All I Really Needed to Know About Federalism, I Learned from Insurance Law

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Canadian law is commonly learned through the examination of court decisions. This "case study" technique is intended to demonstrate not only the prevailing principles of law but also how these principles have developed over time. Taking this approach a step further, this paper demonstrates that the governing principles of Canadian constitutional law pertaining to federalism (i.e. the division of powers) can be discovered by studying Canadian court decisions on a discreet topic: namely, insurance law. While reviewing the fundamental principles of federalism analysis, this paper illustrates the important role that insurance has and continues to play as a focal point for developing constitutional law principles; reminds readers that matters of public law are often decided on the basis of private law disputes; and examines the approach that Canadian courts have taken to federalism issues where the relevant subject matter (i.e. insurance) is not specifically itemized in the written text of the constitution.

Le droit canadien s'apprend généralement par l'examen de décisions judiciaires. Cette technique « d'étude de cas » est destinée à démontrer non seulement les principes de droit actuels mais aussi comment ces principes se sont développés au fil du temps. Poussant cette approche un peu plus loin, l'auteur de cet article démontre qu'on peut découvrir les principes directeurs du droit constitutionnel canadien en matière de fédéralisme (c.-à-d. le partage des pouvoirs) en examinant les décisions judiciaires canadiennes portant sur un sujet discret, à savoir le droit des assurances. En examinant les principes fondamentaux de l'analyse du fédéralisme, l'auteur illustre le rôle important des assurances, qu'elles continuent de jouer, comme point central dans l'élaboration de principes de droit constitutionnel; il rappelle aux lecteurs et lectrices que les questions de droit public sont souvent décidées à partir de litiges de droit privé; et il examine l'approche prise par les tribunaux canadiens par rapport aux questions de fédéralisme là où la matière pertinente (c.-à-d. les assurances) n'est pas expressément détaillée dans le texte de la constitution.

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I. Introduction

In 1988, Robert Fulghum published his bestselling book, *All I Really Needed to Know … I Learned in Kindergarten*. In this book, Fulghum contends that the cardinal rules for success in life can be gleaned from the fundamental lessons taught in a single, elementary institution: namely, kindergarten. Adopting, and adapting, Fulghum's approach (and his catchy title), the main objective of this paper is to demonstrate how the basic principles of Canadian constitutional law regarding federalism — that is, the fundamental legal doctrines pertaining to the division of legislative powers between the federal and provincial governments — can be gleaned solely from court decisions concerning the provision and regulation of insurance.

Readers may appropriately wonder about the relevance of this objective. One hundred and fifty years after Confederation, the central elements of Canadian law regarding division of powers analysis are well-established. One might therefore ask why it is important to look at these basic principles through the lens of insurance law. My answer to this question is threefold. First, the significant role that insurance law cases have played in developing fundamental constitutional law doctrine merits recognition. Insurance law cases depict the evolution of judicial thinking about the division of powers from Confederation to the present day. Moreover, insurance remains an important subject for federalism analysis today. For example, questions have been raised about the constitutionality of the recently passed federal *Genetic Non-Discrimination Act*, which, among other things, prohibits a party from withdrawing from or refusing to enter into a contract with an individual who refuses to undergo genetic testing or who refuses to release the results of genetic testing.[1] Although not aimed specifically at insurance companies, this prohibition applies to insurance companies. In particular, this legislation has the effect of preventing life and disability insurers from requiring their clients to undergo or to disclose genetic testing as a condition of providing insurance coverage. The federal government has therefore raised the possibility of referring this legislation to the Supreme Court of Canada to determine whether the impact of this federal legislation on the provincial authority over insurance is constitutional.[2]

1 SC 2017, c 3, ss 3-4.

2 See e.g. Donna Glasgow, "Genetic Non-Discrimination Act Comes into Force", *The Insurance and Investment Journal* (5 May 2017), online: <insurance-journal.ca/article/genetic-non-discrimination-act-comes-into-force/>; Joan Bryden, "Wilson-Raybould wants Supreme Court advice on genetic non-discrimination bill", *CBC News* (9 March 2017), online: <www.cbc.ca/news/politics/jod-raybould-genetic-descrimin.-1.4018680>.

Second, because federalism concerns the legislative competence of provincial and federal governments, it is easy to lapse into thinking that Canadian constitutional law concerns only public law matters. Insurance law cases remind us otherwise. In legal terms, an insurance arrangement is a contract, and therefore is a matter of private law. Nevertheless, insurance is heavily regulated, and sometimes mandated, by governments. Therefore, court decisions about which order of government can provide for, regulate, or otherwise impact insurance contracts prompt us to acknowledge that the line between public law matters and private law matters is not always clear in Canadian constitutional law.[3] Finally, insurance is not expressly itemized as a subject of legislative authority under the *Constitution Act, 1867*.[4] Nevertheless, it was "one of the first industries to attract fundamental regulation."[5] Accordingly, constitutional law cases concerning legislative competence over insurance matters demonstrate how Canadian courts have developed constitutional law principles in the absence of express constitutional text.

Another question that may be raised in respect of my thesis is what is meant by the "basic principles" of federalism. Over the past 150 years, the courts have produced a plethora of case law regarding federalism analysis, and the principles derived from these cases can be described, categorized, and counted in a number of ways. For the purposes of the present discussion, I have reduced these principles to five key propositions, which I believe collectively provide a reasonably comprehensive overview of how disputes over legislative jurisdiction are resolved under Canadian law. These propositions are:

1. The classes of legislative authority exclusively provided to the federal Parliament and to the provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867*, respectively, are defined by applying the doctrine of mutual modification.

2. Identifying the "pith and substance" of legislation is key to determining its validity under the *Constitution Act*, *1867*.

3 As noted by Peter W Hogg, *Constitutional Law of Canada: Student Edition* (Toronto, Ontario: Thomson Reuters Canada Limited, 2016) at 21-3, "the original distinction between private and public law has tended to break down for constitutional purposes, as governments have increasingly intervened to regulate the economic life of the nation … Much business activity is no longer governed simply by contract, but by statutory rules and the decisions of government officials … In other words, the evolution of our laws has now swept much public law into the rubric which was originally designed to exclude public law."

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

5 Hogg, *supra* note 3 at 21-5.

3. In narrowly defined circumstances, the doctrines of interjurisdictional immunity and paramountcy may apply to limit the application or impact, respectively, of otherwise valid provincial legislation.

4. Courts should employ judicial restraint when assigning remedies for *ultra vires* legislation.

5. A judicial finding that a law is invalid on federalism grounds can be overcome by a constitutional amendment.

Below, I discuss each of these propositions in turn, focusing on the major insurance law cases that have contributed to the development of each principle. Since 1867, Canadian courts have decided 59 insurance cases touching on one or more of these five propositions.[6] Rather than trying to address all of these cases, my comments are intentionally restricted to those cases that I have identified as being particularly significant in establishing, applying or explaining each of the five principles stated above. Considered in the context of these five propositions, the selected cases demonstrate that the fundamentals of Canada's constitutional law regarding federalism are effectively captured in the country's insurance law jurisprudence. Before proceeding with this discussion, however, I offer some general observations about the nature of insurance and insurance law in order to explain more fully why insurance is the ideal subject matter for the development and understanding of basic federalism principles.

II. Insurance and Federalism

Insurance is a subject that, while fundamentally pertaining to private contracts, uniquely lends itself to government regulation and intervention. First, insurance benefits society economically by spreading the risk of financial loss and providing a source of recovery against fortuitous loss. This benefit is only achieved, however, if insurance companies "are solvent and financially capable of fulfilling their obligations to pay for insured losses."[7] Regulations regarding the formation and operation of insurance companies are needed to ensure that this is the case. Second, most insurance contracts are contracts of adhesion: that is, they are drafted by sophisticated insurance companies and are sold to customers as a prepared product. This situation means that insurance is a

6 This figure includes only the highest level of court decision for each case and captures cases where federalism principles were applied in the *ratio decidendi* as well as those where federalism principles were addressed in *obiter dictum*. For a complete list of these cases, see Appendix A.

7 Barbara Billingsley, *General Principles of Canadian Insurance Law,* 2nd ed (Markham, Ont: LexisNexis Canada Inc, 2014) at 2.

prime subject for consumer protection legislation to "regulate[]the content and enforceability of insurance contracts."[8] Finally, with respect to some common and inherently dangerous activities, there is a societal benefit to mandatory insurance coverage. The quintessential example of such an activity is the operation of a motor vehicle. It is in society's interests to ensure that insurance coverage is readily available to assist people who suffer physical injuries and incur associated expenses arising from a motor vehicle accident. Legislation is needed to establish and enforce the insurer's obligation to provide motor vehicle insurance coverage and the obligation of vehicle owners and drivers to purchase this coverage. If a government acts as the insurance provider, as it does for motor vehicle liability insurance in some provinces, legislation is needed to create the insurance scheme.[9]

Despite the need for insurance laws and regulations, however, insurance is not specifically identified as a subject of legislative authority under section 91 or section 92 of the *Constitution Act*, *1867*.[10] Owing to this lack of express constitutional authority over insurance, "[i]n the latter part of the nineteenth century, both levels of government began to regulate the insurance industry."[11] Resulting disputes over which level of government was permitted to legislate on insurance law matters had to be resolved by the courts. The courts were forced to resolve this question by considering the scope of broadly worded subject matter classes, including the provincial authority over property and civil rights and the federal authority over trade and commerce; banking; criminal law; and Peace, Order and Good Government (hereafter "POGG"). Even after concluding that insurance fell under provincial jurisdiction over property and civil rights, courts had to adjudicate federal-provincial disagreements regarding the extent to which valid federal laws could touch on insurance matters and the extent to which provincial insurance laws could impact federal institutions. The courts were forced to develop and apply federalism doctrines to respond to these nuanced considerations.

In addressing these disputes, the courts reached some fundamental conclusions about the legislative authority over insurance law in Canada. These findings include that:

8 *Ibid.*

9 *Ibid* at 2-3.

10 This was changed in 1940 when the *Constitution Act, 1867* was amended to include section 91(2A), which expressly gives the federal Parliament authority to legislate in the area of unemployment insurance. For more on this amendment, see the discussion of Principle 5 in Part III of this paper.

11 Hogg, *supra* note 3 at 21-6. See also Christopher Armstrong, "Federalism and Government Regulation: The Case of the Canadian Insurance Industry 1927-34" (1976) 19:1 CanPublic Administration 88.

- pursuant to their legislative authority over property and civil rights, the provinces have exclusive legislative jurisdiction over insurance contracts and the operation of the insurance industry within each province (except in relation to marine insurance);[12]
- pursuant to its legislative authority to create federal corporations, the federal Parliament has exclusive legislative jurisdiction over the incorporation of national insurance companies,[13] but a federally incorporated insurance company is nonetheless subject to provincial legislation regarding insurance industry operations;[14]
- pursuant to its authority over shipping and navigation, the federal government has exclusive legislative jurisdiction over marine insurance;[15]
- provincial insurance legislation may regulate the promotion of insurance products by federal banks;[16] and
- provincial workers' compensation legislation may bar civil lawsuits relating to marine liability, notwithstanding federal legislative jurisdiction over shipping and navigation.[17]

III: Five Fundamental Federalism Principles Developed in Insurance Law Cases

Principle 1: The classes of legislative authority exclusively provided to the federal Parliament and to the provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867*, respectively, are defined by applying the doctrine of mutual modification.

The subject of insurance initially gained prominence as a vehicle for the development of constitutional law in *Parsons v Citizens Insurance Co. of Canada*,[18] an 1881 decision of the Judicial Committee of the Privy Council ("JCPC"). This case, which has been described as "the first important case to involve a direct

12 *Citizens Insurance Co v Parsons* (1881), 7 App Cas 96, 1881 CarswellOnt 253 (WL Can) (PC) [*Parsons* cited to App Cas].
13 *Ibid*.
14 *Re Insurance Act of Canada* (1931), [1932] AC 41 at 45-46, [1931] 2 DLR 297 (PC) [*Re Insurance Act*].
15 *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc*, [1983] 1 SCR 283, 54 NR 321.
16 *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank*].
17 *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53.
18 *Parsons*, *supra* note 12.

conflict between the enumerated heads of federal and provincial jurisdiction,"[19] involved a constitutional challenge to provisions of an Ontario statute which required all fire insurance contracts issued in the province to include specified conditions. Notably, this case "was not fought directly between the Dominion and the provinces, either as parties or interveners."[20] Instead, the case involved an action by a private individual to recover payment under an insurance contract. In defence of the claim, the insurer argued that the insured had forfeited its right to indemnity by failing to comply with its obligations under the statutory conditions imposed by provincial legislation. In response, the insured argued that the statutory provisions were *ultra vires* the province. Therefore, the central issue in this private lawsuit was whether the statutory provisions were a valid exercise of the province's authority over property and civil rights[21] or whether the provisions were *ultra vires* the province because they fell under Parliament's authority over trade and commerce.[22] In this respect, the case is a salient example of how a private law dispute can drive the development of federalism principles. Writing for the JCPC, Sir Montague Smith upheld the legislation as a valid exercise of provincial authority.

As a matter of insurance law, Smith's judgment established the essential principle that insurance contracts fall within provincial authority over property and civil rights. As a matter of constitutional law, Smith's judgment did much more. Specifically, it established a methodology for the constitutional analysis of a provincial law[23] and "embedded what has become known as the double-aspect and mutual-modification doctrines."[24] The key principle of mutual modification states that the legislative powers listed in sections 91 and 92 must be defined with reference to one another "so as to eliminate the overlapping and make each power exclusive."[25] In particular, "in order to place each head of

19 John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 81.

20 *Re Insurance Act*, *supra* note 14 at 45.

21 *Constitution Act, 1867, supra* note 4, s 92(13).

22 *Ibid*, s 91(2).

23 The methodology involves first determining whether the law *prima facie* falls within one of the areas of authority assigned to the provinces and, if it does, proceeding to the second step of determining whether the law also falls within a class of subject assigned to the federal Parliament and whether the law thereby exceeds the jurisdiction of the province. *Parsons, supra* note 12 at 109-10.

24 Saywell, *supra* note 19 at 84. Double-aspect recognizes that a single matter might, in respect of some aspects, fall under federal authority and, in respect of other aspects, fall under provincial legislative authority. In other words, while sections 91 and 92 of the *Constitution Act, 1867* delineate exclusive classes of legislative authority, different aspects of the same matter might fall under more than one class. For more on the double aspect doctrine, see Hogg, *supra* note 3 at 15-12 to 15-14.

25 Hogg, *supra* note 3 at 20-2.

power in its context as part of two mutually exclusive lists,"[26] the scope of broad legislative powers must be understood to be restricted by the legislative territory occupied by more narrowly expressed powers. Often, this means that broadly worded federal powers must be interpreted as excluding specifically identified areas of provincial authority. Generally, the purpose of this doctrine is to "ensure that no order of government has so extensive a *scope* of jurisdiction that it effectively eliminates the other jurisdiction's effective regulatory capacity."[27] In the context of *Parsons*, application of the doctrine of mutual-modification prevented "either the broadly phrased federal power over trade and commerce or the broadly phrased provincial power over property and civil rights from being interpreted so expansively that the other power has no meaningful content."[28]

Considering the overall structure and wording of sections 91 and 92 of the *Constitution Act*, *1867*, Smith reasoned that a "sharp and definite distinction" between the listed subjects was not intended and that "some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91."[29] Further, he held that, despite its clear intention to "give pre-eminence to the Dominion Parliament in cases of a conflict," the *Constitution Act, 1867* should not be read as meaning that provincial authority is subsumed by the federal Parliament every time an apparent conflict of jurisdiction arises.[30] Instead, Smith concluded that the broad classes of subjects assigned to the federal Parliament under section 91 are limited in scope by the classes of subjects assigned to the provincial legislatures under section 92. So, in order to avoid a conflict of authority, "the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other … to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."[31]

Applying these principles to the case at hand, Smith held that the Ontario insurance legislation related to insurance contracts, which in turn fall within the "fair and ordinary meaning" of civil rights under section 92 of the *Constitution Act*, *1867*. According to Smith, this conclusion is consistent with the scope of federal legislative authority because "bills of exchange and promissory notes" are the only class of contracts expressly mentioned in section 91,

26 *Ibid* at 15-39.
27 Hoi L Kong, "Republicanism and the Division of Powers in Canada" (2014) 64:3 UTLJ 359 at 394.
28 *Ibid.*
29 *Parsons*, *supra* note 12 at 107-08.
30 *Ibid* at 108.
31 *Ibid* at 108-09.

which "would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament."[32] Similarly, Smith found that, while the words "trade and commerce" can be broadly understood to "include every regulation of trade ranging from political arrangements in regard to trade with foreign governments … down to minute rules for regulating particular trades," this interpretation does not make sense in light of other specified areas of federal authority, such as banking, weights and measures, and bills of exchange. Again, Smith reasoned that "[i]f the words [trade and commerce] had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary."[33]

Ultimately, the principle of mutual modification (that the legislative powers listed in sections 91 and 92 must be defined in relation to one another) led Smith to conclude that Parliament's trade and commerce power is limited to the regulation of inter-provincial trade or the general regulation of trade affecting the whole country. It does not include the regulation of a particular business or industry. This finding set the stage for future judicial consideration of the scope of this federal power.[34] The same can be said for Smith's finding that Parliament's authority to incorporate companies operating inter-provincially does not restrict provincial authority to regulate the operation of those companies within provincial boundaries.[35]

Parsons was followed by a series of cases that further entrenched both the provinces' jurisdiction over insurance law and the notion that the exclusive classes of legislative authority listed in sections 91 and 92 of the *Constitution Act, 1867* must be defined in relation to one another. These cases include *Reference re Insurance Companies*,[36] *Ontario (Attorney General) v Reciprocal Insurers*,[37] *Re Insurance Contracts*,[38] *Re Insurance Act of Canada,*[39] and *Re Section 16 of Special*

32 *Ibid* at 110.

33 *Ibid* at 112.

34 As stated by Hogg, *supra* note 3 at 20-2:

> Since the *Parsons* case, it has been accepted that, in general, intraprovincial trade and commerce is a matter within provincial power, under 'property and civil rights in the province' (s. 92(13)), and the federal trade and commerce power is confined to (1) interprovincial or international trade and commerce, and (2) 'general' trade and commerce.

35 *Parsons, supra* note 12 at 117.

36 [1916] 1 AC 588, [1916] 26 DLR 288 [*Reference Re Insurance Companies*, cited to AC].

37 [1924] AC 328, [1924] 1 DLR 789 (PC) [*Reciprocal Insurers*, cited to AC].

38 [1926] 58 OLR 404, [1926] 2 DLR 204 (ONCA) [*Re Insurance Contracts* cited to OLR].

39 *Supra* note 14.

War Revenue Act.[40] In each of these cases, "attempts by the federal government to secure regulatory control over the insurance industry failed, regardless of the jurisdictional basis cited — be it criminal law, aliens, immigration, bankruptcy and insolvency, or taxation."[41]

In *Reference re Insurance Companies*, the Court considered the validity of the federal *Insurance Act, 1910*, which required insurance companies to obtain an operating license from the federal Minister of Finance. Although the statute included an exemption for provincially incorporated companies operating solely within provincial boundaries, the JCPC nonetheless held that the legislation was invalid. The Court found that the law infringed upon provincial authority over insurance by effectively prohibiting provinces from working together without the involvement of the federal government to allow an insurance company incorporated in one province to carry on business in another. The Court concluded that the statute did not fall under the federal trade and commerce power because this legislative authority "does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."[42] The Court also rejected the suggestion that the legislation fell under Parliament's POGG power because POGG must be interpreted as being limited by the specific heads of power listed in sections 91 unless "the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92."[43]

In response to the Court's finding in *Reference re Insurance Companies*, Parliament passed the *Insurance Act* of 1917. This statute empowered the federal Minister of Finance to grant operating licenses to insurance companies. Further, relying on its authority over criminal law, Parliament inserted a provision into the federal *Criminal Code* making it an offence for companies to sell insurance without obtaining such a license. The constitutionality of this legislative scheme came before the JCPC in *Ontario (Attorney General) v*

40 [1942] SCR 429, [1942] 4 DLR 145.

41 Saywell, *supra* note 19 at 172. For a detailed discussion of the motivating factors behind these attempts by the federal government to have legislative control over some element of insurance, see Armstrong, *supra* note 11.

42 *Reference Re Insurance Companies*, *supra* note 36 at 596.

43 *Ibid* at 595. At the time this ruling was issued, the JCPC had already decided *Russell v The Queen* (1882), 7 App Cas 829, [1882] UKPC 33. In *Russell*, the Court upheld the *Canada Temperance Act* as a legitimate exercise of the POGG power, despite the fact that, being contracts, liquor sales transactions fall within the scope of provincial authority over property and civil rights. Responding to the argument that the *Insurance Act, 1910* should be upheld based on the precedent set by *Russell*, the JCPC stated, at 597, that although "the business of insurance is an important one, which has attained to great dimensions in Canada," this does not justify Parliament using the POGG power to usurp provincial authority over the operation of insurance within provincial boundaries.

Reciprocal Insurers. While recognizing that the criminal law power is "a far-reaching one,"[44] the Court reiterated the foundational principle that the legislative powers described in sections 91 and 92 of the *Constitution Act, 1867* must be construed with reference to one another. This means that the scope of the criminal law power should not "be ascertained by obliterating the context, in which the words are placed."[45] Ultimately, the JCPC held that the impugned *Criminal Code* provision was a colourable attempt by Parliament to "appropriate to itself" the provincial authority over insurance "by purporting to create penal sanctions."[46] In essence, the Court found that this was "not a bona fide attempt to create the crime of carrying on the business of insurance without a license."[47] This finding demonstrates that the substance of legislation, rather than the form, is the determinative factor in a division of powers analysis.

Similar findings were made by the courts in *Reference re Insurance Act (Canada)* and in *Reference re Section 16 of Special War Revenue Act*. In the former case, the JCPC held that federal legislation imposing license requirements on resident British and foreign insurers and taxing customers of unlicensed insurers was a colourable use of federal powers over immigration, aliens and taxation. The Court characterized the legislation as the "same old attempt"[48] by the federal Parliament "to intermeddle with the conduct of insurance business"[49] which fell within provincial legislative authority. In the latter case, the Supreme Court of Canada relied on the principles established by the JCPC to strike down federal legislation imposing a tax on premiums paid by an insured person in respect of Canadian property insured by a British or foreign insurer.

The Ontario Court of Appeal again considered the constitutionality of aspects of the federal *Insurance Act* of 1917 in *Re Insurance Contracts*. This time the Court's focus was on provisions of the federal statute which required a series of statutory conditions to be included in insurance contracts issued by federally incorporated insurance companies. A majority of the Ontario Court of Appeal held that the federal authority to legislate in respect of the incorporation of federal insurance companies includes controlling the subsequent operations of such companies only if such control is a necessary incident to the power of incorporation. Since the "absence of such conditions would not have

44 *Reciprocal Insurers, supra* note 37 at 340.
45 *Ibid* at 341.
46 *Ibid* at 342.
47 Morris Manning, "Criminalization by Regulation: The Outer Limits of Section 91(27) of the Constitution Act, 1867" (2002) 13 NJCL 309 at 312.
48 *Re Insurance Act, supra* note 14 at 53.
49 *Ibid* at 51.

caused the action of the Federal authority to become a dead letter when incorporating insurance companies,"[50] the Court concluded that the legislation in question was invalid. In short, the Court held that mandating contract conditions is "not necessarily incidental to the incorporation of Dominion insurance companies."[51]

Specific constitutional concepts established and applied in these cases (such as double aspect, colourability, and necessarily incidental) are components of the larger principle that the legislative powers provided by the *Constitution Act, 1867* must be defined in relation to one another. Years later, these concepts played an implicit role in the Supreme Court of Canada's ruling in *Canadian Indemnity Company v British Columbia,*[52] which upheld the constitutionality of British Columbia's government monopoly over automobile insurance in the province. The Court held that the "effect of the legislation upon companies whose operations are interprovincial in scope does not mean that the legislation is in relation to interprovincial trade and commerce" because the "aim of the legislation relates to a matter of provincial concern."[53]

Principle 2: Identifying "pith and substance" of legislation is key to determining its validity under the *Constitution Act, 1867*.

It has long been established that the crucial first step in a division of powers analysis is to identify the "pith and substance" — otherwise described as the "matter" or the "true nature and character" — of the challenged legislation.[54] Insurance law cases have played a fundamental role in establishing and defining this principle. For example, in *Ontario (Attorney General) v Reciprocal Insurers*, the JCPC noted that, in a federalism enquiry: "the Courts must ascertain the 'true nature and character' of the enactment, its 'pith and substance'"; that "it is the result of this investigation, not the form alone … that will determine which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls"; that "for this purpose the legislation must be 'scrutinised in its entirety'"; and that "where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of

50 *Re Insurance Contracts, supra* note 38 at 420.
51 *Ibid.*
52 *Canadian Indemnity Co v British Columbia (AG)* (1976), [1977] 2 SCR 504, 73 DLR (3d) 111 [*Canadian Indemnity* cited to SCR].
53 *Ibid*, at 512.
54 Hogg, *supra* note 3 at 15-7.

the legislation for the purpose of determining what it is that the Legislature is really doing." [55]

The Supreme Court of Canada relied on the pith and substance principle in *Canadian Indemnity Co v British Columbia,* which involved a constitutional challenge brought by private insurance companies to the provincial government's legislation establishing a compulsory motor vehicle insurance system provided by a government-controlled monopoly. The Court upheld the provincial plan as a valid exercise of the province's authority over property and civil rights, noting that the "constitutional validity of the legislation depends upon its aim and purpose."[56] The Court found that the law was intended to control "the business of automobile insurance in British Columbia,"[57] which fell within provincial jurisdiction notwithstanding the legislation's impact on companies with inter-provincial operations. In *R v Eurosport Auto Co,*[58] the British Columbia Court of Appeal similarly applied the pith and substance doctrine to rule in favour of the province's mandatory automobile insurance scheme. In this case the Court upheld provincial legislation that imposed penalties on individuals who provided fraudulent information to the government insurer, even though the impugned provisions had features (prohibitions and penalties) characteristic of criminal law. The Court stated that, "where the 'matter', 'dominant characteristic' or 'pith and substance' of an enactment" falls within provincial authority under section 92 of the *Constitution Act, 1867*, "then any incidental effects the enactment may have on federal jurisdiction do not affect its validity."[59]

Finally, the significance of the pith and substance principle, and its relationship to the associated doctrines of colourability, necessarily incidental, and double-aspect was more recently recognized by the Supreme Court of Canada in *Canadian Western Bank v Alberta*.[60] The Court in this case stated that:

- "the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the 'pith and substance' of the impugned legislation";[61]

55 *Reciprocal Insurers*, *supra* note 37 at 337. (Note: judicial citations, including a reference to *Parsons*, have been omitted from the quoted passage).
56 *Canadian Indemnity, supra* note 52 at 512.
57 *Ibid*.
58 2003 BCCA 281, 13 BCLR (4th) 220.
59 *Ibid* at para 18.
60 *Canadian Western Bank*, *supra* note 16. See the discussion of Principle 3 in Part III of this paper for a more detailed discussion of the facts and issues involved in this case.
61 *Ibid* at para 25.

- this analysis "may concern the legislation as a whole or only certain of its provisions";[62]
- determining the pith and substance of legislation "consists of an inquiry into the true nature of the law in question for the purpose of identifying the 'matter' to which it essentially relates";[63]
- "[t]o determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law… . To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates";[64]
- the focus of the pith and substance analysis is to "ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose";[65]
- "legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the 'dominant purpose' of the legislation is still decisive … merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law … . By 'incidental' is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature";[66]
- "some matters … may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence";[67] and
- "[i]f the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers."[68]

62 *Ibid*.
63 *Ibid* at para 26.
64 *Ibid* at para 27.
65 *Ibid*.
66 *Ibid* at para 28.
67 *Ibid* at para 30.
68 *Ibid* at para 26.

Principle 3: In narrowly defined circumstances, the doctrines of interjurisdictional immunity and paramountcy may apply to limit the application or impact, respectively, of otherwise valid provincial legislation.

Interjurisdictional immunity and paramountcy are part of "the framework of principles of Canadian federalism aimed at reconciling federal values with the reality that laws enacted by one level of government will inevitably have an impact on matters within the jurisdiction of the other level of government."[69] As exceptions to the fundamental principle of pith and substance (which permits "the co-existence of laws of the two levels of government in the same field"[70]), these doctrines prioritize federal legislation over provincial laws and therefore have the potential to shift the constitutional division of powers in favour of the federal Parliament.[71] The risk of this power imbalance has been reduced, however, by the modern iteration of these doctrines, which makes them principles of last resort. This modern approach is founded in the Supreme Court of Canada's decision in the insurance law case of *Canadian Western Bank*[72] and the companion case of *British Columbia (Attorney General) v Lafarge Canada Inc.*[73] These cases have been described as "perhaps the most important federalism rulings in 20 years."[74]

Canadian Western Bank involved a constitutional challenge to licensing requirements set out in Alberta's *Insurance Act*. The impugned provisions required any lending institution wanting to promote insurance products to obtain a license from the province, which in turn meant complying with marketing standards set by provincial regulation. While acknowledging that the regulation of insurance falls within the legislative authority of the provinces, a group of banks promoting optional credit-related insurance to their loan-seeking customers sought a declaration that the provincial licensing provisions

69 Peter W Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 SCLR (2d) 623 at 623.

70 *Ibid*.

71 In *Canadian Western Bank*, *supra* note 16 at para 35, the Supreme Court stated that, as a matter of constitutional theory, the doctrine of interjurisdictional immunity should be reciprocal, applying equally to protect federal undertakings from provincial legislation and provincial undertakings from federal legislation. The Court also noted, however, that the principle has consistently been invoked in favour of federal interests only. For more commentary on the reciprocal operation of interjurisdictional immunity, see Hogg, *supra* note 3 at 15-38.5 to 15-38.7, and Michelle Biddulph, "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-Canadian Western Bank Era" (2014) 77:1 Sask L Rev 45.

72 *Supra* note 16.

73 2007 SCC 23, [2007] 2 SCR 86.

74 Hogg & Godil, *supra* note 69 at 635.

were "constitutionally inapplicable and/or inoperative to the banks' promotion of insurance."[75] The *Bank Act*, enacted by Parliament pursuant to its constitutional authority over banks,[76] authorized banks to promote certain types of insurance products to their clients, mostly relating to credit-protection.[77] The banks argued that "when banks promote credit-related insurance, they are carrying on the business of banking, not the business of insurance"[78] and so should not be subject to a provincial insurance law.

The Supreme Court of Canada ultimately rejected the banks' argument and ruled in favour of the province.[79] In doing so, the Court "restrained the application of the interjurisdictional immunity doctrine"[80] and reinforced its previously strict approach to paramountcy. The Court held that such federalism doctrines serve three goals, namely: (1) to "permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers"; (2) "to reconcile the legitimate diversity of regional experimentation with the need for national unity"; and, (3) while recognizing that "the task of maintaining the balance of powers in practice falls primarily to governments", to "facilitate … 'co-operative federalism.'"[81]

In regards to interjurisdictional immunity, the Supreme Court expressed concern about widespread use of a doctrine that is inconsistent with a modern "view of federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers."[82] Accordingly, the Court established a restrictive interjurisdictional immunity test, holding that provincial legislation is inapplicable to a federal undertaking only where the application of the

75 *Canadian Western Bank, supra* note 16 at para 11.

76 *Constitution Act, 1867*, *supra* note 4, s 91(15).

77 For an itemized list of the types of insurance included, see *Canadian Western Bank*, *supra* note 16 at para 6.

78 *Ibid* at para 20.

79 The Court's ruling was issued in two concurring judgments. While the majority of the Court held that paramountcy should generally be applied in advance of interjurisdictional immunity (*ibid* at paras 77-78), Justice Bastarache, writing for himself, postulated that the proper methodology for a division of powers analysis considers interjurisdictional immunity before paramountcy (*ibid* at para 113). Justice Bastarache also opted for a less restrictive approach to interjurisdictional immunity overall. See *infra* note 84.

80 Hogg and Godil, *supra* note 69 at 635.

81 *Canadian Western Bank*, *supra* note 16 at para 24. For more on this case in respect of judiciary's role in facilitating intergovernmental co-operation, see Wade K Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 SCLR (2d) 625.

82 *Canadian Western Bank*, *supra* note 16 at para 36.

provincial law impairs an essential or vital element of the federal undertaking.[83] This test was not met in the case at bar because, in the opinion of the Court, "[t]he promotion of 'peace of mind' insurance can hardly be considered 'absolutely indispensable or necessary' to banking activities… ."[84] Noting that the banks' "sole purpose of engaging in the promotion of insurance appears to be to generate additional revenue as a separate product line and profit centre" and that "the insurance promoted is optional and can be cancelled at any time," the Court concluded that "the promotion of authorized insurance is not part of the core of banking because it is not essential to the function of banking."[85]

With regard to paramountcy, the Court held that, while this doctrine is "much better suited to contemporary Canadian [co-operative] federalism than is the doctrine of interjurisdictional immunity,"[86] it should likewise be applied only in narrowly defined circumstances. Specifically, "the mere existence of a duplication of norms at the federal and provincial levels"[87] is an insufficient basis to apply the paramountcy doctrine. The doctrine applies only where the federal and provincial laws are "incompatible" because "it is impossible to comply with both laws" or because applying the provincial law "would frustrate the purpose of the federal law."[88] Applying this strict test to the facts of the case, the Court found that the *Bank Act* provisions were not incompatible with the provincial *Insurance Act*. If the banks chose to promote insurance products, they could do so in compliance with the provincial statute, so "[t]his is not a case where the provincial law prohibits what the federal law permits."[89] Further, the Court noted that the *Bank Act* provisions were permissive and that, "while permitting the banks to promote authorized insurance, [these provisions contain] references that assume the relevant provincial law to be applicable."[90] The Court therefore concluded that the ability of banks to promote insurance products as authorized by the *Bank Act* was not frustrated by the provincial licensing requirement.

83 *Ibid* at paras 48-51. While concurring in the result, Justice Bastarache took issue with the majority's restrictive approach to the interjurisdictional immunity doctrine. He held, at paras 111 and 123, that interjurisdictional immunity applies where the provincial law severely "affects", rather than "impairs", the core of a federal power.

84 *Ibid* at para 51. For a detailed discussion of the facts supporting the Court's conclusion that banking is fundamentally distinct from credit-protection insurance, see paras 86-97.

85 *Ibid* at para 122.

86 *Ibid* at para 69.

87 *Ibid* at para 72.

88 *Ibid* at para 75.

89 *Ibid* at para 100.

90 *Ibid* at para 103. See paras 103-108 for the Court's discussion of the history and the purpose of the *Bank Act* provisions.

Most recently, the Supreme Court considered interjurisdictional immunity and paramountcy in an insurance context in *Marine Services Ltd v Ryan Estate*.[91] This case arose from the death of two Newfoundland fishermen who died when their ship capsized. After receiving compensation under Newfoundland's *Workplace Health and Safety Compensation Act* ("*WHSCA*"), the survivors of the accident brought a tort action against several entities responsible for the design and construction of the deceased's vessel and against Transport Canada for negligent inspection of the vessel. The defendants argued that the lawsuit, which was brought pursuant to the statutory cause of action set out in the federal *Marine Liability Act* ("*MLA*") was barred by section 44 of the *WHSCA*, which prohibited tort recovery where compensation is provided under the *WHSCA*. In response, the claimants argued that interjurisdictional immunity made the *WHSCA* inapplicable to an action brought under the *MLA* or, alternatively, that paramountcy rendered the *WHSCA* inoperable in respect of an action brought under the *MLA*. Relying on the scope of these doctrines as defined in *Western Canadian Bank*, the Supreme Court held that neither principle applied to the case at bar.

As to interjurisdictional immunity, the Court held that "[m]aritime negligence law is indeed at the core of the federal power over navigation and shipping" and that "s. 44 of the *WHSCA* trenches" on this core.[92] Nevertheless, the Court concluded that interjurisdictional immunity did not apply to this situation because the provincial law did not "impair" the federal authority.[93] In arriving at this conclusion, the Court rejected its own earlier ruling that "interjurisdictional immunity applies where a provincial statute of general application has the effect of indirectly regulating a maritime negligence law."[94] This rejection was based on the fact that the precedent in question pre-dated the narrowing of the interjurisdictional immunity test in *Canadian Western Bank* and subsequent rulings.

With regard to paramountcy, the Court held that there was no operational conflict between the provisions of the *WHSCA* and the *MLA*. The *MLA* permitted tort recovery in circumstances where the deceased person could have recovered damages and the WHSCA stated that a person cannot recover tort damages if they have been compensated under the provincial workers' compensation scheme. The provisions can be read harmoniously because "the text

91 *Supra* note 17.
92 *Ibid* at para 59.
93 *Ibid* at para 60.
94 *Ibid* at para 64.

of [the *MLA*] accommodates the statutory bar in [the *WHSCA*]."[95] That is, where the *WHSCA* barred a person from recovering damages, that person is no longer someone who could have recovered damages as defined by the *MLA*. The Court also held that the *WHSCA* "does not frustrate"[96] the purpose of the *MLA*. The Court found that "the MLA was enacted to expand the range of claimants who could start an action in maritime negligence law" and "[t]he *WHSCA*, which establishes a no-fault regime to compensate for workplace-related injury, does not frustrate that purpose."[97] Instead, the *WHSCA* "simply provides for a different regime for compensation that is distinct and separate from tort."[98] Noting in particular that the *MLA* is permissive in allowing, but not requiring, the commencement of litigation, the Court concluded that "[t]he high standard for applying paramountcy on the basis of the frustration of a federal purpose is not met here."[99]

Principle 4: Courts should employ judicial restraint when assigning remedies for *ultra vires* legislation.

This principle is one of several tenets which can be drawn from *Schachter v Canada*,[100] a key constitutional law decision of the Supreme Court of Canada. This decision, which addresses the remedies available when a court determines that a legislative provision is unconstitutional, arose from a constitutional challenge to the parental benefits available under Canada's *Unemployment Insurance Act*. Although the constitutional challenge in this case was brought on the basis of the *Canadian Charter of Rights and Freedoms* rather than on federalism grounds,[101] much of the Supreme Court's commentary about constitutional

95 *Ibid* at para 77.
96 *Ibid* at para 84.
97 *Ibid.*
98 *Ibid.*
99 *Ibid.*
100 [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter* cited to SCR].
101 The challengers argued that section 32 of the *Unemployment Insurance Act* was an unjustified violation of the equality protection guaranteed by s 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The statute provided for unemployment benefits to be paid to natural mothers and to either the mother or father of an adopted child, but benefits were not available to natural fathers. The trial judge held that the statutory provision violated the *Charter* by discriminating against natural fathers on the basis of parental status. As a remedy, he issued a declaration entitling natural fathers to obtain benefits if they otherwise qualified under the legislation. On appeal, the parties conceded the constitutional breach so the Ontario Court of Appeal and, ultimately, the Supreme Court of Canada considered only the issue of remedy.

remedies applies equally to judicial remedies in the context of a division of powers analysis.[102]

First, in regard to the judicial authority to strike out unconstitutional legislation, the Supreme Court acknowledged that "[s]ection 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only 'to the extent of the inconsistency.'"[103] The Court also pointed out, however, that this remedial authority "is not a new development in Canadian constitutional law" because "[t]he courts have always struck down laws only to the extent of the inconsistency."[104] According to the Court, this restrained approach is consistent both with "common sense" and with principles of law which favour preserving "as much of the legislative purpose as possible."[105]

Second, the Supreme Court identified severance as a remedial doctrine which can be applied by Canadian courts to minimize judicial interference with legislative intention. The Court described severance as "an ordinary and everyday part of constitutional adjudication" which provides that "if a single section of a statute violates the Constitution, … that section may be severed from the rest of the statute so that the whole statute need not be struck down."[106] The Court also cautioned, however, that there may be some situations where the unconstitutional portion of legislation is inextricably tied to other constitutionally sound provisions such that the legislating body would not have passed the latter without the former. Accordingly, the Court concluded that in order to limit the impact on legislative intent:[107]

> …the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the re-

102 The Supreme Court's decision was issued in two concurring judgments. The minority judgment, written by Justice LaForest, took issue with the majority reasons of Lamer, C.J. in respect of comments relating "the means for assessing when the techniques of reading down or reading in should be adopted" (*Schachter*, *supra* note 100 at 727). This disagreement between the judgments is not relevant to a remedy in a division of powers context so will not be discussed in this paper.

103 *Ibid* at 695.

104 *Ibid* at 696.

105 *Ibid* at 696-97.

106 *Ibid* at 696.

107 *Ibid* at 697. The JCPC's decision in *Reference Re Employment and Social Insurance Act, 1935*, [1937] AC 355, [1937] 1 DLR 684 is an insurance case which serves as an example of a situation in which the Court found that the challenged parts of a statute were "so inextricably mixed up" with the remainder of the legislation that it was "impossible to sever them." (cited to AC at 367). This case is discussed in more detail under Principle 5, Part III of this paper.

> mainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

Third, the Court recognized "reading down" as an appropriate, and long-standing, remedy to limit the negative impact a constitutional law ruling on legislative intent.[108] Reading down calls for a statutory provision to be interpreted narrowly if possible where a broad interpretation would cause the provision to be constitutionally invalid. As described by Professor Hogg, reading down is "like severance in that both techniques mitigate the impact of judicial review" but "reading down achieves its remedial purpose solely by the interpretation of the challenged statute, whereas severance involves holding part of the statute to be invalid."[109] Thus, by approving of this doctrine in *Schachter*, the Supreme Court essentially approved the technique that makes the principle of interjurisdictional immunity functional.[110]

Finally, the Court in *Schachter* discussed the scope of the Court's authority to suspend temporarily a declaration of invalidity. Here again, the Supreme Court emphasized the need for judicial restraint, noting that a suspended declaration is "not a panacea for the problem of interference with the institution of the legislature."[111] Further, the Court held that deciding the question of whether to suspend a declaration of invalidity should be the "final step" in the analysis of a constitutional remedy and is "an entirely separate question" from "the appropriate route under s. 52 of the *Constitution Act, 1982*."[112] A suspended declaration of invalidity is "clearly appropriate where the striking down of a provision poses a potential danger to the public … or otherwise threatens the rule of law" and "may also be appropriate in cases of underinclusiveness as opposed to overbreadth."[113]

Given these criteria, a suspended declaration of invalidity may be more likely to be issued as a remedy in respect of legislation which violates the *Charter* than legislation which violates federalism principles. It is possible, however, for a suspended declaration to be issued in a division of powers case. This is illustrated by the Supreme Court's ruling in another insurance law case, *Confédération des syndicats nationaux v Canada*.[114] Here the Court held that provisions of the federal *Employment Insurance Act* were an invalid exercise of

108 *Schachter, ibid* at 696.
109 Hogg, *supra* note 3 at 15-26.
110 *Ibid* at 15-28.
111 *Schachter, supra* note 100 at 716.
112 *Ibid* at 715-16.
113 *Ibid* at 715.
114 2008 SCC 68, [2008] 3 SCR 511.

the federal taxing authority and that employment insurance premiums collected pursuant to those provisions had been unlawfully collected. As a remedy, the Court suspended the declaration of invalidity for 12 months "to allow the consequences of that invalidity to be rectified."[115]

Principle 5: A court's finding that a law is invalid on federalism grounds can be overcome by constitutional amendment.

This principle is vividly illustrated by the amendment of the *Constitution Act, 1867* to expressly provide Parliament with legislative authority over unemployment insurance.[116] This amendment was passed in response to the JCPC's 1937 decision in *Reference re The Employment and Social Insurance Act, 1935*,[117] which involved a constitutional challenge to federal legislation establishing a national unemployment insurance scheme. The JCPC struck down the legislation on the grounds that insurance matters, including unemployment insurance, fall under the provincial authority over property and civil rights. This ruling was ultimately by-passed by amending the *Constitution Act, 1867* to add section 92A, which expressly authorizes Parliament to legislate in the area of unemployment insurance.

Of course, at the time of the *Unemployment Insurance Reference*, Canada's Constitution was more easily amended than it is today. Prior to 1982, amendments to Canada's Constitution were made by the United Kingdom Parliament, at the request of the Canadian government. Since 1982, Canada amends its own Constitution pursuant to a complex amending formula which, for amendments involving the redistribution of legislative power, requires substantial agreement between the provinces and the federal Parliament.[118] Nonetheless, it remains a fundamental principle of Canadian constitutionalism that judicial interpretation of constitutional text *can* be overcome by alteration of the text, assuming that the textual alteration can be achieved by the requisite amending process.

This is not to say, however, that disputes about the scope of legislative authority are necessarily put to rest once a constitutional amendment is achieved. On the contrary, the constitutional amendment may serve as the basis for still another federalism argument. For example, decades after the *Constitution Act,*

115 *Ibid* at para 94.

116 See *Constitution Act, 1867*, *supra* note 4, s 92(2A), as amended by *Constitution Act, 1940*, 3-4 Geo VI, c 36 (UK).

117 *Supra* note 107. This reference is commonly referred to as *Unemployment Insurance Reference.*

118 For a detailed discussion of the process of constitutional amendment before and after 1982, see Hogg, *supra* note 3 at 4-1 to 4-16.

1867 was amended to provide Parliament with authority over unemployment insurance, a challenge was brought to federal legislation enacted pursuant to this new class of legislative authority in *Reference re Employment Insurance Act (Canada), ss 22 & 23*.[119] The argument was that maternity and parental benefits provided under this legislation were *ultra vires* the federal government because they encroached on provincial jurisdiction over property and civil rights and matters of a local and private nature (sections 92(13) and 92(16) respectively of the *Constitution Act, 1867*). Ultimately, the Court rejected this contention and upheld the impugned statutory provisions as a valid exercise of the federal authority over unemployment insurance on the basis that the definition of this authority must evolve with the times. Holding that a "generous interpretation of the provisions of the Constitution" should be applied so as to recognize the "evolution of the role of women in the labour market and of the role of fathers in child care," the Court concluded that, while the provinces "have jurisdiction over social programs … Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth to or care for children."[120] Apart from restating the crucial principle that constitutional provisions should be interpreted progressively so as to reflect social developments,[121] this case illustrates the dynamic and ongoing relationship between the text of the written Constitution and judicial interpretation of that text. That is, while constitutional amendments may be employed to overcome the consequences of a court ruling on federalism, the amended provisions are also subject to judicial interpretation.

IV. Conclusion

Since Confederation, the insurance industry has served as "the arena in which the two levels of government contended for the power to regulate business, or at least that part of business activity over which legislative power was not specifically allocated by the *Constitution Act, 1867*."[122] Consequently, as I have aimed to demonstrate in this paper, insurance law has played a central role in the development of essential principles of Canadian constitutional law relating to federalism. In particular, disputes over insurance law jurisdiction have prompted Canadian courts to define the essential federalism principles of mutual modification, pith and substance, paramountcy, and inter-jurisdictional immunity

119 2005 SCC 56, [2005] 2 SCR 669.

120 *Ibid* at para 77.

121 This principle was famously established in *Edwards v Canada (AG)* (1929), [1930] AC 124 at 136, 1 DLR 98 (PC) by Lord Sankey's statement that the written constitution "planted in Canada a living tree capable of growth and expansion within its natural limits."

122 Hogg, *supra* note 3 at 21-5.

and to delineate the appropriate scope of judicial remedies in the constitutional context. Insurance has also provided the context for constitutional amendment to be used as a means of overcoming judicial rulings regarding the division of legislative authority under the written Constitution. Additionally, the trajectory of judicial approaches to federalism, from the early compartmentalization of legislative authority (as seen through early application of the principle of mutual modification) to modern day co-operative federalism (as seen through the narrowing of the principles of paramountcy and inter-jurisdictional immunity), can be traced through insurance law jurisprudence. In the end, while there admittedly may be some hyperbole in the suggestion that *everything* one needs to know about federalism can be gleaned from insurance law, looking to insurance law is certainly not a bad start.

APPENDIX A:
Insurance Law Federalism Cases (1867 to May 2017)

1. *Dear v Western Assurance Co* (1877) 41 UCQB 553, 1877 CarswellOnt 233 (WL Can).
2. *Quebec (AG) v Queen Insurance Co* (1878) 3 App Cas 1090 (PC).
3. *Citizens' Insurance Co of Canada v Parsons* (1881), 7 App Cas 96, 1881 CarswellOnt 253 (WL Can) (PC).
4. *Goring v London Mutual Fire Insurance Co* (1885) 11 OR 82 (Ont HC).
5. *Bank of Toronto v Lambe* (1887), 12 App Cas 575, [1887] UKPC 29 (PC).
6. *R v Holland* (1900), 7 BCLR 281, 1900 CarswellBC 53 (WL Can) (BCSC).
7. *Canadian Pacific Railway Co v Ottawa Fire Insurance Co* (1907), 39 SCR 405, 1907 CanLII 13.
8. *Re Companies Case* (1913), 25 WLR 712, 1913 CarswellNat 18 (WL Can) (SCC).
9. *Reference Re Insurance Companies* [1916] 1 AC 588, 26 DLR 288 (PC).
10. *Farmers Mutual Hail Insurance Assn (Iowa) v Whittaker* (1917), 12 Alta LR 309, 37 DLR 705 (ABCA).
11. *Guardian Assurance Co v Garrett* (1918), 58 SCR 47, 45 DLR 32.
12. *Canadian Pacific Railway Co v Workmen's Compensation Board* (1919), [1920] AC 184, 48 DLR 218 (PC).
13. *Ontario (Attorney General) v Reciprocal Insurers*, [1924] AC 328, [1924] 1 DLR 789 (PC).
14. *Re Insurance Contracts*, [1926] 58 OLR 404, [1926] DLR 204 (Ont CA).
15. *Ontario (AG) v Canada (AG)*, [1931] OR 5, [1931] 2 DLR 297 (Ont SC (AD)).
16. *Re Insurance Act of Canada*, [1932] AC 41, [1932] 1 DLR 97 (PC).
17. *Reference Re Employment and Social Insurance Act, 1935*, [1937] AC 355, [1937] 1 DLR 684 (PC).
18. *Reference Re Special War Revenue Act (Canada), s 16*, [1942] SCR 429, [1942] 4 DLR 145, leave to appeal to PC refused, [1943] 4 DLR 657.
19. *Porter v R* (1964), [1965] 1 Ex CR 200, 1964 CarswellNat 372 (WL Can).

20. *Ontario (Attorney General) v Policy Holders of Wentworth Insurance Co*, [1969] SCR 779, 6 DLR (3d) 545.
21. *Scottish Canadian Assurance Corp v Dufour* (1969), [1970] 1 OR 362, 8 DLR (3d) 420 (Co Ct).
22. *R v Scheer Ltd* (1972), [1974] SCR 1046, 27 DLR (3d) 73.
23. *Martin Service Station Ltd v Minister of National Revenue* (1976), [1977] 2 SCR 996, 67 DLR (3d) 294.
24. *Canadian Indemnity Co v British Columbia (Attorney General)* (1976), [1977] 2 SCR 504, 73 DLR (3d) 111.
25. *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co* (1977), [1978] 2 FC 691, 108 DLR (3d) 494.
26. *Canadian Pioneer Management Ltd v Saskatchewan (Labour Relations Board)* (1979), [1980] 1 SCR 433, 107 DLR (3d) 1.
27. *Canada (Attorney General) v Cardinal Insurance Co* (1982), 39 OR (2d) 204, 1982 CanLII 2017 (Ont SC).
28. *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc*, [1983] 1 SCR 283, 54 NR 321.
29. *Amo Containers Ltd v Drake Insurance Co* (1984), 51 Nfld & PEIR 55, 1984 CarswellNfld 30 (WL Can) (NLTD).
30. *Switzerland General Insurance Co v Logistec Navigation Inc* (1986), 7 FTR 196, 1986 CarswellNat 100 (WL Can) (FCTD).
31. *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532, 59 DLR (4th) 694.
32. *H Smith Packing Corp v Gainvir Transport Ltd* (1989), 61 DLR (4th) 489, 1989 CanLII 5275 (FCA).
33. *Re Advocate General Insurance Co of Canada* (1989) 60 Man R (2d) 186, 1989 CarswellMan 30 (MBQB).
34. *Life Underwriters Assn of Canada v Provincial Assn of Quebec Life Underwriters*, [1992] 1 SCR 449, 133 NR 223.
35. *Fudge v Charter Marine Insurance Co* (1992), 97 Nfld & PEIR 91, 1992 CanLII 7364 (NLTD).
36. *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.
37. *Biggin v British Marine Mutual Insurance Assn*, [1992] 101 Nfld & PEIR 156, 1992 CanLII 7377 (NLTD).

38. *Ultramar Canada Inc v Mutual Marine Office Inc* (1994), [1995] 1 FC 341, 1994 CanLII 3505 (TD).
39. *Tolofson v Jensen*, [1994] 3 SCR 1022, 314 DLR (4th) 257.
40. *Hurst v Leimer* (1995), 26 OR (3d) 760, 130 DLR (4th) 166 (Ct J (Gen Div)).
41. *Non-Marine Underwriters, Lloyds's London v British Columbia (Superintendent of Financial Institutions)* (1997), 86 BCAC 306, 1997 CanLII 3430.
42. *Neshkewe v Royal Insurance* (1999), 41 OR (3d) 480, 1999 CanLII 18730 (Ont CA).
43. *Hogan v Doiron*, 2001 NBCA 97, 243 NBR (2d) 263.
44. *Royal & Sun Alliance Insurance Co of Canada v Sinclair*, 2001 FCT 1050, 220 FTR 28.
45. *Bank of Nova Scotia v British Columbia (Superintendent of Financial Institutions)*, 2003 BCCA 29, 11 BCLR (4th) 206, leave to appeal to SCC refused, [2003] 3 SCR viii.
46. *R v Eurosport Auto Co*, 2003 BCCA 281, 13 BCLR (4th) 220, leave to appeal to SCC refused, 2003 CarswellBC 2940 (WL Can).
47. *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40, [2003] 2 SCR 63.
48. *Reference re Employment Insurance Act (Canada), ss 22 & 23*, 2005 SCC 56, [2005] 2 SCR 669.
49. *Thon v Manitoba Public Insurance Corp.* 2004 BCSC 1468, 37 BCLR (4th) 186.
50. *Kingsway General Insurance Co v Alberta*, 2005 ABQB 662, 53 Alta LR (4th) 147.
51. *Secunda Marine Services Ltd v Fabco Industries Ltd*, 2005 FC 1565, [2006] 3 FCR 3.
52. *Hartling v Nova Scotia (Attorney General)*, 2006 NSSC 225, 247 NSR (2d) 154.
53. *Williams v Brown*, 2006 NBCA 123, 311 NBR (2d) 331.
54. *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3.
55. *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511.

56. *Royal Bank of Canada v Mujagic*, 2010 ONSC 550, 2010 CarswellOnt 260 (WL Can).
57. *Bruyère v Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 SCR 635.
58. *Newfoundland (Workplace Health, Safety & Compensation Commission) v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53.
59. *Insurance Corp of British Columbia v Automotive Retailers Assn*, 2013 BCSC 2062, 57 BCLR (5th) 183.