

Towards A Restrained Approach to Canadian Federal Paramountcy

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Introduction

In federal states, supreme courts have to grapple with the exercise of overlapping jurisdiction between the federal authority and federated entities. Canadian courts have developed the doctrine of paramountcy (“paramountcy”) as a response to this problem. Paramountcy ensures that when a validly enacted provincial law conflicts with federal legislation, it will be found inoperable. Essentially, to the extent of the conflict, the provincial law does not apply.

This said, despite the Supreme Court of Canada’s (the “Supreme Court”) repeated statements that the written text of our Constitution enjoys primacy¹, its approach has been divorced from the constitutional text. No paramountcy provision was provided in 1867.² In this paper, I will first look at the state of paramountcy as developed by the Supreme Court (A). Then, I propose a reading of paramountcy that takes into account the text of the Constitution (B). Lastly, I shine a light on the recent paramountcy trilogy by the Supreme Court and the opportunity it offers to adopt an approach consistent with the constitutional text (C).

A. Paramountcy As Understood by the Supreme Court of Canada: Moving Away from the Text

Scholars generally agree that the Supreme Court’s approach to federalism can be starkly contrasted to that of the Judicial Committee of the Privy Council (the “Privy Council”), Canada’s highest court in constitutional and civil matters until 1949.³ The Privy Council is credited with adopting a view of federalism that strengthened the exclusivity principle, while the Supreme Court has largely adopted a vision that encourages overlap and shared jurisdiction.⁴ The latter approach has led, indirectly, to a centralization of power in the Parliament of Canada. Essentially, greater shared

1. See for example: *Reference Re Remuneration of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at paras 93 and 104, 150 DLR (4th) 577; *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 53, 161 DLR (4th) 385; *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at para 65, 2005 SCC 49; *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873 at para 24, 2007 SCC 21.

2. *Reference Re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at para 98, 150 DLR (4th) 577; Patrick J. Monahan and Byron Shaw, *Constitutional Law*, Toronto: Irwin Law, 2013 at p 135.

3. Eugénie Brouillet, “« La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada » », (2004) 45:1 *Les Cahiers de droit* 7 at p 33.

4. Patrick J. Monahan and Byron Shaw, *Constitutional Law*, Toronto: Irwin Law, 2013 at pp 243-245 and 256-260; Eugénie Brouillet, “« La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada » », (2004) 45:1 *Les Cahiers de droit* 7 at pp 34-36.

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jurisdiction through an expansive reading of federal powers provides a higher possibility of conflict, which naturally leads to provincial laws being found inoperable.⁵

In recent years, courts have completely stopped referring to the text of the *Constitution Act, 1867* (the “Constitution”) when considering paramourty.⁶ As a result, the discourse surrounding federalism doctrines has been divorced from the text adopted by the Fathers of Confederation and refined by subsequent generations through constitutional amendment. In fact, in the *Reference Re Remuneration of Provincial Judges*, the Supreme Court went so far as to admit that it had no textual basis for paramourty:

The doctrine of paramourty is of fundamental importance in a legal system with more than one source of legislative authority, because it provides a guide to courts and ultimately to citizens on how to reconcile seemingly inconsistent legal obligations. However, it is nowhere to be found in the *Constitution Act, 1867*.⁷

Courts have thus been incrementally changing this doctrine without focusing their attention on the textual map provided by the Constitution.⁸

Despite their claim that there is no textual basis for paramourty, the Supreme Court has developed a broad approach to the doctrine. Their analysis has two steps: (1) a narrow focus, also called the “operational conflict branch”; and (2) a broad focus, also called the “federal purpose branch”. At the first step, the Court asks whether “the same citizens are being told to do inconsistent things” in a way that naturally means “compliance with one is defiance of the other”.⁹ If so, there is a conflict. If no conflict is found, the Court then asks whether the provincial legislation “frustrates the purpose of a federal law”.¹⁰ This means that if compliance with both pieces of legislation is possible, a conflict may still exist if the purpose behind the federal legislation – a purpose not necessarily voiced through express legislative action – is displaced.¹¹

5. Eugénie Brouillet, “« La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada » », (2004) 45:1 *Les Cahiers de droit* 7 at pp 35-44. For an expansive reading of federal powers, see for example: *Alberta Government Telephones v (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225, 61 DLR (4th) 193; *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32; *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 185 DLR (4th) 577; *Ward v Canada (Attorney General)*, [2002] 1 SCR 569, 210 DLR (4th) 42.

6. It is important to note that considerations of paramourty were always divorced from the text in some way. However, courts always seemed to do so by grappling with the text by focusing on the importance of the federal Parliament’s exclusive powers. The paramourty doctrine was said to be inferred. For example, the Supreme Court in *Huson v South Norwich (Township)*, [1895] 24 SCR 145 at p 149, 1894 CarswellOnt 30 (SCC) stated: “In the event of legislation providing for prohibition enacted by the Dominion and by a province coming into conflict the legislation of the province would no doubt have to give way.” The Privy Council itself in *Canada (Attorney General) v Ontario (Attorney General)*, [1894] AC 189 at pp 200-201, 1894 CarswellOnt 30 (SCC) explained: “Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament.” See also: *R v Narain*, 1908 CarswellBC 11 at para 12, 7 WLR 781.

7. *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at para 98, 1997 CanLII 317 (SCC).

8. The Supreme Court of Canada should pay close attention to the words of Lord Sankey in *Reference Re Regulation and Control of Aeronautics in Canada*, 1931 CarswellNat 6 at para 27, [1931] 3 WWR 625: “[t]he process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded”.

9. *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at p 191, 138 DLR (3d) 1; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para 11, [2005] 1 SCR 188.

10. *Bank of Montreal v Hall*, [1990] 1 SCR 121 at p 155, 65 DLR (4th) 361; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at paras 12-13, [2005] 1 SCR 188.

11. *Law Society of British Columbia v Mangat*, 2001 SCC 67 at paras 58-60 and 72, [2001] 3 SCR 113.



B. Paramourcy As Reflected in the Text of the Constitution: Moving Towards An Internally Coherent Approach

It is an accepted rule of constitutional interpretation that the legislature does not speak in vain.¹² In that sense, if the Imperial Parliament, when adopting the *British North America Act 1867* (as it then was), had intended to include a paramourcy provision for the exclusive powers, as it had done in section 95, “it surely would have manifested such intention”.¹³ In this way, the Canadian Constitution is different from the Australian¹⁴ and Indian¹⁵ constitutional documents which expressly provide paramourcy provisions.

Contrary to the Supreme Court’s statement above, two early decisions suggested the textual anchor for the paramourcy doctrine may be found in the opening and concluding paragraphs of section 91 of the Constitution. In *Tennant v Union Bank*, the Privy Council explained paramourcy in this way:

But sect. 91 expressly declares that, “notwithstanding anything in this Act”, the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.¹⁶

In *Re Bozanich*, the Supreme Court itself placed the textual anchor of the doctrine in the concluding paragraph of section 91.¹⁷

Grappling with these textual provisions of the Constitution should be the basis for refining paramourcy moving forward. For greater clarity, I now produce the provisions of section 91 in question:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.¹⁸

12. *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873, 2007 SCC 21; *Edwards v AG of Canada*, [1930] AC 124, 1 DLR 98 (UKPC).

13. *Edwards v AG of Canada*, [1930] AC 124 at pp 139-140, 1 DLR 98 (UKPC).

14. *Commonwealth of Australia Constitution Act* (UK), 63 & 64 Vict, c 12, s 109: “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

15. *Constitution of India, 1950*, at s 254: “If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.”

16. *Tennant v Union Bank*, [1894] AC 31 at p 45, 5 Cart BNA 244 (Ontario PC).

17. *Re Bozanich*, [1942] SCR 130 at p 136, 1942 CarswellOnt 76.

18. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91.



The finding in *Re Bozanich* is not supported by the text of the Constitution. The concluding paragraph of section 91 simply explains that the list of powers granted to the Parliament of Canada cannot be said to fall under the listed powers of the provinces. This concluding sentence strengthens the powers of the federal Parliament by acting as a bulwark against the broad powers found in section 92.¹⁹ The concluding paragraph of section 91 ensures that legislation validly enacted pursuant to a federal head of power is not struck down for falling under a provincial head of power. The paragraph does not fall within the ambit of paramountcy because it goes to validity of legislation, not to operability.

Moreover, while the opening paragraph puts an emphasis on the “exclusive” powers of the federal Parliament “notwithstanding anything in this Act”, this does not by necessary implication mean that a broad paramountcy doctrine applies where there is overlap between validly enacted federal and provincial legislation. It is important to note that the Rough Draft of the *British North America Act 1867* clearly stated that the federal Parliament had exclusive authority over a list of subjects and concluded with:

And also for the peace, welfare and good government of the Confederation respecting all matters of a general character, not specifically and exclusively herein reserved for the Legislatures; and such laws shall control and supersede any laws in any wise repugnant thereto or inconsistent therewith which may have been made prior thereto [...]²⁰

This formulation disappears in the first draft²¹ before making a return in the third²² and fourth²³ drafts of the Bill. Ultimately, in the last draft the framers decided to remove the paramountcy provision altogether.²⁴ It seems clear then that the framers and the British Cabinet knew how to formulate a paramountcy provision, as they did for the concurrent powers in section 95²⁵, but decided to remove it entirely in section 91. The only additions made in the Bill presented to and adopted by the British Parliament were to emphasize the exclusivity principle in the opening paragraph and to formulate the concluding paragraph a bit differently.²⁶

19. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 92(13) and (16): “property and civil rights” and “matters of a merely local or private nature”.

20. “Rough Draft of the London Conference for a British North America Bill” (no date), s 36(37), in Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*, Toronto: Carswell, 1895 at p 132.

21. “First Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (January 23, 1867), s 38(27), in Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*, Toronto: Carswell, 1895 at p 154.

22. “Third Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (February 2, 1867), s 52, in Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*, Toronto: Carswell, 1895 at pp 167-169.

23. “Fourth Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (updated), s 48, in Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*, Toronto: Carswell, 1895 at pp 190-192.

24. “Final Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (February 9, 1867), s 99, in Joseph Pope, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*, Toronto: Carswell, 1895 at pp 233-234.

25. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 95.

26. *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith, 1867* (UK), 30 & 31 Vict, c 3, s 91.



Therefore, while the federal Parliament does have exclusive authority to legislate on matters coming within the subjects assigned to it by the Constitution, the provincial legislatures also possess exclusive authority to legislate on subjects they have been assigned. This means that while the opening paragraph may textually support the paramountcy doctrine in some limited way, the extent of its scope must be consistent with the exclusivity principle. Provincial legislation should not be found inoperable unless the federal Parliament has directly exercised its exclusive legislative authority²⁷, and thus displaced valid provincial legislation by making compliance with both practically impossible.

C. Recent Developments in the Supreme Court of Canada: A Window of Opportunity

Since the paramountcy doctrine has been a staple of federalism jurisprudence, to do away with it completely would not be consistent with the value of *stare decisis*²⁸ in the common law tradition. Instead, when applying or modifying this doctrine, the Supreme Court should develop it in a way consistent with the text – that is, to apply paramountcy in limited cases. This may also entail modifying the doctrine used to determine the validity of laws (“pith and substance”)²⁹, but that argument is best left to another day.

The recent paramountcy trilogy by the Supreme Court signals a willingness to meaningfully consider the place of the provinces in the analysis.³⁰ More specifically, in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, it stated:

To improperly broaden the intended purpose of a federal enactment is inconsistent with the principle of cooperative federalism. At some point in the future, it may be argued that the two branches of the paramountcy test are no longer analytically necessary or useful, but that is a question for another day.³¹

Going forward, both branches of paramountcy can and should be collapsed into one, as alluded to by Justices Abella and Gascon. In doing so, they are advised to follow the constitutional text, which does not provide an express paramountcy provision. It is not the role of judges to render inoperable provincial legislation validly enacted pursuant to an exclusive power unless the conflict is clearly expressed through overlapping federal legislation that makes following both pieces of legislation absolutely impossible. As W.R. Lederman notes, this duplication is “the ultimate in harmony”.³²

27. The Supreme Court of Canada is encouraged to turn its attention to the statements of Chief Justice Dickson on paramountcy in *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at pp 18-19, 41 DLR (4th) 1: “Furthermore, as Professor Hogg implies, the federal Parliament always has a powerful weapon – its own legislation. If Parliament does not approve of the application of a provincial law to a matter within federal jurisdiction it can easily legislate to prevent the unwanted application.” When Chief Justice Dickson made this statement, he also noted the “restrained approach to concurrency and paramountcy issues” that existed at the time.

28. *Black’s Law Dictionary*, 8th ed, *sub verbo* “« stare decisis »”: “« [Latin to stand by things decided] The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” ».

29. See *Reference re Firearms Act (Can.)*, 2000 SCC 31 at paras 16-57, [2000] 1 SCR 783; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at paras 36-56, [2016] 1 SCR 467.

30. *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397, *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327, *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419.

31. *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 23, [2015] 3 SCR 419.

32. WR Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada” in *Continuing Constitutional Dilemmas*, (Toronto: Butterworths, 1981) 250 at p 260; Luanne A. Walton, “Paramountcy: A Distinctly Canadian Solution”, (2004) 15 *Natl J Const L* 335 at p 340.



In situations where conflict persists but is not expressly contradictory, the federal and provincial actors have two options: (1) amend the Constitution via the amending formula provided in Part V of the *Constitution Act, 1982*³³ or (2) cooperate over the exercise of these exclusive powers³⁴. These questions are best left to the legislative and executive branches themselves, rather than overly limiting provincial spheres of competence.

Our Constitution does provide the federal government with another option: the disallowance power.³⁵ In fact, John A. Macdonald, Canada's first Prime Minister, noted that the disallowance power would be used when provincial legislation "clash[ed] with the legislation of the Dominion Parliament".³⁶ Of course, that power is now in desuetude as a result of convention and for good reason.³⁷ That being said, through a broad interpretation of paramountcy, the Supreme Court has, in some way, transferred the use of disallowance to the judicial branch. We should be equally incensed when this occurs.

Conclusion

In short, the Supreme Court's approach to federal paramountcy has become a source for concern in federalism jurisprudence. It has been developing and refining paramountcy without staying attentive to the textual provisions of the Constitution.

Going forward, the federal purpose branch of the paramountcy analysis should be abandoned. It is overbroad and contrary to the primacy afforded to express legislative enactments. If the federal Parliament intends to legislate on a matter flowing from its exclusive powers, it must do so clearly so as to exclude provincial legislation that may apply. This narrow view of paramountcy is in accordance with the text of the Constitution and the Supreme Court's recent pronouncements.

This approach may differ from that adopted in other federal states.³⁸ The distinction, however, lies not in a refusal to engage with paramountcy, but in the recognition that the Constitution is the supreme law of Canada.³⁹ Applying its terms as written is to recognize and affirm the political compromise reached 150 years ago.

33. See for example Belgium's culture of constitutional amendments: Marc Uyttendaele, *Précis de droit constitutionnel belge: regards sur un système institutionnel paradoxal*, Bruxelles: Bruylant, 2005 at pp 823-831. This is possible for Canada: Johanne Poirier, "150^e anniversaire du Canada: Le moment de faire le point", *Le Devoir*, March 20, 2017.

34. This would include para-constitutional exercises and shaping of constitutional powers through intergovernmental agreements, subject to the overriding right of the federal Parliament and the provincial legislatures to unilaterally reject these agreements through the exercise of parliamentary sovereignty: Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien : les ententes intergouvernementales", (2009) *RQDC 1*; *Québec v Canada*, 2015 SCC 14 at paras 18-20, [2015] 1 SCR 693.

35. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 55 and 90.

36. Author unknown, "Disallowance", *The Toronto Daily Star*, May 4, 1908.

37. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed, Québec: Éditions Yvon Blais, 2014 at p 423.

38. Luanne A. Walton, "Paramountcy: A Distinctly Canadian Solution", (2004) 15 *Natl J Const L* 335 at p 341.

39. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52.