

In support of this holding, Binnie J. invoked both the Court's decision in *Bank of Montreal v. Hall* and the Privy Council's 1908 decision in *Crown Grain v. Day*.[31] The former case was simply cited. In respect of the latter case, he relied on Peter Hogg's explanation of the reasoning that led the Privy Council to hold that provincial legislation denying a right of appeal from a province's highest court to the Supreme Court of Canada in mechanics lien cases conflicted with, and hence was inoperative in the face of, federal legislation that granted a right to appeal in such cases. According to Hogg:

> ... both laws could be complied with by the losing litigant in a mechanics lien case not taking an appeal to the Supreme Court, [b]ut if the laws are recast as directives to a court that has to determine whether or not an appeal to the Supreme Court is available, the contradiction emerges. A court cannot decide that there is a right of appeal (as directed by federal law) and that there is not a right of appeal (as directed by provincial law). For a court, there is an impossibility of dual compliance and therefore an express contradiction.[32]

Justice Binnie summarized his reasoning by saying that "we have here an 'express contradiction' within the extended meaning of the relevant jurisprudence", and that "[t]he doctrine of federal paramountcy is triggered". Hence, he said, the order granted under the provincial statute "was invalid".[33]

2. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* (2001)

The issue in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* was whether a municipal government in Quebec had exceeded its authority in enacting a by-law regulating pesticide use within municipal boundaries. One of the contentions made in support of the claim that the by-law was invalid was that the municipal government lacked the requisite statutory authority to enact the by-law. That contention, which did not in any way engage the paramountcy doctrine, was rejected

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30 *Id.*

31 [1908] A.C. 504 (P.C.).

32 This passage was taken from 428-29 of the 4th edition of Hogg's text (Carswell, 1997).

33 *Supra*, note 1, at para. 42.

by a unanimous court (although there were two sets of reasons in support of this holding). The other contention was that the by-law conflicted with both federal and provincial enactments dealing with the use of pesticides.

Insofar as the alleged conflict with the federal legislation was concerned — which clearly did engage the paramountcy doctrine — the argument was that the by-law conflicted with provisions of the federal *Pest Control Products Act*[34] and the *Pest Control Products Regulations*[35] made pursuant to that Act. Compliance with these provisions, it was said, meant that it was legal to use pesticide products of the kind at issue in this case, and a municipal by-law could not provide otherwise. In rejecting this argument, L'Heureux-Dubé J., writing for four members of the seven member panel, relied on the approach to conflict set out in Dickson J.'s reasons for judgment in *Multiple Access*. She described the federal legislation as "[regulating] which pesticides can be registered for manufacture and/or use in Canada", and characterized it as "permissive, rather than exhaustive".[36] She then held that there was "no operational conflict" between it and the by-law. "No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes," she said, adding that "[t]here is, moreover, no concern in this case that application of By-law 270 displaces or frustrates 'the legislative purpose of Parliament'".[37]

Justice LeBel, writing for the other three members of the Court, also rejected the argument that the municipal by-law conflicted with the federal legislation. He was of the view that the appropriate test to apply in such circumstances was the impossibility of dual compliance test, which, he said, had been "recently reexamined and restated" in *M & D Farm*.[38] On the basis of this test, he held, no conflict could be found to exist between the federal legislation in question and the by-law. His reasoning paralleled that of L'Heureux-Dubé J.:

> The federal Act and its regulations merely authorize the importation, manufacturing, sale and distribution of [pesticide] products in Canada. They do not purport to state where, when and how pesticides could or should be used. They do not grant a blanket authority to pesticide

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34 R.S.C. 1985, c. P-9.

35 C.R.C. 1978, c. 1253.

36 *Supra*, note 1, at para. 35. It is at least arguable that reading the federal legislation in the manner proposed by Spraytech would have extended its reach beyond the limits of federal legislative jurisdiction over the environment. See, in this regard, the discussion of Major J.'s reasons for judgment in *Rothmans, Benson & Hedges*, *id.*, in text accompanying note 65.

37 *Id.*

38 *Id.*, at para. 46.

> manufacturers or distributors to spread them on every spot of greenery within Canada.[39]

Interestingly, L'Heureux-Dubé J., now speaking for all seven members of the Court, expressed the view that the impossibility of dual compliance test is the appropriate standard to apply to claims of conflict between municipal by-laws and *provincial* legislation, unless the provincial legislation in question itself stipulates a different test.[40] In this case, the provincial legislation — Quebec's *Pesticides Act*[41] — did not include any such stipulation, and she had no difficulty concluding that "the by-law does not render dual compliance with its dictates and ... [that] provincial legislation impossible".[42] She noted in support of this conclusion that, by its terms, the *Pesticides Act* anticipated the possibility of municipal legislation regulating the use of pesticides.[43]

3. *Law Society of British Columbia v. Mangat* (2001)

This case arose out of an attempt by the Law Society of British Columbia to enjoin Mr. Mangat, an immigration consultant, from representing clients before federally established refugee and immigration tribunals in that province on the basis that, in doing so as a non-lawyer, he was practising law contrary to the provisions of the province's *Legal Profession Act*.[44] The case raised the full panoply of division of powers issues — validity, applicability and operability. The validity issue concerned sections 30 and 69(1) of the federal *Immigration Act*,[45] which allowed persons appearing before immigration and refugee tribunals to be represented by fee-charging non-lawyers as well as lawyers: were these provisions within federal legislative jurisdiction under either or both of section 91(25) ("Naturalization and Aliens") and section 95 ("Immigration into all or any of the Provinces") of the *Constitution Act, 1867*? The applicability issue concerned section 26 (now section 15) of the *Legal Profession Act*, which prohibited anyone other than a lawyer or a person included in a list of prescribed exceptions from engaging in the practice

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39 *Id.*
40 *Id.*, at para. 36.
41 R.S.Q. c. P-9.3.
42 *Supra*, note 1, at para. 43.
43 *Id.*, at para. 40.
44 S.B.C. 1987, c. 25, s. 26.
45 R.S.C. 1985, c. I-2.

of law in the province: assuming that representing people for a fee before immigration and refugee tribunals amounted to the practice of law, could section 26 be constitutionally applied to proceedings before those federally established tribunals? Finally, the operability issue concerned the relationship between section 26 of the *Legal Profession Act* and sections 30 and 69(1) of the *Immigration Act*: assuming those provisions all to be valid, and the provincial prohibition to be applicable in the immigration tribunal context, was that relationship such that the former conflicted with, and hence was inoperative in the face of, the latter?

Justice Gonthier, writing for the full Court, held on the basis of the double aspect doctrine that the impugned provisions of the *Immigration Act* were valid federal enactments under section 91(25) of the *Constitution Act, 1867*.[46] He avoided the applicability issue by holding that, because of "[t]he existence of a double aspect to the subject matter of sections 30 and 69(1)",[47] the paramountcy doctrine was more appropriate than the interjurisdictional immunity doctrine (the doctrine that governs the resolution of applicability issues) to the resolution of this particular case. He was concerned that "[t]he application of the interjurisdictional immunity doctrine in such a context might lead to a bifurcation of the regulation and control of the legal profession in Canada",[48] because it would mean that provincial legislation could not constitutionally apply to legal representation before immigration and refugee tribunals even in the absence of federal legislation dealing with the matter. Moreover, it was his view that "[t]he application of the paramountcy doctrine safeguards the control by Parliament over the administrative tribunals it creates".[49]

When he came to consider the operability issue, Gonthier J. said that *Multiple Access* was "the controlling authority",[50] and recited the part of the above-quoted passage from Dickson C.J.'s reasons in that case in which he articulated the impossibility of dual compliance test. Drawing extensively on the reasoning of La Forest J. in *Bank of Montreal v. Hall*, however, Gonthier J. said that that test should now be understood to mean that there will be a conflict in operation "where the application of the provincial law will displace the legislative purpose of Parliament".[51]

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46 *Supra*, note 1, at paras. 24-50.

47 *Id.*, at para. 52.

48 *Id.*

49 *Id.*

50 *Id.*, at para. 68.

51 *Id.*, at para. 69.

This understanding of the test was said to be the result of a "gloss"[52] on the impossibility of dual compliance test that La Forest J.'s reasoning had added in the following passage in *Bank of Montreal*:

> A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible.[53]

Having set out this understanding of the test, Gonthier J. then proceeded to apply it to the circumstances before him. He first engaged in a careful analysis of sections 30 and 69(1) of the *Immigration Act* to ensure that, properly construed, they did in fact authorize non-lawyers to represent people before the Immigration and Refugee Board for a fee.[54] Having concluded on the basis of this analysis that they did — and therefore revealed a clear intention on Parliament's part "to address the subject of who may appear before the IRB"[55] — he reasoned as follows:

> In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal, supra*, dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling

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52 *Id.*, at para. 70.

53 *Supra*, note 11, at 154-55.

54 *Supra*, note 1, at paras. 55-67.

55 *Id.*, at para. 67.

> federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts.[56]

It will be noted that Gonthier J. devoted most of this passage to an analysis of the relationship between the provincial legislation and the purpose of the federal legislation. However, at the end of it, he also made reference to the impossibility of a court or other state agency giving effect to both enactments in circumstances in which they were both invoked by parties appearing before it. Hence, he can be said to have taken advantage of the post-*Multiple Access* doctrinal developments in both *Bank of Montreal v. Hall* (the frustration of federal purpose "gloss") and *M & D Farm* (the extension of the impossibility of dual compliance test to decision-makers).

Justice Gonthier concluded his analysis of this issue by distinguishing *Mangat* from the *Spraytech* case. "In that case", he said, "it was possible to comply with the federal, provincial, and municipal statutes or regulations without defeating Parliament's purpose. As previously shown, in this case, it is impossible to comply with the provincial statute without frustrating Parliament's purpose."[57]

4. *Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005)

That brings us to *Rothmans, Benson & Hedges*, the most recent and arguably most significant of these cases, at least from a doctrinal standpoint. The provincial legislation at issue was section 6 of the *Tobacco Control Act*[58] of Saskatchewan, which prohibited the advertising, display and promotion of tobacco and tobacco-related products in any premises in the province in which the presence of persons under the age of 18 was permitted. The federal legislation was section 30 of the federal *Tobacco Act*,[59] one of a number of provisions of that Act that created exemptions from the general prohibition in section 19 against the promotion anywhere in Canada of tobacco products and tobacco product-related brand elements. It stipulated that, "[s]ubject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element", and also permitted retailers to post notices

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56 *Id.*, at para. 72.

57 *Id.*, at para. 73.

58 S.S. 2001, c. T-14.1.

59 S.C. 1997, c. 13.

indicating the availability and price of tobacco products on their premises. The question was whether section 6 of the provincial enactment conflicted with section 30 of the federal enactment. The Court held unanimously that it did not.

Justice Major, writing for the Court, began his analysis by noting that *Multiple Access* "is often cited for the proposition that there is an inconsistency... if it is impossible to comply simultaneously with both provincial and federal enactments".[60] Significantly, he did not acknowledge in this passage that the Court in *Multiple Access* had suggested that an inconsistency could *only* be found if simultaneous compliance was impossible. Nor did he acknowledge that *Multiple Access* had often been cited in support of the latter proposition. The reason for his failure to acknowledge either of these things is revealed in the next paragraph of his opinion. In that paragraph he asserted that "subsequent cases indicate that impossibility of dual compliance is not the sole mark of inconsistency. Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the [paramountcy] doctrine".[61] *Bank of Montreal*, *Spraytech* and *Mangat* are all cited in support of this proposition, even though in none of them did the Court go so far as to acknowledge that the frustration of federal purpose standard was an independent test for finding a conflict. According to Gonthier J. in *Mangat*, it will be recalled, that new standard was simply a "gloss" on the impossibility of dual compliance test.

Rothmans is doctrinally important not only because it is the first case in which the Court has explicitly acknowledged that the frustration of federal purpose test provides an independent basis upon which to find a conflict between provincial and federal legislation. It is also doctrinally important because the Court characterized that test as the "overarching principle" in this area of the law.[62] Demonstrating that dual compliance is impossible was said by Major J. simply to be one way of showing that the provincial legislation will frustrate the purpose of the federal.[63]

Justice Major proceeded to apply this new understanding of the paramountcy doctrine by asking first, whether it was possible for retailers in the Province of Saskatchewan to comply with both the provincial and federal enactments, and second, if it was, whether application of the

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60 *Supra*, note 1, at para. 11.
61 *Id.*, at para. 12.
62 *Id.*, at para. 14.
63 *Id.*

provincial prohibition would nevertheless frustrate the purpose of the federal legislation on some other basis. He concluded that, "It is plain that dual compliance is possible in this case."[64] Retailers, he said, could comply with both "by admitting no one under 18 years of age on to the premises or by not displaying tobacco or tobacco-related products".[65] And judges before whom both enactments were pleaded "can proceed on the understanding that *The Tobacco Control Act* simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations".[66]

Those answers, it should be noted, were preceded by, and based upon, Major J.'s refusal to accept the tobacco companies' contention that the federal legislation granted retailers what they referred to as "a positive entitlement to display tobacco products".[67] Such a contention, he said, was based on an unacceptably broad reading of the reach of section 91(27) of the *Constitution Act, 1867* (the criminal law power), upon which the validity of the *Tobacco Products Control Act* depended.[68] It was also "unsupported by, and perhaps even contrary to, the stated purposes of [that Act]", which spoke *inter alia* of Parliament's desire to respond to "a national public health problem of substantial and pressing concern".[69] Justice Major also refused to accept the tobacco companies' contention that, in enacting the relevant provisions of the *Tobacco Act*, it intended that that statute be the only legislation governing the rights of retailers to promote tobacco products, adding that, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* [*v. Sparling*]",[70] a case decided in 1960.

Justice Major also concluded that giving effect to the provincial prohibition would not frustrate the purpose of the federal legislation. "Indeed", he said, "s. 6 of the *Tobacco Control Act* appears to further at least two of the stated purposes of the *Tobacco Act*, namely, 'to protect young persons and others from inducements to use tobacco products'... and 'to protect the health of young persons by restricting access to tobacco

64 *Id.*, at para. 22.
65 *Id.*
66 *Id.*, at para. 23.
67 *Id.*, at para. 18.
68 *Id.*, at para. 19.
69 *Id.*, at para. 20.
70 *Id.*, at para. 21.

products'...".[71] That conclusion was supported, he said, by the fact that the federal government had taken the position in its argument in this case that the provincial prohibition should not be found to conflict with the federal and should, therefore, be allowed to operate.[72]

III. TAKING STOCK OF WHERE WE ARE NOW: THE SUPREME COURT OF CANADA'S NEW UNDERSTANDING OF CONFLICT AND ITS IMPLICATIONS

What lessons are we to learn from these cases insofar as the current state of the law governing the application of the paramountcy doctrine is concerned? As I see it, there are three. The first is that the governing test — the "overarching principle" — for determining whether or not provincial legislation conflicts with federal legislation is now the frustration of federal purpose test.[73] If giving effect to provincial legislation would serve to frustrate the ability of the federal government to achieve the purpose or purposes underlying federal legislation, then a conflict exists and the provincial legislation must be held inoperative. The second is that, rather than constituting a distinct test in its own right, the previously dominant impossibility of dual compliance test is now to be understood as being simply one way of applying the frustration of federal purpose test.[74] Thirdly, in order to satisfy the impossibility of dual compliance understanding of the frustration of federal purpose test, one does not have to show that it is impossible for the people who are subject to valid provincial and federal legislation to comply with both enactments.[75] It is sufficient to show that it is impossible for a court or other state organ to comply with (in the sense of give effect to) both enactments in the event that they are both invoked by parties appearing before it.

Is there a lesson to be learned from these cases about the status of the federal intention to cover the field test of conflict? I would argue not. That test is mentioned in only one of the four cases — *Rothmans* — and Major J.'s response to it leaves open the question of whether or not it constitutes a distinct basis upon which to find a conflict. All that can be said is (1) that Major J. refused in that case to find that Parliament

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71 *Id.*, at para. 25.

72 *Id.*, at para. 26.

73 This lesson comes directly from *Rothmans, Benson & Hedges.*

74 This lesson also comes directly from *Rothmans, Benson & Hedges.*

75 This lesson comes from *M & D Farm, Mangat* and *Rothmans, Benson & Hedges.*

had intended the *Tobacco Act* to constitute the only legislative regime governing the promotion of tobacco products in Canada, and (2) that that refusal was based at least in part on his opinion — said to be in keeping with the view reflected in the jurisprudence that courts should generally be reluctant to find that provincial legislation conflicts with federal — that Parliament should be required to state an intention to cover the field in explicit terms rather than leaving it to inference. He did not indicate that, had such a clear statement of intention been made in the *Tobacco Act*, that statement in and of itself would have brought the paramountcy doctrine into play. The uncertainty surrounding the status of that test after the decision in *Bank of Montreal* therefore remains.

I turn now to a consideration of each of the three doctrinal lessons that I say are to be extracted from the recent cases, beginning with the last. My focus is on the implications, both legal and practical, that each of them has for litigants seeking to invoke the federal paramountcy doctrine. But I also comment on the new conception of that doctrine that the lessons can be said to embody and that we must assume the Supreme Court of Canada has now adopted.

1. Extending the Reach of the Impossibility of Dual Compliance Test

The last of these lessons embodies what Binnie J. in *M & D Farm* called an "extension" of the impossibility of dual compliance understanding of conflict. That "extension" entails considering not only the position of the people to whom federal and provincial enactments dealing with the same subject matter are intended to apply, but also the situation of courts and other state agencies called upon to give effect to such enactments. Such an extension was initially suggested over 25 years ago by Eric Colvin.[76] As Peter Hogg's use of the extension to explain the result in the *Crown Grain* case points out, it can even be said to have been implicit in the existing jurisprudence.[77] It is not without significance, however, that the Supreme Court has now explicitly endorsed the extension. That explicit endorsement means not only that the question to be answered when litigants seek to avoid a provincial enactment on the basis of the impossibility of dual compliance understanding of conflict can take a

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76 "Legal Theory and the Paramountcy Rule" (1979) 25 McGill L.J. 82.

77 It could also be used to explain the result in *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.), in which the Privy Council held that a provincial statute restricting the legal effect of warehouse receipts conflicted with federal legislation providing that such receipts could be used to pass title to the goods to which they applied.

new and different form. It also, and more importantly, means that, even without having to have recourse to the frustration of federal purpose test, such litigants have now have a more promising option available to them.

As the language used by Dickson J. in *Multiple Access* made clear, the question to be answered when the impossibility of dual compliance test as he conceived of it was invoked was whether or not it was impossible for *citizens* to comply with both enactments. Under the extended version of that test that the Court has now endorsed, the question is different, and in two respects. It is different for the obvious reason that the focus of the inquiry shifts from the citizens to whom the two enactments apply to the *decision-maker* before whom both enactments are relied upon by opposing parties in a dispute. It is also different in a less obvious sense. In this latter context, the appropriate question is not whether the decision-maker can *comply with* both enactments, but whether the decision-maker can *give effect to* both enactments. One could speak — and in fact Gonthier J. in *Mangat*[78] does speak — in terms of judges complying with the two enactments, but that seems an odd term to use in the context of judges engaged in the process of adjudicating disputes. Judges — and other governmental decision-makers — are required to give effect to, not comply with, the law.

The greater promise afforded by this extended understanding of the impossibility of dual compliance test to those seeking to have provincial legislation declared inoperative is a direct consequence of this change in the nature of the question that the new understanding entails. It is clearly easier to establish that a conflict exists when the question to be answered is whether both enactments can be given effect by a decision-maker than when it is whether they can both be complied with by the people to whom they apply. This implication of the extension is clearly reflected in the reasons for judgment of both Binnie J. in *M & D Farm* and Gonthier J. in *Mangat*. The passage from Peter Hogg's text that Binnie J. quoted with approval in the former indicated that, even though the losing litigants to whom the two enactments at issue in *Crown Grain v. Day* were *prima facie* applicable were able to comply with both by not taking advantage of the right to appeal given by the federal statute, there was nevertheless a conflict between the enactments because a judge before whom they were relied upon by opposing litigants could not give effect to both.[79] In the latter case, Gonthier J. acknowledged that it was not

78 *Supra*, note 1, at para. 72.

79 *Supra*, note 1, at para. 41.

impossible for non-lawyers wishing to represent people appearing before the Immigration and Refugee Board to comply with both the *Legal Profession Act* of British Columbia and the federal *Immigration Act*. As he put it, they could comply with both enactments "either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee".[80] However, he was of the view that it would be impossible for a judge or Board member to give effect to both. It is clear, therefore, that, at least as the Court views this new understanding of the test, it can produce a conflict in circumstances in which a focus on the people to whom the two enactments are intended to apply will not.

The fact that this extended understanding of the test has the potential to provide parties seeking to avoid the reach of provincial legislation with greater prospects for success means that, as a practical matter, it is likely to replace the original understanding as the focus of inquiry in cases in which the paramountcy doctrine is invoked. There seems little point in lawyers arguing now that it is impossible for the citizenry to comply with both enactments — an argument that, not surprisingly, has shown itself to be exceedingly difficult to sustain — given that they will have a much easier time arguing that it is impossible for decision-makers to give effect to both. It would not be at all surprising to see the original understanding of the test disappear from the jurisprudence in the not too distant future.

With that observation in mind, I offer one further comment on the significance of this change in the law. In my view, the fact that the shift in focus from the citizenry to decision-makers entails a recasting of the question to be answered raises doubts about the appropriateness of describing this doctrinal innovation as a mere "extension" of the impossibility of dual compliance test. A more accurate description is that it is a new test — one that might be termed the "impossibility of dual effect" test. And if, as a practical matter, lawyers invoking the paramountcy doctrine are unlikely to see any benefit accruing from an argument that it is impossible for the citizenry to comply with both enactments now that they can argue that it is impossible for decision-makers to give effect to both, that is the only version of this test that is likely to have any real significance in the future.

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80 *Supra*, note 1, at para. 72.

2. The Frustration of Federal Purpose Test as the "Overarching Principle"

The Supreme Court's endorsement of the frustration of federal purpose test as not only a distinct test in its own right, but the dominant test for finding a conflict, is important for at least two reasons. It is important because it suggests a significant reorientation of the way in which the Court now thinks about the doctrine of federal paramountcy, and because, like the new understanding of the impossibility of dual compliance test, it portends a broadening of the range of circumstances in which that doctrine will be applicable.

The impossibility of dual compliance test is based on a concern about the position in which either the citizenry (in the original understanding of the test) or governmental decision-makers (in the extended or new understanding of it) find themselves when they are confronted by apparently inconsistent provincial and federal enactments. The frustration of federal purpose test shifts the focus to a concern about the ability of the federal government to achieve the public policy goals that led it to enact the particular piece of federal legislation at issue. That shift in focus entails not only a change in the nature of the inquiry the application of the federal paramountcy doctrine requires. It also entails — albeit implicitly — a change in the Court's perception of the purpose and role of that doctrine itself. The perception of that doctrine's purpose and role reflected in the approach taken to it in *Multiple Access* was that the doctrine was in the nature of a necessary evil, an omnipresent threat to an unstated constitutional value that the Court considered to be exceedingly important (presumably, provincial autonomy), that the courts should only apply in circumstances in which they had no choice but to do so. The perception reflected in the new approach is that the doctrine is designed to ensure that provincial legislative activity does not impinge on the ability of the federal government to achieve the goals it has decided to pursue through legislation enacted in what it perceives to be the national interest.

Important as this reorientation is, it is a striking feature of the recent cases that in none of them is any explanation provided of the need for a rethinking of the doctrine's purpose and role. In fact, with the exception of *Rothmans, Benson & Hedges*, the reasons for judgment in these cases were crafted in such a way as to leave the reader with the impression that no new law is being created, let alone that a fundamental rethinking of the paramountcy doctrine is taking place. In each of them, the Court purports simply to be applying the rules and principles set down in previous

cases. In *Rothmans, Benson & Hedges*, the Court appears to acknowledge that a change in the law has taken place, but no explanation for the need for that change is provided, nor is any indication given that that change reflects a new and different conception of the doctrine's purpose and role. Nor, therefore, is any justification given for rejecting the conception that was reflected in the prior jurisprudence and replacing it with this new one. What that justification might be, and whether or not it is persuasive, are questions I leave to Part IV of this paper.

3. The Impossibility of Dual Compliance Test as an Application of the Frustration of Federal Purpose Test

According to Major J. in *Rothmans, Benson & Hedges*, asking whether it is impossible for either the citizenry to comply with, or decision-makers to give effect to, both the provincial and the federal enactments is simply one way of testing whether or not application of the provincial legislation would frustrate the purpose underlying the federal.[81] The assumption underlying this recharacterization of the role of the impossibility of dual compliance test is clearly that, if that test is met (in either of its forms), then it necessarily follows that application of the provincial legislation *would* frustrate the federal government's purpose. Is that assumption valid? If it is, is there anything to be gained from asking this question? Why not go straight to the heart of the matter — to the "overarching principle" — and ask whether application of the provincial legislation would frustrate the federal government's purpose?

There is every reason to believe that an affirmative answer to the question of whether it is impossible for either the citizenry to comply with, or decision-makers to give effect to, both enactments will mean that application of the provincial legislation *would* frustrate the ability of the federal government to achieve its purpose. To conclude either that the citizenry cannot comply with both enactments, or that decision-makers cannot give effect to both, means that enforcement of the provincial legislation would preclude the federal legislation from having any effect, and that, in turn, would necessarily mean that the purpose underlying that legislation would be frustrated. Take, for example, the situation that arose in *Mangat*. When Gonthier J. concluded that a judge or member of the Immigration and Refugee Board could not simultaneously give effect to both the provincial prohibition against non-lawyers engaging in the

81 *Supra*, note 1, at para. 14.

practice of law and the permission explicitly granted to non-lawyers by the *Immigration Act* to act for a fee for individuals appearing before that board, he was effectively holding that for the Board to give effect to the provincial legislation would mean that it could not give effect to the federal. And to deny effect to the federal legislation would necessarily result in the purposes underlying it being frustrated.

That leads to the second question: given that the Court is apparently now of the view that the real point of the paramountcy doctrine is to ensure that the application of provincial legislation does not frustrate the ability of the federal government to achieve the public policy goals underlying its legislation, why not limit the analysis to the line of inquiry that that concern raises? Why not require courts in each and every case to ask whether or not application of the provincial legislation would have that effect instead of allowing for the possibility that some cases will be resolved without that question ever being addressed? There is, I think, much to be said for such a requirement. It would ensure that courts always engaged directly with the real concern. It would provide greater consistency within the jurisprudence. And it would also likely mean that guidance from the Supreme Court on the appropriate manner in which to apply this new test would be provided more quickly. However, as a practical matter, the impossibility of dual compliance/dual effect inquiry does have the appeal of being relatively easy to apply. And it does serve as an effective proxy for the main test. It is unlikely, therefore, that we will see it jettisoned.

IV. ASSESSING THE COURT'S NEW APPROACH

Are the legal developments embodied in these recent cases to be welcomed? One's answer to that question depends on at least two considerations. The first is whether one thinks these developments make sense as a matter of constitutional principle. The second is whether one thinks they make sense as a matter of constitutional policy.

It would be implausible in my view to argue that it is wrong as a matter of principle to extend the impossibility of dual compliance test to the circumstances confronting decision-makers who are asked to give legal effect to what are arguably inconsistent legal rules. If it is true in some such circumstances — as cases like *Crown Grain*, *M & D Farm* and *Mangat* demonstrate it will be — that legal effect cannot in fact be given to both enactments, then it seems entirely logical and appropriate

to say that there is a conflict between the two and hold the provincial inoperative. In fact, to conclude otherwise would be to turn the doctrine of federal paramountcy on its head, because it would mean that in such circumstances the provincial legislation is given effect while the federal is not. Hence in *Crown Grain*, to deny that the provincial prohibition against appealing mechanics lien cases to the Supreme Court of Canada conflicted with the federal legislation permitting such appeals to be taken, on the basis that it was not impossible for the prospective appellant to comply with both enactments by not taking advantage of the permission granted by the federal, would have meant giving effect — and hence priority — to the provincial and not the federal. Similarly, had Gonthier J. in *Mangat* held that, because it was not impossible for people in the position of Mr. Mangat to comply with both enactments, there was no conflict between them, he would have given effect to the provincial and denied effect to the federal. It is surely an odd understanding of a doctrine of *federal* paramountcy that allows provincial legislation to be given effect rather than federal when effect cannot be given to both.

It would also be difficult to argue convincingly that it is wrong in principle to hold that provincial legislation that, if applied, would frustrate the purpose underlying federal legislation conflicts with the latter.[82] All legislation is presumably a means to one or more public policy ends, and it is the achievement of those ends that matters, not only to the body that enacts it, but also to the citizenry in general and those whose interests it serves in particular. To hold that provincial legislation that makes it impossible for federal legislation to achieve its intended purpose does not conflict with that legislation is to allow form — the continued existence of the federal legislation on the books, with either no or a highly distorted legal effect — to triumph over substance.

Moreover, in many instances in which the frustration of federal purpose test is found to have been met, it will be because giving effect to the provincial legislation means denying effect to the federal. Hence,

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[82] It is important to note that I draw a sharp distinction in this context between the federal government's purpose in enacting a piece of legislation (understood in the sense of the public policy goals the legislation is intended to serve) and the federal government's intention to have that legislation "cover the field" (in the sense of the desire to have its legislation override any provincial legislation that has been or may in the future be enacted in the same field). While I see merit in the position that provincial legislation should be held inoperative if its application in a particular context would serve to frustrate the public policy purpose underlying a federal enactment, I see no merit in the position that the federal government should be able to trigger the application of the paramountcy doctrine simply by evincing an intention to cover the field. My argument in relation to the latter point is made *infra*, in the text accompanying note 92 *et seq*.

to refuse to find that a conflict exists in such circumstances would pose the same problem as noted above: it would turn the federal paramountcy doctrine on its head. Here again, the *Mangat* case serves as a good example. Applying the provincial prohibition against non-lawyers practising law to people like Mr. Mangat would frustrate the purpose underlying the federal legislation — defined by Gonthier J. in terms of "establishing an informal, accessible (in financial, cultural and linguistic terms) and expeditious process, peculiar to administrative tribunals" — precisely because it would deny effect to the latter enactment's grant of permission to non-lawyers to represent litigants for a fee before immigration and refugee tribunals. And to deny that such a finding necessitated the application of the paramountcy doctrine would mean, as noted above, giving effect to the provincial legislation at the expense of the federal.

Finally, an understanding of conflict based upon the frustration of federal purpose test provides a compelling explanation of a handful of decisions in which — appropriately, in my view — provincial legislation has been held inoperative in circumstances in which neither dual compliance nor dual effect was impossible. One such case is *Hughes v. Hughes*,[83] in which the British Columbia Court of Appeal held that a maintenance order made under the corollary relief provisions of the federal *Divorce Act*[84] rendered inoperative a maintenance order previously made against the same spouse under provincial legislation. That holding seems intuitively correct. In fact, as Peter Hogg contends, for the court to have held otherwise would have produced an absurd result.[85] However, as Hogg points out, it would not have been impossible for that spouse to comply with both orders (by paying the cumulative amount).[86] Nor would it have been impossible for a judge to enforce both (even though it would undoubtedly have been very unfair to that same spouse for a judge to do that). So the decision cannot be explained on the basis of the impossibility of dual compliance or dual effect test.

Eric Colvin has suggested that the decision in *Hughes v. Hughes* was based on the federal intention to cover the field test.[87] However, the status of that test as a distinct basis upon which to find a conflict is, as I have noted above, dubious. In my view, that decision can better be

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83 (1976), 72 D.L.R. (3d) 577 (B.C.C.A.).

84 R.S.C. 1970, c. D-8, s. 11(1).

85 P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Carswell, 2007) ch. 27.8(a), at 27.13.

86 *Id.*

87 *Supra*, note 76, at 84, footnote 5.

explained on the basis that continuing to give effect to the order made under the provincial legislation after the order under the *Divorce Act* had been made would have frustrated the purpose underlying the corollary relief provisions of the latter statute. That purpose could be said to be to empower a judge in the context of divorce proceedings to make such orders in relation to custody and maintenance as are found to be fair and appropriate as between the parties given their and their family's particular circumstances. To require a spouse to pay anything more in maintenance than that judge determined to be fair and appropriate — which would be the effect of continuing to enforce the order made under the provincial legislation — would clearly frustrate that purpose in the context of this particular family. Hence, that latter order had to be held inoperative.

In using the frustration of federal purpose test the courts must, of course, be careful to ensure that the purpose ascribed to the federal legislation is one that respects the limits of Parliament's legislative jurisdiction under section 91 of the *Constitution Act, 1867*. Justice Major's reasons for judgment in *Rothmans, Benson & Hedges* are instructive in this regard. It will be recalled that one of the grounds upon which he rejected the argument of the tobacco manufacturers that section 30 of the federal *Tobacco Act* had the effect of creating a right on the part of retailers to display tobacco products was that such a reading of the legislation would be inconsistent with the limited reach of section 91(27), the federal head of power that sustained the Act. By rejecting the argument on that ground, Major J. effectively — and correctly — eliminated as a possible purpose of section 30 that of creating such a right, and thereby made it impossible for the tobacco manufacturer to claim that, because application of section 6 of the provincial statute would frustrate that purpose, it had to be declared inoperative. In both *Bank of Montreal v. Hall* and *Mangat*, it is worth noting, the purpose ascribed by the Court to the federal enactment at issue in the context of applying the frustration of federal purpose test did respect the limits of federal jurisdiction under section 91(15) (banking) and section 91(25) (naturalization and aliens) respectively. The use of those purposes in those cases therefore posed no constitutional problem.[88]

One final point needs to be made in relation to the frustration of federal purpose test. The purpose that matters in applying this test is the purpose of the particular provision or provisions of the federal enactment with

[88] I am grateful to Richard Butler of the Department of the Attorney-General of British Columbia for pointing out this important constraint on the use of the frustration of federal purpose test.

which the provincial legislation at issue is said to conflict. That was the approach taken by La Forest J. in *Bank of Montreal v. Hall* and by Gonthier J. in *Mangat*. In *Rothmans, Benson & Hedges*, however, Major J. made reference to and invoked both the narrow purpose of the relevant provision of the federal *Tobacco Act* and the broader purpose of the statute as a whole. Of the former purpose — to delimit the reach of the prohibition against promoting tobacco products found in section 19 — he said that it would still "remain fulfilled" if effect was given to the provincial legislation. Of the latter purpose — to address the health-related problems associated with tobacco use — he said that it was actually furthered by the provincial legislation. In my view, his inclusion of the broader statutory purpose was unnecessary, and potentially misleading. There is no requirement under the frustration of federal purpose test that application of the provincial legislation further the broader public policy goals of the federal legislation. It is enough in order to avoid a finding of conflict that application of that legislation not frustrate the public policy goals of the specific provision or provisions of the federal legislation with which the provincial legislation allegedly conflicts.

From the standpoint of constitutional principle, I would argue for the reasons given above that there is in fact much to commend in the doctrinal developments embodied in the recent jurisprudence. The more difficult consideration is that of constitutional policy. Peter Hogg is clearly right when he says that the legal definition of conflict in this context "has profound implications ... for the balance of power in the federal system".[89] A strict or narrow definition of conflict — one that results in very few provincial enactments being held to satisfy it — favours the provincial order of government over the federal, while a broad definition favours the federal over the provincial. The decision in *Multiple Access* appeared to be a firm commitment by the Supreme Court to the narrow approach. The extension in these recent cases of the impossibility of dual compliance test to cover decision-makers, coupled with the confirmation of the frustration of federal purpose test as a separate, and in fact the "overarching" test, marks a clear shift away from that approach. Provincial autonomy, in this sphere at least, is being sacrificed, at least to some degree, to federal dominance. Equally troubling, it must be said, is the fact that the Court has seen fit to make these doctrinal changes without acknowledging, let alone attempting to deal with, the fact that the cases have this important implication.

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89 *Supra*, note 21, at 435.

Whether or not one finds that shift troubling depends, of course, on one's preferred conception of Canadian federalism. As what I would describe as a moderate provincialist, I do find it troubling, at least in some contexts. The fact that this broader definition of conflict might result in provincial legislation having to give way to a larger body of federal legislation in areas of core federal jurisdiction is not a concern.[90] It seems entirely appropriate that federal legislation in such areas should predominate. Hence, I am not particularly troubled by a decision like that in *Bank of Montreal v. Hall*. If, as La Forest J. held, Parliament's jurisdiction over banking includes as part of its core the power to legislate in relation to the taking of security interests by banks when they make loans to their customers, it must surely also include — as he also held — the power to prescribe a realization regime for those security interests when the customers default.[91] Giving priority to that regime over very different provincial regimes for the realization of security interests generally seems entirely appropriate.

What is a concern, however, is the potential that these developments hold for eroding provincial autonomy in areas of core, or close to core, provincial jurisdiction, particularly when the federal legislation at issue lies at the periphery of federal jurisdiction (as will presumably be the case in most instances when it reaches into an area of core, or close to core, provincial jurisdiction). However, there is, I believe, a way to avoid this erosion, at least in some circumstances, that does not entail the abandonment of these recent developments.

That way is through the creative use of the federal intention to cover the field test. The status of that test, as I have noted, still remains unclear. There is reason to doubt that it functions as a distinct ground upon which to hold that provincial legislation conflicts with federal. That is, there is reason to doubt that a finding of conflict can be based solely on a finding that Parliament in enacting the federal legislation at issue intended that legislation to cover the field. But there is also reason to believe that the question of whether Parliament had such an intention when it legislated has

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[90] In many if not most such instances, it should be open to the party seeking to raise the paramountcy doctrine to first invoke the doctrine of interjurisdictional immunity and argue that the provincial legislation cannot constitutionally be applied in the context in question. That doctrine requires that generally worded valid provincial legislation cannot be applied in a context that, because of its peculiarly federal character, can be said to fall within a core area of federal legislative jurisdiction. See, in this regard, Peter Hogg's text, *id.*, chapter 15.8 and the cases cited therein.

[91] *Supra*, note 11, at 140-50.

some relevance in the application of the doctrine of federal paramountcy. Justice La Forest clearly thought it did in *Bank of Montreal v. Hall.*

In my view, it would not be appropriate to accord the status of a distinct ground for finding a conflict to the federal intention to cover the field test, regardless of how that intention is expressed. To take that step would place provincial autonomy in far too vulnerable a position. It would effectively mean that, in areas of functional concurrency, of which there are now many,[92] provincial legislation would only operate for as long as Parliament decided it could. As Bruce Ryder has noted,[93] it would also effectively mean that control over the application of the paramountcy doctrine, and hence the balance of power between the federal and provincial orders of government, would pass from the courts to the federal government.

There is support in the jurisprudence for this view of the matter. In *R. v. Dick*, Beetz J., speaking for himself and four other members of the Supreme Court, said in the context of interpreting section 88 of the *Indian Act* (and without, it must be noted, any supporting reasons) that "it would not be open to Parliament in my view to make the *Indian Act* paramount over provincial laws simply because the *Indian Act* occupied the field".[94] Peter Hogg has interpreted that statement to amount to a rejection by Beetz J. of the general proposition that Parliament can trigger the application of the paramountcy doctrine by expressly declaring that federal legislation in a particular area is to prevail over any and all provincial legislation in that area. Having so interpreted it, Hogg also takes the position that Beetz J. was wrong to reject that general proposition. His argument is that, "Assuming that the express federal paramountcy provision was valid under federalism rules, that is, it was part of a law in relation to a federal head of power, ... then a provincial law in the same field would be inconsistent with the federal law, and would therefore be rendered inoperative by the doctrine of paramountcy."[95]

Is that argument persuasive? I think not. Its flaw lies in the assumption that such an express declaration would be characterized as being "part of

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92 These areas now include *inter alia* temperance, motor vehicle offences, aspects of securities regulation, insolvency, interest rates, maintenance and custody, gaming, film censorship, nude dancing in taverns, legal representation before federal administrative tribunals and professional responsibility on the part of Crown prosecutors. The relevant authorities can be found in Peter Hogg's text, *supra*, note 21, in chapter 15.5(c).

93 *Supra*, note 1, at 371.

94 [1985] S.C.J. No. 62, [1985] 2 S.C.R. 309, at para. 42.

95 *Supra*, note 21, at 446.

a law in relation to a federal head of power", that is (I presume Hogg means), as legislation in relation to the federal head of power pursuant to which the rest of the statute of which it forms part had been enacted. I would think that the courts would be inclined to characterize such a declaration as being in relation, not to that federal head of power, but to the operability of provincial legislation in the same field, or more simply to the paramountcy doctrine, and hence invalid. Such an inclination would find strong support in decisions such as those in the *Labour Conventions* case[96] (in which the Privy Council refused to characterize federal legislation implementing treaty obligations as "treaty implementing legislation" in order to protect provincial autonomy) and in *Reference re Anti-Inflation Act (Canada)*[97] (in which a majority of the Supreme Court of Canada refused to characterize that federal statute as being in relation to "the containment and reduction of inflation", again in order to protect provincial autonomy). What those decisions represent is a high degree of sensitivity on the part of the courts to the need to come to the aid of provincial autonomy when they see it being placed seriously at risk — as it would be, in my view, if Parliament were to be allowed to trigger the application of the paramountcy doctrine at will.

I therefore reject the proposition that Parliament should be able to trigger the application of the paramountcy doctrine on the basis that it intended its legislation to cover the field in a particular area. However, rejecting that proposition does not require one to jettison completely the line of inquiry that underlies that "test". On the contrary, in my view, there is every reason to believe that that line of inquiry can and should have a significant role to play in determining whether or not a conflict can be held to exist. What that role is, and why it should play that role, is the subject of the next part of this paper.

V. SAFEGUARDING PROVINCIAL AUTONOMY: A NEW APPROACH TO THE FEDERAL PARAMOUNTCY DOCTRINE

The role I think it appropriate to assign the line of inquiry that underlies the federal intention to cover the field "test" entails the creation of a new approach to the application of the federal paramountcy doctrine. The broad outlines of that new approach can be summarized as follows: *In any*

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96 [1937] A.C. 326 (P.C.).

97 [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373. It is worth noting that that majority opinion was authored by Beetz J.

case in which the doctrine of federal paramountcy is invoked, the court must first satisfy itself that Parliament intended that the federal legislation at issue was to govern the activity in question in the face of existing or future provincial legislation touching upon the same area and potentially inconsistent with it. If the court is satisfied that such an intention existed at the time the federal legislation was enacted, it can then proceed to determine, relying on the doctrinal developments that have emerged from the cases examined above, whether or not the provincial legislation at issue conflicts with that federal legislation. However, if such an intention cannot be attributed to Parliament, then the federal legislation should not be interpreted to have that effect, there would be no need to consider whether or not the provincial legislation conflicts with the federal, and the provincial legislation could continue to operate.[98] In effect, under this approach, *a federal intention to cover the field would be a necessary but not sufficient condition for the application of the paramountcy doctrine.* Such an approach might be novel. But it would not, I contend, be unprincipled. On the contrary, it would in my view be entirely consistent with principle.

If this new approach were to be adopted, it would be necessary for the courts in each case to determine as a preliminary matter the extent to which provincial autonomy was at stake. That is because — and I see this as being an integral feature of the approach — *the greater the cost to provincial autonomy that would flow from holding the provincial legislation inoperative, the clearer the evidence of a federal intention to cover the field must be.*[99] Where that cost would be minimal, the wording of the federal legislation in question might be sufficient. For example, it might be enough in such circumstances if the federal legislation addresses a narrow issue and does so in terms that leave little if any doubt that

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[98] It is important to note that allowing the provincial legislation in question to continue to operate would not mean that the reach of the federal legislation would necessarily be cut back in all of the provinces. It would only be cut back in those provinces with legislation similar to that in the province in which the first case arose. In all of the other provinces, the federal legislation could be given its full reach (consistent, of course, with the limits of Parliament's jurisdiction under s. 91).

[99] It is interesting to note that the approach that I am proposing appears to be taken in the application of the doctrine of federal pre-emption in the United States. That doctrine permits Congress to render ineffective state legislation simply by expressing an intention that federal legislation is to override state legislation in the same field. The courts in that country have shown themselves to be less willing to find that such an intention has been expressed when the field in question is one that has traditionally been understood to fall within state legislative jurisdiction; in such cases, they require the intention to be expressed in "clear and manifest" terms. See, in this regard, L.J. Dhooge, "The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution" (2000) 37 Am. Bus. L.J. 387, at 449.

Parliament intended that legislation to govern the precise activity in question. As that cost became more significant, stronger evidence — provided, for example, by the legislative history of the federal legislation[100] — would be required. In cases in which the cost would be severe, nothing short of an express declaration in the federal legislation would suffice.

The well-known case of *Ross v. Ontario (Registrar of Motor Vehicles)*,[101] decided by the Supreme Court of Canada in 1975, provides a good example in my view of a situation in which very strong evidence of a federal intention to cover the field would be required. The issue in that case was whether a provision of the Ontario *Highway Traffic Act*[102] stipulating that conviction of certain *Criminal Code* driving offences resulted in the automatic suspension of a person's driving licence conflicted with, and therefore had to be held inoperative in the face of, a recently amended provision of the *Criminal Code*.[103] The latter provision granted to judges sentencing a person convicted of one of these offences explicit authority to incorporate in an order prohibiting him or her from driving for a certain period of time, permission to drive during particular times of the week for particular purposes. In Mr. Ross's case, the sentencing judge had granted him permission to drive to and from work between 8:00 a.m. and 5:45 p.m. on weekdays. Five members of a seven member panel of the Supreme Court held that the provincial legislation did not conflict with the sentencing judge's order. Although Pigeon J., who wrote for the majority, did not use the language of impossibility of dual compliance, his reasoning is consistent with the application of that test. In his view, "as long as the provincial licence suspension is in effect, the person gets no benefit from the indulgence granted under the federal legislation".[104] In other words, there was no conflict here because it was not impossible for Mr. Ross to comply with both enactments.

That resolution of the issue clearly served the interest of protecting provincial authority over the ability to drive on provincial roads and highways. But it also resulted in the federal legislation being rendered ineffective, at least for the period during which Mr. Ross's licence was suspended. That result, as noted above, must be said to be an odd one in

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100 It is worth noting that the legislative history of the provisions of the *Bank Act* at issue in *Bank of Montreal v. Hall* featured prominently in La Forest J.'s characterization of their purpose, particularly in the context of his analysis of the provisions' validity.

101 [1973] S.C.J. No. 130, [1975] 1 S.C.R. 5.

102 R.S.O. 1970, c. 134, s. 21.

103 R.S.C. 1970, c. C-34, s. 238(1).

104 *Supra*, note 101, at 13.

a constitutional regime that purports to give priority to federal legislation when it clashes with provincial. One can only speculate as to why the majority judges were willing to live with this anomaly. But it is not implausible to suggest that the reason lay in a combination of two factors at play in that case.[105] One was a conviction on the majority's part — not clearly articulated, but arguably implicit in Pigeon J.'s reasons — that, in general terms, control over the ability to drive lies much closer to the core of provincial legislative jurisdiction than federal. The other was their reluctance to ascribe to Parliament an intention to govern comprehensively the right to drive of persons convicted of serious motor vehicle offences. This reluctance is clearly evident at two different junctures in Pigeon J.'s reasoning. At one point, he says that, in his view, Parliament had not intended "... to deal generally with the right to drive a motor vehicle after a conviction"[106] when it amended the *Code* to give sentencing judges the power to limit the reach of orders prohibiting persons convicted of serious driving offences from driving. At the other, he says, "... Parliament did not purport to state exhaustively the law respecting motor driving licences, or the suspension or cancellation for driving offences".[107] In effect, Pigeon J. interpreted the *Code* provision as though it had a condition attached to its application: a permissive order made by a sentencing judge was only to take effect if the person being sentenced had a valid and operative driver's licence. On this reading of *Ross*, the fact that the *Criminal Code* provision ends up being denied effect for as long as Mr. Ross's licence is suspended is not only no longer anomalous, it makes eminent sense. It serves both to honour Parliament's legislative intent and to protect provincial autonomy in an area of considerable importance to provincial governments and the citizens they represent.

Would the results in the four recent cases examined above have been different if they had been analyzed on the basis of the approach for which I am advocating? The results in the two cases in which the provincial legislation was held not to conflict with the federal — *Spraytech* and *Rothmans, Benson & Hedges* — certainly would not have been different. Integral to both of those holdings was the Court's view that Parliament did not intend the federal legislation at issue to govern completely the

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105 A third factor could have been that the majority judges simply thought that drivers like Mr. Ross should be kept off the road. In other words, they preferred the public policy reflected in the provincial legislation over that reflected in the federal legislation.

106 *Id.*, at 15.

107 *Id.*, at 16.

activity in question (the use of pesticides in the former and the promotion of tobacco products in the latter). Had my proposed approach been used in those cases, that finding would have brought the analysis in each of them to an end. But that end would have been the same: the paramountcy doctrine would not have been applied and the provincial legislation would have remained operative.

The other two cases, *M & D Farm* and *Mangat*, cannot be dealt with quite so easily. While it is true that the Court in each of them was satisfied that the federal legislation at issue did apply to the activity regulated by the provincial legislation — the launching of the preliminary foreclosure proceeding in the former and the representation for a fee by non-lawyers of people appearing before the IRB in the latter — it did not reach that conclusion after first considering the impact on provincial autonomy of applying the paramountcy doctrine and holding the provincial legislation inoperative. It is obviously difficult to predict what would have happened in the two cases had that consideration been factored in, but it is not unreasonable to suggest that the result could well have been the same in both. It is clear that the provincial legislation at issue in *M & D Farm* had been enacted for the same broad purpose as the federal, namely the protection of farmers. The only difference between the two enactments, at least in the context of that particular case, was that the federal legislation was more protective of farmers than the provincial. It is therefore hard to see how annulling the permission granted to the Credit Corporation to commence foreclosure proceedings on the basis that the action that led to that permission being granted was prohibited by the federal legislation could be said to constitute a significant attack on provincial autonomy. The fact that prohibiting such proceedings did not preclude them from being brought at all, but merely resulted in their commencement having to be postponed for a short period, adds force to this assessment. It is highly likely, in other words, that this would have been a case in which sufficient evidence of an intention to cover the field on Parliament's part could have been found in the text of the federal legislation itself. And it was on that text that the Court in *M & D Farm* relied in support of its conclusion that the federal legislation governed the preliminary proceeding taken by the Credit Corporation.[108]

A similar analysis could be made of the situation in *Mangat*. The provincial interest in being able to determine who is entitled to represent for a fee a narrowly defined group of people appearing before a highly

[108] *Supra*, note 1, at 973-79.

specialized tribunal of Parliament's creation does not seem to be a particularly strong one. Denying provincial legislatures control over that determination when the federal government has decided it is in the national interest to have Parliament make it would therefore not seem to constitute a significant inroad into provincial autonomy. Again, this could very easily be said to have been a case in which sufficient evidence of Parliament's intention to cover that field could be held to reside in the text of the federal legislation.[109]

The primary advantage of the approach I am proposing is, as I have already argued, that it serves to provide the courts with a means to protect provincial autonomy in circumstances in which that critically important constitutional value is at risk. But it has other advantages as well. By requiring Parliament to make clear its intention to override provincial autonomy when it legislates in areas of importance to provincial governments, this approach ensures that provincial jurisdiction over those areas cannot be overridden by stealth. If that jurisdiction is to be overridden, it will only be after federal legislators have confronted openly the fact that they are taking that far-reaching step, and have decided to take the risks consequent upon doing so. The approach therefore protects democratic accountability as well as provincial autonomy. It also provides clarity to an aspect of the law in this area — the status of the federal intention to cover the field test — that has remained unclear for several decades.[110] And while it delays the application of the doctrinal developments relating to the meaning of conflict that have emerged from the cases examined

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[109] It is interesting to note that the trial judge in *Mangat* interpreted the *Immigration Act* provisions at issue to authorize only counsel licensed under either federal or provincial legislation to represent people before the IRB. It was her view that the meaning of the provisions was unclear, and that the interpretation she gave them was appropriate in part because of her conviction that the interest in protecting the public required it, and in part because of a "constitutional norm" requiring courts to avoid interpretations of federal legislation that result in conflict between it and provincial legislation. She based this "constitutional norm" on the following passage from the reasons for judgment of Estey J. in *Canada (Attorney General) Canada v. Law Society of British Columbia*, [1982] S.C.J. No. 70, [1982] 2 S.C.R. 307, at 356: "When 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." The thinking reflected in that "norm" can be said to underlie the first step of the new approach that I am proposing. Justice Gonthier rejected the trial judge's interpretation on the ground that it "would be repugnant to the text and context of the federal legislation" (*supra*, note 1, at para. 66). The trial judge's reasons for judgment are reported at [1997] B.C.J. No. 1883, 149 D.L.R. (4th) 736 (S.C.).

[110] It should be noted that the approach for which I am advocating does not incorporate this test as it would have been understood by the Judicial Committee of the Privy Council a century or more ago. It incorporates the test in a new and more refined or nuanced form, one that is directed to ensuring that provincial autonomy is protected to the extent possible.

above, it leaves those developments intact. Finally, the approach is consistent with the Supreme Court's professed (if neither fully observed nor explained) commitment — one that Major J. in *Rothmans, Benson & Hedges* claimed has marked the Court's jurisprudence since the 1960s — to "the path of judicial restraint in questions of paramountcy".[111]

In summary, I propose that cases in which the doctrine of federal paramountcy is invoked be dealt with on the basis of two relatively simple analytical steps: (1) did Parliament intend when it enacted the federal legislation at issue that the legislation should govern the activity in question, even in the face of provincial legislation that might conflict with it? (2) if so (and only if so), would applying the provincial legislation at issue frustrate the public policy purpose underlying that federal legislation? If the latter question is answered in the affirmative, the paramountcy doctrine comes into operation and the provincial legislation must be held to be inoperative. If it is answered in the negative, that doctrine has no application and the provincial legislation can continue to operate. Insofar as step (2) is concerned, my preference would be to abandon the impossibility of dual compliance and impossibility of dual effect inquiries and apply the frustration of federal purpose test on its own terms. Limiting the analysis to the question called for by that test would serve to simplify matters by eliminating what I consider to be unnecessary lines of inquiry, to promote consistency in analysis and to reflect a coherent and arguably compelling theoretical rationale for the existence of the doctrine of federal paramountcy. However, it is by no means essential to the application of this proposed approach that these inquiries be abandoned. The primary innovation of that approach is the introduction of the first step, and the approach can function with an application of the second step that includes more than one line of inquiry.

VI. CONCLUSION

Bruce Ryder has rightly noted that, "in the post World War II era, judicial interpretation of the constitution has gradually moved away from a 'classical' view of the distribution of powers, that allowed for little overlap and interplay of provincial and federal powers, towards [a] more flexible 'modern' federalism",[112] which "[maximized] the ambit of the

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111 *Supra*, note 1, at para. 21.

112 "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 309, at 309.

legislative powers available to the federal and provincial governments alike".[113] While he acknowledged that that trend could be said to be salutary in some respects, he argued that it also contained within it a significant threat to provincial autonomy. That threat he explained in the following terms: "the modern paradigm, by extending the areas subject to concurrent powers, extends the federal dominance inherent in the paramountcy rule. Carried to its logical extreme, the modern paradigm would make a mockery of provincial autonomy."[114]

The degree to which that threat is realized depends to a very large extent, of course, on the approach taken by the courts to the application of the federal paramountcy doctrine. The more difficult the courts make it to establish that provincial legislation conflicts with, and hence must be rendered inoperative by, federal legislation, the less likely it is that modern federalism will compromise provincial autonomy. The approach to that issue taken by the Supreme Court of Canada in the 1960s and 1970s, and confirmed in 1982 in *Multiple Access*, made it exceedingly difficult to establish a conflict. In fact, only in the rarest of cases — those in which it could be shown to be impossible for people to whom the two enactments applied to comply with both — was it possible to do so under that approach. Had the Court remained committed to that approach, the threat to provincial autonomy inherent in modern federalism would be minimal. However, it is clear from more recent decisions of the Court in this area that the *Multiple Access* approach has given way to another one, one that requires a finding of conflict whenever application of the provincial legislation can be said to frustrate the ability of the federal government to achieve the public policy purposes underlying its legislation. This new approach poses a much greater threat to provincial autonomy.

The concern about provincial autonomy aside, there is, as I have argued, much to commend in the Court's new approach to determining whether or not a conflict between the provincial and federal enactments exists. The old approach allowed for the possibility — realized in the *Ross* case — that its application could result in federal legislation being rendered ineffective so that effect could be given to provincial legislation. That is, of course, exactly the opposite result to that expected if not required under a doctrine designed to give preference to federal legislation over provincial. The new approach, which requires courts to respect that preference in circumstances in which effect cannot be given to both

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[113] *Id.*, at 313.

[114] *Id.*, at 314.

enactments, eliminates that problem. The new approach also suggests that the Court has come to a new — and I think better — understanding of the role of the paramountcy doctrine. That new understanding is based on the realization that federal legislation is enacted to achieve one or more public policy goals, and that the real question when the doctrine is invoked therefore has to be whether or not application of the provincial legislation will frustrate the achievement of those goals. The role of the doctrine, as it is now conceived, is to ensure that that does not happen.

Salutary as these features of the Court's new approach to the meaning of conflict may be, the threat to provincial autonomy that this new approach poses cannot be ignored if this area of the law is to evolve in a manner that respects this country's constitutional traditions. Fortunately, there is a relatively simple way in which to ensure that that important value is not forgotten when the new approach is applied. All that is required is the addition of a preliminary step, one that obliges courts called upon to invoke the paramountcy doctrine first to satisfy themselves that Parliament intended the federal legislation at issue to apply even in the face of valid provincial legislation in the same field. Only if they can so satisfy themselves is it appropriate for them to consider whether or not any provincial legislation that has entered that field conflicts with that federal legislation.

In those cases in which courts are entitled to proceed to a determination of whether or not the provincial legislation conflicts with the federal, that determination should be made on the basis of the Court's new approach. My preference would be for courts to limit themselves at that point to the question of whether application of the provincial legislation would frustrate the achievement of the purposes underlying the federal. But the courts may find it helpful to engage in the impossibility of dual compliance and impossibility of dual effect inquiries before turning to that question. The critical change in approach for which I am arguing is the addition of the preliminary step. It is that step that will provide protection to a value that the Court's new approach ignores, and that, if the jurisprudence in this area is to be faithful to our traditions as a federal state, needs to be protected.

1. Postscript

On May 31, 2007, as this paper was going to print, the Supreme Court of Canada rendered two decisions in which it considered and applied the federal paramountcy doctrine, *Canadian Western Bank v. Alberta*[115] and *British Columbia (Attorney General) v. Lafarge Canada Inc.*[116] In both cases the Court employed the understandings of conflict that have emerged from the recent cases discussed in this paper. In the former, it held (a) that a court would have no difficulty giving effect to both enactments (provisions of Alberta's *Insurance Act*[117] regulating the insurance business in that province and provisions of the federal *Bank Act*[118] authorizing banks to promote and sell insurance), and (b) that giving effect to the provincial legislation in the circumstances would not frustrate the purpose of the federal, and that both enactments could therefore continue to operate. In the latter case, by contrast, it held both (a) that, in the circumstances of that case, a court could not simultaneously give effect to the two enactments (a municipal zoning and development by-law[119] and land-use plans and policies created pursuant to the *Canada Marine Act*)[120] and (b) that giving effect to the municipal by-law in those circumstances would frustrate the purpose of the federal legislation, and that the by-law therefore had to be held inoperative. From a doctrinal standpoint, it would appear that the decisions in these two cases leave intact the essential elements of the Court's new approach in this area.

115 [2007] S.C.J. No. 22, 2007 SCC 22.
116 [2007] S.C.J. No. 23, 2007 SCC 23.
117 R.S.A. 2000, c. I-3.
118 S.C. 1991, c. 46.
119 City of Vancouver Zoning and Development Bylaw No. 3575.
120 S.C. 1998, c. 10.