

THE EMERGENCE OF A NORMATIVE PRINCIPLE OF CO-OPERATIVE FEDERALISM AND ITS APPLICATION

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This article provides an overview of co-operative federalism within Canadian legal history and jurisprudence. The author contends that co-operative federalism has expanded to now comprise two distinct branches. “Coordinative co-operation” is the intentional coordination by federal and provincial governments to enact policy that requires the constitutional powers of both. The author contends a new branch, “conjunctive co-operation,” directs courts to prefer interpretations of federal and provincial legislation that do not bring them into conflict, allowing them to operate conjunctively. This article outlines the application of both branches in the resolution of contemporary interjurisdictional disputes and considers their implications. Finally, the article attempts to place co-operative federalism within Canada’s constitutional doctrine.

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[T]he federalism principle reminds us of the careful and complex balance of interests captured in constitutional texts ... the Canadian constitution cannot be understood if it is approached with some preconceived theory of what federalism is or should be.

— The Supreme Court of Canada, 2018¹

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¹ *R v Comeau*, 2018 SCC 15 at para 82 [*Comeau*], in part citing FR Scott, “Centralization and Decentralization in Canadian Federalism” (1951) 29:10 Can Bar Rev 1095 at 1095.

I. INTRODUCTION

In 1864, delegates from the British North American colonies met in Quebec City to negotiate the compact that would result in Confederation. While federalism would become a foundational feature of Canada's constitution,² it was not well defined nor well understood by these early framers.³ They were therefore seized by contemporary views of federalism in the United States,⁴ then engaged in the American Civil War.⁵ Many delegates viewed this armed conflict as an extension of jurisdictional conflict fostered by American constitutionalism, which they saw as giving excessive authority to the states.⁶ Accordingly, they adopted a stance favouring centralization of power to Parliament where conflict arose.⁷ As a result, interpretive constitutional doctrine tended to overlook normatively desirable and legally sanctioned mechanisms⁸ that foster the parallel exercise of federal and provincial power in their respective "sovereign spheres."⁹

The conference featured robust debate on whether more intergovernmental conflict arose through "concurrent" or "exclusive" areas of jurisdiction.¹⁰ Such discussion was warranted, as jurisdictional conflict between federated polities was unknown to British constitutional law in the late 19th century.¹¹ The delegates, however, exhibited a subtle sophistication in contemplating such conflict, viewing it as a practical reality of governance.¹² Indeed, the *Quebec Resolutions* borrowed from the United States the notion of a "supremacy provision," which would have voided the effects of provincial legislation to the extent of "repugnancy" with federal legislation.¹³

² See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32 [*Secession Reference*]. See also *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 821 [*Patriation Reference*], Martland & Ritchie JJ dissenting.

³ See Rachel Chagnon, "The Fathers of Confederation and the BNA Act: Constitutional Visions and Models" in Eugénie Brouillet, Alain-G Gagnon & Guy Laforest, eds, *The Quebec Conference of 1864: Understanding the Emergence of the Canadian Federation* (Montreal: McGill-Queen's University Press, 2018) 29 at 35–37.

⁴ See Christopher Moore, *Three Weeks in Quebec City: The Meeting that Made Canada*, ed by Margaret MacMillan & Robert Bothwell (Toronto: Penguin Canada Books, 2015) at 142.

⁵ See Chagnon, *supra* note 3 at 41.

⁶ *Ibid* at 36.

⁷ *Ibid* at 40.

⁸ See *Patriation Reference*, *supra* note 2 at 888.

⁹ *Interprovincial Co-operatives Ltd v R*, [1976] 1 SCR 477 at 521 [*Interprovincial Co-operatives*]. See also *Patriation Reference*, *ibid* at 821.

¹⁰ See Moore, *supra* note 4 at 142.

¹¹ See Chagnon, *supra* note 3 at 42.

¹² Robert C Vipond, Jacqueline D Krikorian & David R Cameron, "The Quebec Resolutions and the Ideas Left Behind" in Brouillet, Gagnon & Laforest, *supra* note 3, 282 at 292–93.

¹³ See "Report Of Resolutions adopted at a Conference of Delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island" in *Sir John A Macdonald Papers Volume 46* (City of Quebec, Public Archives Canada, 1866) 18176 at 18180 (Resolution 45: "[i]n regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with, the former"); and US Const art VI, cl 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). See also *McCulloch v Maryland*, 17 US 316 (1819). A doctrine of legislative repugnancy had developed within colonial jurisprudence that held colonial law invalid if inconsistent with Imperial law, eventually codified by the *Colonial Laws Validity Act*, 1865 (UK), 28 & 29 Vict, c 63. As an Imperial statute, it was clear that legislative inconsistency with the *British North America Act*, 1867 (UK), 30–31 Vict, c 3 would invoke this doctrine, however, less clear how inconsistency between federal and provincial legislation would be handled. See Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 93; Norman Siebrasse, "The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act" (1993) 1:1 Rev Const Stud 75.

While the supremacy provision did not make the final text of the *British North America Act*,¹⁴ courts would later discover a doctrine of federal paramountcy that would achieve its centralizing function.¹⁵ Moreover, absent a supremacy provision, early courts simply read away conflict.¹⁶ Provincial law was read down if not “directed solely to the purposes specified in sec. 92”¹⁷ reflecting Lord Atkin’s “watertight compartments” model of the division of powers,¹⁸ — later termed, “interjurisdictional immunity.”¹⁹ Thus, under both approaches, provincial legislation was rendered ineffectual whenever federal power was implicated.

Judges and scholars, however, have been critical of the centralizing character of these doctrines,²⁰ advancing instead a notion of flexible, or “co-operative federalism.”²¹ The Supreme Court of Canada has described this notion as a “flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation”; however, contemporary jurists have disagreed on the principle of co-operative federalism’s exact meaning, desirability, and its normative strength in resolving disputes over Canada’s division of powers.²² Perhaps seizing on this disagreement, “co-operative federalism” seems close to the lips of political leaders as being both a cause and cure to strife over matters of jurisdictional conflict in the federation today.²³

But what, if anything, does this invocation mean to courts in Canada? How should Canada’s federal structure engage with interjurisdictional conflict?

The traditional approach, as described by Peter Hogg, suggests co-operative federalism represents the complex interactions between the federal and provincial administrations. It accounts for the “network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process.”²⁴ While this principle has provided flexibility in the

¹⁴ See Vipond, Krikorian & Cameron, *supra* note 12 at 293–94.

¹⁵ *Ibid* at 294.

¹⁶ See also Robert C Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991) at ch 5–6.

¹⁷ *R v Great West Saddlery Company*, 58 DLR 1 at 26 (JCPC).

¹⁸ *Canada (AG) v Ontario (AG)*, [1937] UKPC 6 at 10 [*Weekly Rest Reference*] (“[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure”).

¹⁹ See *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at 16–20 [*OPSEU*] for the term’s first mention by the Supreme Court of Canada.

²⁰ See *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 45 [*Canadian Western Bank*]; *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 766 [*Bell Canada*]; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2013, release 1) at 15-30 [Hogg, *Constitutional Law*].

²¹ See e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 45 [*COPA*].

²² *Reference re Securities Act*, 2011 SCC 66 at para 57 [*Securities Reference*].

²³ See e.g. Simon Little, “John Horgan Video Pumps Budget, Slaps Alberta for ‘Unfair Trade Practices,’” *Global News* (19 February 2018), online: <globalnews.ca/news/4033963/john-horgan-video-pumps-budget-slaps-alberta-for-unfair-trade-practices/>; Charlie Smith, “Alberta Premier Rachel Notley Calls Kinder Morgan Pipeline the Poster Child for Cooperative Federalism,” *The Georgia Straight* (15 April 2018), online: <www.straight.com/news/1058456/alberta-premier-rachel-notley-calls-kinder-morgan-pipeline-poster-child-cooperative>.

²⁴ Hogg, *Constitutional Law*, *supra* note 20 at 5-46.

application of the division of powers doctrine,²⁵ Jean-François Gaudreault-Desbiens and Johanne Poirier have suggested that co-operative federalism has lacked normative legal strength even when invoked by litigants.²⁶

These conceptions, however, are doctrinally incomplete in light of prevailing jurisprudence, concluding most recently with *Reference re Pan-Canadian Securities Regulation*²⁷ and *Orphan Well Association v. Grant Thornton Ltd.*²⁸ This article contends that co-operative federalism now comprises two distinct branches. First, the intentional coordination by federal and provincial governments to enact policy that requires the constitutional powers of both,²⁹ in other words, a form of “executive federalism.”³⁰ While driven primarily by practical and political considerations, this branch of co-operative federalism also has distinctly legal aspects. Second, a new branch that directs courts to prefer interpretations of federal and provincial legislation that do not bring them into conflict, allowing them to operate conjunctively.³¹ This normatively driven approach restricts centralization and allows both orders of government to accomplish separate and distinct policy goals,³² thus promoting the parallel exercise of sovereign power.³³ Together, these two aspects compose a principle that strengthens Canada’s division of powers doctrine that fosters policy diversity and national unity.³⁴

The article attempts to define co-operative federalism and its normative qualities. It frames co-operative federalism in its history and jurisprudence, then considers its applicability in resolving contemporary interjurisdictional disputes. Part II introduces and delineates the two applications of co-operative federalism, the article defines: “coordinative co-operation” and “conjunctive co-operation.” Part III outlines the rationalization of co-operative federalism as “coordinative co-operation.” Part IV canvasses co-operative federalism’s formulation as “conjunctive co-operation.” Part V sketches the contours of a normative framework for these two applications of co-operative federalism and remarks on its implications. Part VI offers some concluding thoughts and attempts to place co-operative federalism within Canada’s constellation of constitutional doctrine.

²⁵ See *COPA*, *supra* note 21. See also *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 [*Quebec (Attorney General)*].

²⁶ See Jean-François Gaudreault-Desbiens & Johanne Poirier, “From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of The Canadian Constitution* (New York: Oxford University Press, 2017) 391 at 411.

²⁷ 2018 SCC 48 [*Pan-Canadian Securities Reference*].

²⁸ 2019 SCC 5 [*Orphan Well Association*].

²⁹ See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91–92.

³⁰ See J Peter Meekison, Hamish Telford & Harvey Lazar, *Canada: The State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen’s University Press, 2004) at 8.

³¹ See *Orphan Well Association*, *supra* note 28 at para 66.

³² *Ibid* at para 111.

³³ See *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 23 [*Lemare Lake*].

³⁴ *Contra* Asher Honickman, “Watertight Compartments: Getting Back to the Constitutional Division of Powers” (2017) 55:1 *Alta L Rev* 225 at 244.

II. CO-OPERATIVE FEDERALISM: TWO APPLICATIONS

Unlike some other federal jurisdictions, for example Germany or Switzerland, Canada has no constitutionally enshrined rule or principle obliging co-operation among its federal and provincial governments and legislatures.³⁵ This absence has meant that normative development of co-operative federalism in the Canadian context has largely occurred at the level of the judiciary and to a lesser extent, political actors. Though based on earlier pronouncements by the British Privy Council, the term, “co-operative federalism” was first used by the Supreme Court of Canada in 1976.³⁶ Since then, however, the Supreme Court has taken a piecemeal approach to co-operative federalism’s doctrinal contours; it has also been equivocal on the meaning and significance of its operative concept, namely “co-operation.”

The Supreme Court of Canada has suggested that co-operative federalism is an interpretive aid meant to accommodate overlapping jurisdiction so as to “encourage” intergovernmental co-operation, and “discourage” judicial interference with co-operative regulatory schemes provided they remain consistent with sections 91 and 92 of the *Constitution Act 1867*.³⁷ As the Supreme Court set out in *Comeau*: “[c]ooperative federalism describes situations where different levels of government work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own.”³⁸ While the lexicon of “co-operative federalism” is modern, this application is not,³⁹ with the Supreme Court deciding over the *vires* or validity of legislation as it pertains to the division of powers,⁴⁰ but seeking to utilize more flexible tools of interpretation.⁴¹ Importantly though, co-operative federalism does not place any limitations on the otherwise valid exercise of legislative authority.⁴² Thus, there is no constitutional “duty of co-operation” imposed on Parliament and the provincial legislatures; as the Supreme Court held in *Quebec (Attorney General)*:

Neither this Court’s jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle [co-operative federalism] to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another.⁴³

³⁵ See e.g. Gaudreault-Desbiens & Poirier, *supra* note 26 at 394–95.

³⁶ See *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 421–22.

³⁷ *Securities Reference*, *supra* note 22 at para 57. See also *OPSEU*, *supra* note 19 at 18.

³⁸ *Comeau*, *supra* note 1 at para 87.

³⁹ See e.g. *British Columbia (Attorney General) v Canada (Attorney General)*, [1937] 1 DLR 691 (UK PC), Atkin LJ [*Natural Products Marketing Reference*] (“it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired” at 695).

⁴⁰ *Comeau*, *supra* note 1 at para 87 (“[i]n division of powers cases where interlocking regulatory schemes have been impugned, the concept of cooperative federalism has often informed this Court’s assessment of *vires*”).

⁴¹ See *Canadian Western Bank*, *supra* note 20 at para 24; *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 27 [*Moloney*].

⁴² See *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 39 [*Rogers Communications*]. But see *Quebec (Attorney General)*, *supra* note 25 (“[t]he principle of cooperative federalism does not constrain federal legislative competence *in this case*” at para 3 [emphasis added]).

⁴³ *Quebec (Attorney General)*, *ibid* at para 20.

These judicial patterns consider the impact of the division of powers on joint endeavours between federal and provincial governments through the lens of validity — sorting legislative matters into Lord Atkin’s watertight compartments. This conception of co-operative federalism persists, and these tenets of co-operative federalism were recently invoked in the *Pan-Canadian Securities Reference*,⁴⁴ the latest attempt at consolidating Canada’s provincial securities regulators into a single (federal) agency.⁴⁵ Therein, the Supreme Court of Canada upheld the validity of a “co-operative capital markets regulatory system” — a coordinated regime where provinces would delegate their regulatory powers to a common regulator created by Parliament, which would also establish criminal offences pertaining to securities markets.⁴⁶ This case — and holding — is emblematic of the traditional application of co-operative federalism, what this article defines as “coordinative co-operation,” which will be explored further in Part III.

Another application of co-operative federalism, however, has begun to emerge. This application arises not when the power to legislate is in doubt, but when courts must engage with the doctrine of federal paramountcy⁴⁷ and interjurisdictional immunity⁴⁸ — notably in how these doctrines define conflict and transgression. As the Supreme Court of Canada directed in *Lemare Lake*:

Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a “restrained approach”, and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility.⁴⁹

Absent clear Parliamentary intention to the contrary, this approach to co-operative federalism directs courts to avoid interpretations of federal legislation that would invite conflict with provincial legislation.⁵⁰ This formulation of co-operative federalism was taken up again by the Supreme Court of Canada in *Orphan Well Association*, which considered whether certain provisions of Alberta’s *Oil and Gas Conservation Act*⁵¹ conflicted with the federal *Bankruptcy and Insolvency Act*.⁵² The context of this case engaged the interaction of provincial and federal laws designed to promote essentially distinct policy goals — in contrast to coordinative co-operation. This article calls this emergent formulation of co-operative federalism “conjunctive co-operation,” which will be investigated in Part IV.

⁴⁴ See *Pan-Canadian Securities Reference*, *supra* note 27 at paras 16–20.

⁴⁵ See e.g. *Securities Reference*, *supra* note 22.

⁴⁶ *Pan-Canadian Securities Reference*, *supra* note 27 at paras 1–2.

⁴⁷ See *Lemare Lake*, *supra* note 33 at para 21.

⁴⁸ See *Rogers Communications*, *supra* note 42 at para 39. See also *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 [*Lacombe*], Deschamps J dissenting (referring to the “relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces” at para 118), but cited with approval in *Lemare Lake*, *ibid* at para 22.

⁴⁹ *Lemare Lake*, *ibid* at para 21.

⁵⁰ *Ibid*.

⁵¹ RSA 2000, c O-6 [*OGCA*].

⁵² RSC 1985, c B-3 [*BIA*].

III. TRADITIONAL APPLICATION: VALIDITY OF COORDINATED LEGISLATIVE REGIMES

A. THE NEED FOR COORDINATION AND COLLABORATION

The story of co-operative federalism is as much a historical development as it is a political and legal one. Indeed, to the extent that any bright line separating federal and provincial powers into watertight compartments existed in 1867, it was already dimming by the start of the next century.⁵³ The Great Depression and World War II demonstrated that in a technologically advancing world, economic and social issues transcend both geography and jurisdiction. This prompted an expansion of activity by both federal and provincial governments, resulting in the development of the contemporary welfare state.⁵⁴

The clarity of the division of powers was further eroded by the fact that many of these emerging issues did not fall neatly within the enumerated classes of sections 91 and 92 of the *Constitution Act, 1867*.⁵⁵ Indeed, matters such as the environment, consumer protection, and labour relations now straddle federal and provincial jurisdiction;⁵⁶ in many other cases, the advantage simply went to the legislative order that entered the field first.⁵⁷ In other words, overlap and concurrency became normalized in the development and execution of public policy. To Richard Simeon, this overlap means that “coherent policies in fields which cut across jurisdictions, or in which the policy instruments to deal with them are shared, can only be achieved if there is some degree of coordination, or of collaborative decision-making.”⁵⁸

Canada’s fusion of executive and legislative power (in other words, responsible government or cabinet government)⁵⁹ has meant that intergovernmental processes occur at the executive level,⁶⁰ despite a lack of institutional machinery to support them⁶¹ — at least officially.⁶² This has given rise to the various intergovernmental conferences, specialist agencies, and summits,⁶³ most notably the First Ministers Conferences and more recently the “Council of the Federation.”⁶⁴ The resultant model is what has been termed, “executive

⁵³ See Kenneth Norrie, Richard Simeon & Mark Krasnick, *Federalism and Economic Union in Canada* (Toronto: University of Toronto Press, 1986) at 49.

⁵⁴ See Meekison, Telford & Lazar, *supra* note 30 at 5–6.

⁵⁵ Norrie, Simeon & Krasnick, *supra* note 53 at 50.

⁵⁶ See e.g. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 (environment); *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 367–68 (labour relations).

⁵⁷ Norrie, Simeon & Krasnick, *supra* note 53 at 51.

⁵⁸ Richard Simeon, “Intergovernmental Relations in Canada Today: Summary of Discussions” in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979) 1 at 4.

⁵⁹ See Hogg, *Constitutional Law*, *supra* note 20 at 9.1. This article uses the term, “government” to generally refer to the political exercise of executive and legislative power.

⁶⁰ See Meekison, Telford & Lazar, *supra* note 30 at 6.

⁶¹ Ronald L Watts, *Executive Federalism: A Comparative Analysis*, Research Paper No 26 (Kingston, Ont: Institute of Intergovernmental Relations, 1989) at 17.

⁶² See David Cameron & Richard Simeon, “Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism” (2002) 32:2 *Publius* 49 at 50 [Cameron & Simeon].

⁶³ See Watts, *supra* note 61 at 4.

⁶⁴ See Council of the Federation Secretariat, “About” (2019), online: *The Council of the Federation* <www.canadaspremiers.ca/about/> (representing the 13 provincial and territorial premiers).

federalism,”⁶⁵ or “collaborative federalism,” described as being “based on the premise that [federal, provincial, and territorial] governments possess strong fiscal and jurisdictional tools and that ... effective policy depends on coordination among them.”⁶⁶

Thus, coordinative co-operation arises when federal and provincial governments must turn their minds to collective action, where effective policy requires power wielded by each order of government, or demands collaboration in areas of concurrent jurisdiction.⁶⁷ It was along these lines that in the *Natural Products Marketing Reference*, Lord Atkin suggested that “satisfactory results for both [Canada and the provinces] can only be obtained by co-operation.”⁶⁸ But *how* exactly to co-operate? As Hogg observes: “[t]heir lordships did not concern themselves with the great difficulties of securing co-operation, nor did they indicate what forms of co-operation would be constitutionally permissible.”⁶⁹ However, a number of approaches have emerged for federal and provincial governments to act in constitutional concert with one another.⁷⁰

B. CO-OPERATION THROUGH EXECUTIVE COORDINATION

1. CONJOINT LEGISLATIVE SCHEMES

As has already been noted, the increasing complexity and scope of the state project identified several policy realms where neither Parliament nor the provincial legislatures are fully competent to act effectively.⁷¹ *Gold Seal Ltd. v. Alberta (Attorney-General)*,⁷² decided in 1921, was an early example of Canada’s federal and provincial governments turning their mind to a common subject matter through legislation.⁷³ *Gold Seal* concerned the validity of provisions of the *Canada Temperance Act* that prohibited liquor importation into a dry province.⁷⁴ Because the provinces were not constitutionally competent to regulate interprovincial trade,⁷⁵ the federal legislation was complementary to provincial measures

⁶⁵ See Donald V Smiley, *Constitutional Adaptation and Canadian Federalism Since 1945*, Documents of the Royal Commission on Bilingualism and Biculturalism #4 (Ottawa: Queen’s Printer, 1970); Donald V Smiley, *Canada in Question: Federalism in the Seventies* (Toronto: McGraw Hill Ryerson, 1972); Donald V Smiley, “An Outsider’s Observations of Federal-Provincial Relations Among Consenting Adults” in Richard Simeon, ed, *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979) at 105.

⁶⁶ Cameron & Simeon, *supra* note 62 at 55 (note Cameron and Simeon make a distinction between provincial and territorial executives acting together with and without federal involvement, however, this distinction is not consequential to this analysis). See also Hogg, *Constitutional Law*, *supra* note 20 at 5-46.

⁶⁷ See also Simeon, *supra* note 58 at 4.

⁶⁸ *Natural Products Marketing Reference*, *supra* note 39 at 695.

⁶⁹ Hogg, *Constitutional Law*, *supra* note 20 at 14.3(b).

⁷⁰ See generally Gerard V La Forest, “Delegation of Legislative Power in Canada” (1975) 21:1 McGill LJ 131.

⁷¹ See Hogg, *Constitutional Law*, *supra* note 20 at 14.3(a). Here, “effectively” may refer to the constitutional authority to legislate over a particular matter or the policy desirability of a particular order of government acting. See Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74:1 Sask L Rev 21 at 27-31 [Newman, “Subsidiarity”]. See also *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3 (“law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity”).

⁷² [1922] 62 SCR 424 [*Gold Seal*].

⁷³ See also *Comeau*, *supra* note 1 at paras 89-95.

⁷⁴ RSC (1906) c 152, Part IV, as amended by *An Act to amend the Canada Temperance Act*, C 1919, 10 Geo V, c 8 [*Canada Temperance Act*].

⁷⁵ See the *Constitution Act, 1867*, *supra* note 29, s 121.

implementing prohibition policies.⁷⁶ Thus, *Gold Seal* is representative of the notion of “interlocking” schemes arranged through coordination at the political level⁷⁷ while also respecting the inherent bounds of sections 91 and 92 of the *Constitution Act, 1867*,⁷⁸ and was endorsed as such by the Supreme Court of Canada in *Comeau*.⁷⁹

2. CONJOINT ADMINISTRATIVE SCHEMES

Beginning in the 1930s and 1940s, Canadian governments started to look to delegative models of co-operation to accomplish shared policy goals that fell across constitutional boundaries. This has included old age pensions, agricultural marketing, and famously (or infamously) securities regulation.⁸⁰ The first — and ultimately unsuccessful — model for this kind of co-operation was legislative “inter-delegation,” wherein federal power was delegated to the provinces or vice versa, allowing governments to effectively agree for specific purposes to lend each other needed legislative powers.⁸¹ By 1950, Canada was contemplating changes to the old age pension system that would emphasize universality over means testing.⁸² Parliament would create a pension system financed through contributions from employers and employees, as well as the federal and provincial governments. In turn, the provinces proposed to fund their contributions through an indirect tax. Both of these measures were constitutionally questionable, since the Privy Council had previously opined that a contributory pension system would be ultra vires Parliament,⁸³ and since indirect taxation is expressly beyond the scope of provincial jurisdiction.⁸⁴ The attempt involved reciprocal delegations; however, it was the opinion of the Nova Scotia Court of Appeal, and later the Supreme Court of Canada, that such delegation was unconstitutional, with Chief Justice Thibaudeau Rinfret holding that “section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other.”⁸⁵ The matter was resolved through constitutional amendment granting Parliament the requisite powers for the pension scheme, but other models also emerged in the wake of the legislative inter-delegation problem.⁸⁶

⁷⁶ This combination of federal and provincial measures, where the germane provisions of the *Canada Temperance Act*, *supra* note 74 applied only to dry provinces, is also an example of conditional legislation, this may be another tactic for coordinative federalism, but is beyond the scope and consideration of this article. For more on conditional and referential legislation, see La Forest, *supra* note 70 at 137–40. This legislative mechanism, however, may also be used unco-operatively to assert federal jurisdiction over provincial jurisdiction. See e.g. Fenner L Stewart & Scott A Carrière, “Carbon Pricing, Federalism, and Enforcement” in Allan E. Ingelson, ed, *Environment in the Courtroom*, 2nd ed (Calgary: University of Calgary Press) [forthcoming in 2021].

⁷⁷ *Quebec (Attorney General)*, *supra* note 25 at paras 17–19.

⁷⁸ See e.g. *Securities Reference*, *supra* note 22 at para 57.

⁷⁹ See *Comeau*, *supra* note 1 at para 92. See also *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 [*Agricultural Products Marketing Reference*], Pigeon J (“[i]n my view this [conjoint legislative scheme] is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme ... [that is] orderly and efficient” at 1296).

⁸⁰ See generally *Securities Reference*, *supra* note 22; *Pan-Canadian Securities Reference*, *supra* note 27. *Ibid.*

⁸¹ See Canadian Museum of History, “The History of Canada’s Public Pensions,” online: <www.history.museum.ca/cmhc/exhibitions/hist/pensions/cpp1sp_e.html>.

⁸² See generally *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 684 (UK PC). See *Constitution Act, 1867*, *supra* note 29, s 92(2).

⁸³ See *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31 at 34–35 [*Nova Scotia Inter-delegation*].

⁸⁴ See *Constitution Act, 1867*, *supra* note 29, s 94A.

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A slightly different form of inter-delegation came before the courts in *P.E.I. Potato Marketing Board v. Willis*,⁸⁷ decided two years after *Nova Scotia Inter-delegation*, in 1952. This time, however, the validity of scheme was upheld by the Supreme Court of Canada. Parliament had given the Governor General in Council the power to delegate to provincial marketing boards interprovincial and international export authority. Since Prince Edward Island had by then established such a board for the marketing of potatoes, the P.E.I. Potato Marketing Board, and the federal government made the authorized delegations to the board with respect to potatoes produced in the province. The purpose of these measures was to ensure that the provincial board was possessed of the totality of regulatory power over P.E.I. potatoes.⁸⁸ Thus, this system of “administrative inter-delegation”⁸⁹ allows for federal and provincial governments to create agencies and confer on them powers to receive delegated authority from the other,⁹⁰ although the Supreme Court did not expound greatly on how this type of delegation was distinguishable from that in *Nova Scotia Inter-delegation*.⁹¹ Its significance, however, was to allow for federal and provincial governments to coordinate on the creation of such a board and associated regulatory scheme. This “co-operative” element of this mechanism was explicitly recognized in the *Agricultural Products Marketing Reference*,⁹² which also concerned administrative inter-delegation involving agricultural products marketing.

Administrative inter-delegation has provided for effective schemes coordinated by federal and provincial governments that demonstrate “Canadian federalism’s constitutional creativity and cooperative flexibility.”⁹³ For example, petroleum resources off Newfoundland’s coast are governed by a federal-provincial regime comprised of the *Canada Oil and Gas Operations Act*,⁹⁴ *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*,⁹⁵ and *Canada–Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*.⁹⁶ The scheme reflects a political compromise between Canada and Newfoundland for joint management of petroleum resources,⁹⁷ despite their sole ownership by Canada as determined by the Supreme Court in *Reference re Newfoundland Continental Shelf*.⁹⁸ The effect of the federal legislation is to devolve the federal government’s interests to Newfoundland,⁹⁹ with developments governed by the province’s

⁸⁷ [1952] 2 SCR 392 [*Willis*].

⁸⁸ See Hogg, *Constitutional Law*, *supra* note 20 at 14.3(b). See also La Forest, *supra* note 70 at 141. This objective also invokes notions of the principle of subsidiarity as discussed by Newman, “Subsidiarity,” *supra* note 71 at 27–31. The relationship between co-operative federalism and subsidiarity will be taken up in Part V below.

⁸⁹ See Hogg, *Constitutional Law*, *supra* note 20 at 14.3(b).

⁹⁰ See *Willis*, *supra* note 87 at 414–15.

⁹¹ See e.g. Hogg, *Constitutional Law*, *supra* note 20 at 14.3(b). But see Bora Laskin et al, “Case and Comment” (1956) 34:2 Can Bar Rev 188; and La Forest, *supra* note 70 (suggesting that *Willis* be interpreted as permitting inter-delegation between the federal Parliament and provincial legislatures in relation to matters on which the delegated body is independently competent). See also W R Lederman, “Some Forms and Limitations of Co-operative Federalism” (1967) 45:3 Can Bar Rev 409.

⁹² *Agricultural Products Marketing Reference*, *supra* note 79 at 1296, Pigeon J.

⁹³ *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20 at para 15 [*Pelland*].

⁹⁴ RSC 1985, c O-7.

⁹⁵ SC 1987, c 3 [*Federal Accord Act*].

⁹⁶ RSNL 1990, c C-2.

⁹⁷ See Shawn Denstedt & RJ (Jack) Thrasher, “The Accord Acts 20 Years Later” (2007) 30:2 Dal LJ 287 at 289.

⁹⁸ [1984] 1 SCR 86 at 128–29.

⁹⁹ See Alexander (Sandy) MacDonald & Nicholas Crosbie, “The Land Tenure System in the Newfoundland and Labrador Offshore Regulatory Regime: Review, Analysis and Current Issues” (2014) 37:1 Dal LJ 1 at 5.

*Petroleum and Natural Gas Act*¹⁰⁰ and subject to the regulatory authority of the Canada–Newfoundland and Labrador Offshore Petroleum Board, a board with delegated authority from both Parliament and the provincial legislature. In another example, the *Impact Assessment Act* allows the federal government to “substitute” provincial environmental assessment processes for federal ones under certain conditions, effectively delegating such authority to provincial agencies and avoiding unnecessary duplication of regulatory processes.¹⁰¹

As noted, this co-operative pattern of administrative delegation was on offer in the Supreme Court’s most recent consideration of capital markets regulation in the *Pan-Canadian Securities Reference*, which built off previously unsuccessful attempts to establish a national securities regulator. Just as with old age pensions and agricultural products marketing, attempts have been made to consolidate or nationalize Canada’s disparate system of provincial (and territorial) securities regulators since the 1930s.¹⁰² In the prior *Securities Reference*, the Supreme Court considered the validity of a federal scheme that would have assumed the entire field of securities regulation under the “General Trade” branch of Parliament’s power over trade and commerce flowing from section 91(2) of the *Constitution Act, 1867*.¹⁰³ In other words, the approach was not a co-operative one.¹⁰⁴ The Supreme Court found the federal government’s plan at that time ultra vires Parliament, noting primarily that such a scheme does not implicate trade in general, but rather securities in particular, a matter consigned to the provinces by the *Constitution Act, 1867*.¹⁰⁵ Thus, most of the legislative power over securities and capital markets rests with the provinces, even if the most efficient policy apparatus would exist with Parliament.¹⁰⁶

The system proposed in the *Pan-Canadian Securities Reference* made use of both a conjoint legislative scheme and an administrative delegation, building off the Supreme Court’s decision in the *Securities Reference*,¹⁰⁷ to arrive at a coordinated,¹⁰⁸ co-operative scheme whose validity was ultimately upheld under Parliament’s criminal and general trade

¹⁰⁰ RSNL 1990, c P-10. See *Federal Accord Act*, *supra* note 95, s 97.

¹⁰¹ SC 2019, c 28, s 1, ss 31–35. Similar legislation exists at the provincial level, allowing for federal agencies’ processes to be treated as equivalent under provincial processes. See e.g. *Environmental Assessment Act*, SBC 2002, c 43, s 27. See also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 152, McLachlin CJC [AHRA Reference].

¹⁰² See e.g. David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th Ed (Markham, ON: LexisNexis, 2014) at 634–62.

¹⁰³ See generally *Securities Reference*, *supra* note 22. See also *Pan-Canadian Securities Reference*, *supra* note 27 at paras 10–15.

¹⁰⁴ See *Securities Reference*, *ibid* (“[i]t is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another” at para 7). Ontario was the only province who supported Canada’s case; British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, and New Brunswick all intervened to oppose the implementation of the proposed legislation. *Ibid*.

¹⁰⁵ See *Securities Reference*, *ibid* at para 125.

¹⁰⁶ See Canada, Expert Panel on Securities Regulation, *Creating a Canadian Advantage in Global Capital Markets* (Ottawa: Her Majesty the Queen in Right of Canada, 2007) at 5.

¹⁰⁷ See *Securities Reference*, *supra* note 22 (“[n]o doubt the provinces possess constitutional capacity to enact uniform legislation on most of the administrative matters.... By way of administrative delegation, they could delegate provincial regulatory powers to a single pan-Canadian regulator” at para 118).

¹⁰⁸ See Cooperative Capital Markets Regulatory System, “About” (2020), online: *Cooperative Capital Markets Regulatory System* <www.ccmr-ocrmc.ca/about/>. See e.g. James Fitz-Morris, “Saskatchewan and N.B. Join ‘Nation-Building’ Securities Regulator,” *CBC News* (9 July 2014), online: <www.cbc.ca/news/politics/saskatchewan-and-n-b-join-nation-building-securities-regulator-1.2700829> (explaining that agreement to join in the co-operative scheme was concluded between federal and provincial executives).

powers.¹⁰⁹ As noted, the proposed federal-provincial regime would establish a co-operative securities regulator,¹¹⁰ and was composed broadly of two legislative elements, one federal and one provincial. The federal legislation utilized Parliament's exclusive power over criminal law to establish criminal offences pertaining to securities, and provisions aimed at preventing and mitigating "systemic risk" in capital markets, as well as creating a national securities regulator.¹¹¹ The provincial element was a model securities act to be legislated in the participating provinces that would delegate provincial regulatory power to the national regulator established by Parliament.¹¹² Another aspect of the scheme was to grant supervisory authority to a board composed of the responsible minister in each of the participating provinces.¹¹³

The Supreme Court's reasoning expressly invoked co-operative federalism in its determination of the scheme's validity pursuant to the division of powers.¹¹⁴ The Supreme Court emphasized in particular how co-operative federalism is used to support the division of powers by "fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries."¹¹⁵ Importantly, the decision directly implicated how co-operative federalism permits coordination by federal and provincial governments in exercising their constitutional competencies together to establish regulatory systems that neither could enact on their own.¹¹⁶ The Supreme Court expounded on how this kind of co-operative federalism works in context:

[W]e are of the view that the provinces, acting alone or in concert, would be incapable of enacting a scheme like the one set out in the Draft Federal Act. Relying on the principle of parliamentary sovereignty, this Court in *Reference re Securities Act* observed that "[t]he provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection", given that each of the provinces "retain[s] the ability to resile from an interprovincial scheme". In other words, the fact that any one province can opt against participating in (or can subsequently resile from) such a cooperative scheme could seriously impair that scheme's capacity to protect the Canadian economy from systemic risk. The Draft Federal Act, with its carefully tailored scope, constitutes a response to this provincial incapacity, with Parliament stepping in to fill this constitutional gap.¹¹⁷

¹⁰⁹ See *Pan-Canadian Securities Reference*, *supra* note 27 at paras 21, 98, 116.

¹¹⁰ This time, the proposed measures were supported by Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon; they were opposed by Alberta and Quebec. See *Pan-Canadian Securities Reference*, *ibid*.

¹¹¹ *Ibid* at paras 2, 21.

¹¹² *Ibid* at para 21.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* ("[a]mong the issues in the present case is whether the Cooperative System is consistent with this co-operative approach to the constitutional division of federal and provincial powers" at para 20).

¹¹⁵ *Ibid* at para 18.

¹¹⁶ *Ibid* at para 19.

¹¹⁷ *Ibid* at para 113 [citations omitted]. The Supreme Court went on to affirm that securities regulation is composed of federal and provincial aspects under the double aspect doctrine, which "permits the provinces to legislate in pursuit of a valid provincial objective and Parliament to do the same in pursuit of a separate federal objective. While provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so from a *local* perspective and therefore in a manner that cannot effectively address *national* concerns which transcend their own respective concerns," *ibid* at para 114. See also *Securities Reference*, *supra* note 22 at para 66. With this assertion, however, came reiteration of co-operative federalism's limitation that it cannot modify the division of powers in any context, nor make *ultra vires* legislation *intra vires*, meaning the validity of either federal or provincial legislation, even in a coordinated and co-operative regime, must be affirmed independently from one another, *ibid* at paras 114, 118. See also *Rogers Communications*, *supra* note 42 at para 39; *Quebec (Attorney General)*, *supra* note 25 at para 19.

These applications demonstrate that co-operative federalism — when rationalized as coordinative co-operation — may provide additional normative rationale when characterizing and classifying legislation's pith and substance when the full complement of constitutional power (that is, both federal and provincial) over a subject matter is brought to bear. In other words, this model provides interpretive flexure in the division of powers for effective policy without recourse to express constitutional change.¹¹⁸

IV. EMERGENT APPLICATION: OPERATIVITY¹¹⁹ OF INDEPENDENT LEGISLATIVE REGIMES

A. THE CONCERN OF CENTRALIZING LEGISLATIVE POWER

As much, however, as the federal and provincial governments may pursue policy goals together through legislation, the converse is also true. Indeed, Parliament and the provincial legislatures each possess powerful, sovereign authority and may put them to use to pursue policies distinct from one another.¹²⁰ As the Supreme Court of Canada put in the *Secession Reference*, Canadian federalism recognizes “the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.”¹²¹ However, in a multi-juridical federation such as Canada, interaction — or even conflict — between federal and provincial law is inevitable.¹²² Having an effective, logical, and just system of resolving this type of conflict is therefore extremely important in a federal system.

As has been noted, the *Constitution Act, 1867* did not include a supremacy provision,¹²³ but the courts developed a doctrine of federal paramountcy that achieves the same ends.¹²⁴ The basic premise of the doctrine of federal paramountcy is that where valid federal and provincial laws conflict with one another, the federal law prevails and the provincial law is “inoperative” to the extent of the conflict.¹²⁵ Another doctrine at play is interjurisdictional immunity, which limits the applicability of a generally valid law where it purports to apply to a matter outside the jurisdiction of the enacting body.¹²⁶ While this could implicate laws passed by either Parliament or provincial legislatures,¹²⁷ the doctrine has only been applied

¹¹⁸ See Cameron & Simeon, *supra* note 62 at 55; Hogg, *Constitutional Law*, *supra* note 20 at 5-46.

¹¹⁹ Referring to the doctrine of federal paramountcy. This article will also briefly consider applicability, referring to the doctrine of interjurisdictional immunity.

¹²⁰ See *Interprovincial Co-operatives*, *supra* note 9 at 521.

¹²¹ *Secession Reference*, *supra* note 2 at para 58.

¹²² Hogg, *Constitutional Law*, *supra* note 20 at 16.1.

¹²³ See Vipond, Krikorian & Cameron, *supra* note 12 at 293-94.

¹²⁴ It has been suggested that the constitutional source for the doctrine of federal paramountcy is either the opening or closing words of section 91 of the *Constitution Act, 1867*, *supra* note 29. See *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004 (“[t]he *non obstante* clause of s. 91 has, however, another office, another aspect, and that is to declare the paramountcy of valid federal legislation as against any incompatible provincial legislation and as against any other provisions of the Act of 1867” at 1031).

¹²⁵ See *Moloney*, *supra* note 41 at para 29; *Canadian Western Bank*, *supra* note 20 at para 69.

¹²⁶ See *Canadian Western Bank*, *ibid* at para 34.

¹²⁷ *Ibid* at para 35.

to provincial legislation.¹²⁸ Where a law transgresses its jurisdictional limit, it is held inapplicable to the extra-jurisdictional matter.¹²⁹ Both doctrines are only applied to valid legislation, meaning the crux of both rules is in how to define conflict (in the case of paramountcy), or how to delimit an interjurisdictional immunity.¹³⁰ The more liberal the definition, the more courts will find provincial law ineffectual in the face of federal legislative expression.¹³¹

The inherently centralizing tendency of these doctrines implicates the tension that has long existed in Canada with respect to whether provinces are legislatively “subordinate” to Parliament.¹³² In *Re The Initiative and Referendum Act*, the Privy Council stated that the *Constitution Act, 1867*’s purpose was not “to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest.”¹³³ In the *Secession Reference*, the Supreme Court of Canada felt this statement supported the constitutional imperative of diversity,¹³⁴ which logically includes the legislative space for diverse policy action.¹³⁵ In one sense, this pronouncement suggests that Parliament’s authority was to be limited to national concerns; however, history demonstrates that provincial pursuits have often been stymied on the basis of Parliament’s national interest.¹³⁶ Again, with the great complexity of the state project, the line between where the exercise and application of one set of powers ends and the other begins may at times be blurred, leading to legislative concurrency between Parliament and the legislatures.¹³⁷

¹²⁸ Academic commentary has speculated on the scope of whether and how interjurisdictional immunity might apply to provincial heads of power (i.e., against federal legislation), however the Supreme Court of Canada has not clarified this position. See e.g. Jonathan Penner, “The Curious History of Interjurisdictional Immunity and Its (Lack of) Application to Federal Legislation” (2011) 90:1 Can Bar Rev 1; Dwight Newman, “Canada’s Re-Emerging Division of Powers and the Unrealized Force of Reciprocal Interjurisdictional Immunity” (2011) 20:1 Const Forum Const 1; 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.

¹²⁹ See *COPA*, *supra* note 21 at para 27.

¹³⁰ For the proper order of application of these rules, see Fenner L Stewart, “Interjurisdictional Immunity, Federal Paramountcy, Co-operative Federalism, and the Disinterested Regulator: Exploring the Elements of Canadian Energy Federalism in the *Grant Thornton Case*” (2018) 33:2 BFLR 227 at 248–49.

¹³¹ See W R Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada” (1963) 9:3 McGill LJ 185 at 192 [Lederman, “Concurrent Operation”].

¹³² See e.g. *Mercer v Attorney General for Ontario*, (1881) 5 SCR 538 [*Mercer*], Gwynne J dissenting (“[The *Constitution Act, 1867*] expresses in sufficiently clear language the plain intent of the framers of that Act to have been, that the plan designed by them... was, to confer upon the Dominion... national power [and]... certain subordinate bodies called provinces having jurisdiction *exclusive* though not ‘Sovereign’ over matters specially assigned to them of a purely local, municipal and private character” at 711).

¹³³ [1919] 48 DLR 18 at 22 [*Initiative Reference*].

¹³⁴ See *Secession Reference*, *supra* note 2 at para 58.

¹³⁵ For a celebrated judicial decision supporting policy diversity in the United States federal context, see *New State Ice Co v Liebmann*, 285 US 262 (1932), Brandeis J (“[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country” at 311).

¹³⁶ For an early example of federal paramountcy, see *Spooner Oils Ltd v Turner Valley Gas Conservation*, [1933] SCR 629. For an early example of interjurisdictional immunity, see *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207.

¹³⁷ See Lederman, “Concurrent Operation,” *supra* note 131 at 195. See also *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 190–91 [*Multiple Access*].

However, increasing concurrency, combined with a robust doctrine of federal paramountcy — where conflict is defined liberally — risks the very subordination of the provincial legislatures that the Supreme Court of Canada has stated are to be considered sovereign.¹³⁸ Recognizing this potential in *Bell Canada*, Justice Jean Beetz urged restraint with respect to paramountcy and re-emphasis on categorizing legislation into “exclusive” authorities:

The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the *Constitution Act, 1867* and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution.¹³⁹

Some, such as Asher Honickman, have urged a return to this conception as a means for safeguarding provincial legislative authority, and with it, provincial autonomy.¹⁴⁰ This approach advocates for interpretations of federal and provincial legislation along the lines of Lord Atkin’s watertight compartments, including stricter but more frequent recourse to interjurisdictional immunity, which Honickman sees as derivative of courts’ classification of laws into the *Constitution Act, 1867*’s heads of power.¹⁴¹ For Honickman, the Supreme Court of Canada’s more “flexible” approach is in contrast to the *Constitution Act, 1867*’s textual meaning.¹⁴² In some ways, this approach echoes early division of powers jurisprudence, where “conflict” between federal and provincial legislation was read away in favour resolving disputes by recourse to sections 91 and 92 of the *Constitution Act, 1867*.¹⁴³ Modern courts have, from time to time, adopted this stance as well;¹⁴⁴ however, as Hogg notes, the correctness of this approach has been uneven,¹⁴⁵ and the Supreme Court has decidedly moved away from this model, toward “a fair amount of interplay and indeed overlap between federal and provincial powers.”¹⁴⁶ For Bruce Ryder, however, this flexible approach to federalism presents a “real danger to the federal principle.”¹⁴⁷ Viewing provincial

¹³⁸ See Lederman, “Concurrent Operation,” *ibid* (“[n]o doubt the doctrine of Dominion paramountcy means that in a concurrent field the federal parliament is the senior partner” and that the provinces are the “junior partner” at 195).

¹³⁹ *Bell Canada*, *supra* note 20 at 766.

¹⁴⁰ See Honickman, *supra* note 34 at 249–51.

¹⁴¹ *Ibid* (“circumstances where a provincial law passed broadly under the property and civil rights power would, in its widest application, apply to federal works and undertakings” at 249).

¹⁴² *Ibid* at 246.

¹⁴³ See Vipond, *supra* note 16. See also *Weekly Rest Reference*, *supra* note 18.

¹⁴⁴ See e.g. *Clark v Canadian National Railway Co.*, [1988] 2 SCR 680 at 708–09 where the Supreme Court of Canada found section 342(1) of the *Railway Act*, RSC 1970, c R 2, which purported to set a limitation period on a cause of action arising under provincial law, ultra vires Parliament, meaning that New Brunswick’s *Limitation of Actions Act*, RSNB 1973, c L 8 would apply to actions concerning railways, which are federal works and undertakings pursuant to section 92(10)(a) of the *Constitution Act, 1867*, *supra* note 29. See also Penner, *supra* note 128 at 25. But see Biddulph, *supra* note 128 at n 22; *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23.

¹⁴⁵ Where the Supreme Court of Canada has confused of validity with consistency, either by treating the aspect doctrine as relevant to consistency, or by treating the existence or terms of one law as relevant to the validity of the other, or by treating inconsistency as a withdrawal of provincial power to enact the inconsistent legislation. For an exhaustive list of such cases, see Hogg, *Constitutional Law*, *supra* note 20 at 16.5(a), n 79.

¹⁴⁶ *OPSEU*, *supra* note 19 at 18, cited in *Canadian Western Bank*, *supra* note 20 at para 36.

¹⁴⁷ Bruce Ryder, “Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers” (2011) 54 SCLR 565 at 594 [Ryder, “Equal Autonomy”]. See also Bruce Ryder, “The End of Umpire? Federalism and Judicial Restraint” (2006) 34 SCLR (2d) 345 at 372–77.

autonomy as an animating aspect of the federalism principle, Ryder echoes Beetz' concern for the application of federal paramountcy as having the effect of subordinating the provinces to the federal government:

The provinces have only a conditional autonomy in areas of *de jure* or *de facto* concurrent jurisdiction. Rather than exercising guaranteed, exclusive jurisdiction, they are put in the position of supplicants to the federal government.... For this reason, the combined effect of the federal paramountcy rule and the growth of areas of *de facto* concurrency poses a serious threat to the federal principle and its corollary, the principle of equal autonomy.¹⁴⁸

So in a centralizing world, what judicial recourse do provinces have to protect their legislative autonomy?¹⁴⁹

B. *ORPHAN WELL ASSOCIATION*¹⁵⁰ AND THE RISE OF CONJUNCTIVE CO-OPERATION

Redwater Energy Corporation (Redwater) was a publicly traded oil and gas company that was licensed under the jurisdiction of the Alberta Energy Regulator (AER) with respect to several properties. The AER regulates under a complex regime dictated by the *Oil and Gas Conservation Act*,¹⁵¹ and the *Pipeline Act*.¹⁵² The AER had set conditions on Redwater pertaining to abandonment and environmental clean-up of some of those properties. The conditions placed restrictions on transfers of both valuable properties and those of net liability. Such conditions are imposed to ensure net funds are available to undertake environmental clean-up,¹⁵³ avoiding the environmental liabilities accruing to taxpayers through transfer of the implicated sites to the Orphan Well Association (OWA), an arm's length non-profit that assumes this work on behalf of the provincial government.¹⁵⁴

Redwater suffered financial setbacks, and when it was unable to meet its financial obligations, its principal secured creditor, ATB Financial, commenced enforcement proceedings, and Grant Thornton was appointed receiver under the (federal) *Bankruptcy and Insolvency Act*.¹⁵⁵ The AER took the position that its conditions on Redwater's properties were to be discharged by the receiver prior to the distribution of funds to creditors, secured or otherwise, owing to the AER being a regulator, not a creditor, and as such the conditions were not "provable claims."¹⁵⁶

¹⁴⁸ Ryder, "Equal Autonomy," *ibid* at 595.

¹⁴⁹ See *Canadian Western Bank*, *supra* note 20 at para 45.

¹⁵⁰ This case has also been called the Redwater case since the insolvent corporation in the case was named Redwater Energy Corporation and the case at the Court of Queen's Bench of Alberta was at one time called *Re Redwater Energy Corporation*. See *Re Redwater Energy Corporation*, 2016 ABQB 278. See also Stewart, *supra* note 130 at 227.

¹⁵¹ *OGCA*, *supra* note 51.

¹⁵² RSA 2000, c P-15.

¹⁵³ See *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process*, Alberta Energy Regulator (May 2013).

¹⁵⁴ See Stewart, *supra* note 130 at 230–35. See also Richard Butler, "Understanding Redwater" (2019) 34 BFLR 461 at 464–66; Scott Carrière, "Not Your Grandfather's Cooperative Federalism: Constitutional Themes at the Supreme Court Hearing of Redwater" (2 April 2018), online (blog): <ablawg.ca/wp-content/uploads/2018/04/Blpg_SC_SCCRedwater.pdf>.

¹⁵⁵ *BIA*, *supra* note 52.

¹⁵⁶ *Ibid*, s 2. The AER's position mirrored the one taken in *PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd* (1991), 81 DLR (4th) 280 (Alta CA).

In a majority ruling, the Alberta Court of Appeal held the paramountcy doctrine was engaged by the operation of the provincial regime,¹⁵⁷ including the AER's orders made pursuant to it: (1) were in conflict with section 14.06 of the *BIA*, interpreted as exempting trustees and receivers from personal liability, and allowing trustees and receivers to disclaim assets, as well as provisions respecting the priority of remediation costs; and (2) frustrated the federal purpose of managing the winding up of insolvent corporations and settling the priority of claims against them by granting the regulator a form of super-priority over secured creditors.¹⁵⁸ In so doing, the Alberta Court of Appeal also found that the AER's orders were in fact "provable claims" in bankruptcy by reference to the tripartite test in *Newfoundland and Labrador v. AbitibiBowater Inc.*,¹⁵⁹ another case involving interactions between provincial environmental enforcement and the federal bankruptcy regime.

The Supreme Court of Canada, however, allowed the appeal, relying expressly on co-operative federalism for guidance in the application of the doctrine of federal paramountcy. The Supreme Court used co-operative federalism as an interpretative tool to identify the correct interpretation of the germane federal and provincial legislation. Moreover, Chief Justice Richard Wagner, speaking for the majority, would not entertain the theoretical potential for violation of the doctrine of federal paramountcy, but only an actual one before he would render the provincial law inoperative:

I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism.

...

To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism.¹⁶⁰

Using co-operative federalism as a guiding principle, the majority found no constitutional conflict between the provincial law and the priority scheme in the *BIA*.¹⁶¹ This case has cleared the path for co-operative federalism's future development as an interpretative tool for guiding the application of the doctrine of federal paramountcy.

While the Supreme Court of Canada's invocation of co-operative federalism in *Orphan Well Association* is arguably not new, its use in assessing a provincial statute's operativity cements a new application of it.¹⁶² Specifically, this application is as an interpretive aid in the definition and determination of conflict between Parliament and provincial legislatures: "[w]hile co-operative federalism does not impose limits on the otherwise valid exercise of

¹⁵⁷ See *OGCA*, *supra* note 51, ss 29, 106.

¹⁵⁸ *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 89, aff'g 2016 ABQB 278.

¹⁵⁹ 2012 SCC 67 at para 29 [*AbitibiBowater*].

¹⁶⁰ *Orphan Well Association*, *supra* note 28 at paras 105, 111.

¹⁶¹ *Ibid* at para 162.

¹⁶² See Parts II–III, above.

legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.”¹⁶³ This statement is significant for two reasons. First, it divides co-operative federalism along the same lines as this article, recognizing that co-operative federalism does not limit legislatures in assessments of validity, but has a role to play in paramountcy. Second, and more importantly, it adopts an interpretive stance that favours the operativity of provincial law, that is, one that favours legislative conjunction.

The majority constructed this framework from its previous decisions in *Lemare Lake* and *Moloney*, respectively, that courts should favour “harmonious interpretations of federal and provincial legislation” absent a clear contrary intention and that as such,¹⁶⁴ courts should presume that “Parliament intends its laws to co-exist with provincial laws.”¹⁶⁵ These notions are also reflective of the Supreme Court’s view of co-operative federalism calling on courts to “consider how different interpretations impact the balance between federal and provincial interests,”¹⁶⁶ but that its function is ultimately to “avoid unnecessary constraints on provincial legislative action.”¹⁶⁷ Thus, this approach delineates the bounds between separate federal and provincial interests and the “common interests” invoked in the *Initiative Reference*.¹⁶⁸

Contrary then to Honickman’s concerns, this emergent application of co-operative federalism, which promotes legislative conjunction, may actually serve to constrain the centralizing nature of the doctrine of federal paramountcy, just in the way Justice Beetz was concerned for in 1988, however, through a different judicial mechanism. Admittedly, this approach does not in itself vacate federal law from any particular regulatory field,¹⁶⁹ but the foregoing demonstrates that the court’s “flexible federalism” can protect provinces from subordination and the operativity of their laws.¹⁷⁰

¹⁶³ *Orphan Well Association*, *supra* note 28 at para 66.

¹⁶⁴ *Lemare Lake*, *supra* note 33 at paras 21, 27.

¹⁶⁵ *Moloney*, *supra* note 41 at para 27.

¹⁶⁶ *Comeau*, *supra* note 1 at para 78.

¹⁶⁷ *Quebec (Attorney General)*, *supra* note 25 at para 17.

¹⁶⁸ *Initiative Reference*, *supra* note 133 at 22. There may also be something to be said here about how the doctrine of federal paramountcy implicitly engages with valuation of federal and provincial interests. In *Orphan Well Association*, the Supreme Court considered the provincial scheme to essentially be an environmental protection regime, and that the AER’s orders were not properly considered “provable claims” in bankruptcy, see *Orphan Well Association*, *supra* note 28 at para 159. Contrast this scenario with *AbitibiBowater* or *Moloney*, where the provincial schemes were viewed as legislative attempts to enforce a debt outside the bankruptcy system. See *AbitibiBowater*, *supra* note 159 at para 18; *Moloney*, *supra* note 41 (“[the provincial law] is, in substance a debt collection mechanism” at para 47). See also Stewart, *supra* note 130 at 257. In other words, in *AbitibiBowater* and *Moloney*, the provincial legislation was directed largely to the same interests (though with a contrary action) as the *BIA*, whereas in *Orphan Well Association* and *Lemare Lake*, the federal and provincial interests, at least as interpreted by the Supreme Court, were distinct from one another. See also *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453. This notion may be engaged in other instances of more specific federal powers interacting with general provincial powers (e.g. property and civil rights), however, bankruptcy seems to be the main culprit. See *Orphan Well Association*, *supra* note 28; *Lemare Lake*, *supra* note 33; *AbitibiBowater*, *supra* note 159; *Moloney*, *supra* note 41.

¹⁶⁹ Neither, however, would have Justice Beetz’ conception of concurrent fields. See *Bell Canada*, *supra* note 20 (merely re-emphasizing that the authority for each legislature to legislate over the same subject matter “can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction” at 766).

¹⁷⁰ *Canadian Western Bank*, *supra* note 20 at para 42.

V. TOWARDS A NORMATIVE CONCEPTION OF CO-OPERATIVE FEDERALISM

A. A PRINCIPLE OF CO-OPERATIVE FEDERALISM

What exactly *is* co-operative federalism as a matter of law? How can the foregoing description of its applications inform Canada's institutions and structures of governance?

Co-operative federalism has been described in varied terms by the Supreme Court of Canada even in recent case law: as a “concept” in *Comeau*;¹⁷¹ as an “interpretive aid” in the *Pan-Canadian Securities Reference*;¹⁷² and as a “principle” in *Orphan Well Association*.¹⁷³ Professor Ronald Dworkin suggested that law comprises both “rules” (black letter law) and “principles” (custom or convention).¹⁷⁴ Principles provide a necessary logical framework for interpolation within the spaces between rules, for resolving conflicts and inconsistencies among rules, and for clarifying the meaning of ambiguous rules.¹⁷⁵ Dworkin described principles as being more flexible or malleable than rules, but that they provide a consistency and predictability to adjudication that may not otherwise exist.¹⁷⁶ In other words, principles operate to stabilize and clarify the application of doctrine where ambiguities arise, but do not supplant or subsume it.

This model does appear to describe how co-operative federalism has been applied in context. It can mediate stringent applications of division of powers doctrines and promote provincial autonomy,¹⁷⁷ but in a flexible manner that engages consideration of interests at stake.¹⁷⁸ While not altering the division of powers doctrines,¹⁷⁹ cooperative federalism “works to support, rather than supplant, the division of legislative powers.”¹⁸⁰ Jurisprudence suggests that Canadian courts have accepted this notion, at least in principle, though somewhat equivocally. In *Reference re Greenhouse Gas Pollution Pricing Act*, the Saskatchewan Court of Appeal explained that, “[t]he Supreme Court made it clear that cooperative federalism is an interpretive principle and not a substantive one in [*Quebec (Attorney General)*] ... we conclude the principle of federalism, like that of cooperative federalism, is not a free-standing principle.”¹⁸¹

To take the Saskatchewan Court of Appeal at their word, co-operative federalism does seem to implicate both parliamentary sovereignty and subsidiarity. Parliamentary sovereignty is the principle that the legislature can make or unmake laws at its pleasure within the

¹⁷¹ *Comeau*, *supra* note 1 at para 87.

¹⁷² *Pan-Canadian Securities Reference*, *supra* note 27 at para 17.

¹⁷³ *Orphan Well Association*, *supra* note 28 at para 66.

¹⁷⁴ Ronald M Dworkin, “The Model of Rules” (1967) 35:1 U Chicago L Rev 14 at 24–25.

¹⁷⁵ See Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van Der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42:4 McGill LJ 993 at 1006.

¹⁷⁶ See also Richard M Re, “Clarity Doctrines” (2019) 86:6 U Chicago L Rev 1497.

¹⁷⁷ See generally Parts III–IV. See also *Comeau*, *supra* note 1 at para 78. See also Stewart, *supra* note 130 at 248–49.

¹⁷⁸ See Dworkin, *supra* note 174 at 26–28.

¹⁷⁹ See *Rogers Communications*, *supra* note 42 at para 39.

¹⁸⁰ *Pan-Canadian Securities Reference*, *supra* note 27 at para 18.

¹⁸¹ 2019 SKCA 40 at paras 393, 395 [*GGPPA Reference SKCA*].

confines of its constitutional authority¹⁸² (namely, the *Constitution Act, 1867* and *Canadian Charter of Rights and Freedoms*).¹⁸³ Subsidiarity is the principle that decisions affecting individuals should, as far as reasonably possible, be made by the level of government closest to the individuals affected.¹⁸⁴ In the context of coordinative co-operation, which concerns the power to legislate, these two principles fuel the normative idea that federal and provincial governments may *choose* to co-operate on the use of their respective legislative powers to achieve a common policy goal. And further, that this co-operation does not fetter either legislative body's capability to at some later time "resile" from co-operation in whole or in part.¹⁸⁵ With respect to conjunctive co-operation, which concerns operativity, Justice Marie Deschamps suggested in *Lacombe* that, "[t]he unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity favour a strict definition of the concept of conflict."¹⁸⁶ Moreover, as *Orphan Well Association* demonstrates, such strict definition engages with parliamentary sovereignty by giving preference to interpretations of such conflict that allow for the broadest exercise of legislative power without rendering law inoperative.¹⁸⁷

This approach to co-operative federalism addresses much of Ryder's normative concern that flexible approaches to federalism subvert provincial autonomy. For Ryder, subversion may occur with the "extension of the penumbra of federal jurisdiction over areas reserved to the provinces"¹⁸⁸ (namely, expansion in de facto or de jure fields of concurrent authority¹⁸⁹), which inevitably lose out in a clash with federal paramountcy.¹⁹⁰ However, the emergent principle of co-operative federalism this article defines is underpinned by a robust conception of provincial autonomy, calling on courts to give meaningful expression to provinces' sovereign — rather than subordinate — capacity when interpreting division of powers doctrines. In this light, when rationalized as reconjunctive co-operation, federalism represents a manifestation of Ryder's "principled counterbalance to the threat to an authentic federalism posed by the hierarchical relations created by federal paramountcy in areas of concurrent jurisdiction."¹⁹¹ Moreover, coordinative co-operation maximizes provincial autonomy when engaging with federal power, allowing provinces increased agency in their access to (and potential exercise of) a broader suite of powers through administrative interdelegation.¹⁹²

To Gaudreault-Desbiens and Poirier, co-operative federalism represents judicially-sanctioned coordination by federal and provincial actors, which they see as normatively

¹⁸² See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 36. See also *Secession Reference*, *supra* note 2 at paras 61–69.

¹⁸³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁸⁴ See Peter W Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 NJCL 341.

¹⁸⁵ *Pan-Canadian Securities Reference*, *supra* note 27 at para 113.

¹⁸⁶ *Lacombe*, *supra* note 48 at para 119, Deschamps J dissenting.

¹⁸⁷ *Orphan Well Association*, *supra* note 28 at para 66.

¹⁸⁸ Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36:2 McGill LJ 308 at 351 [Ryder, "Promoting Autonomy"].

¹⁸⁹ See Ryder, "Equal Autonomy," *supra* note 147 at 594.

¹⁹⁰ *Ibid* at 577, 595.

¹⁹¹ Ryder, "Promoting Autonomy," *supra* note 188 at 359. See also Ryder, "Equal Autonomy," *ibid* at 577–78. Such an interpretive approach is also applicable in instances concerning interjurisdictional immunity. See discussion of doctrinal implications below.

¹⁹² See Ryder, "Equal Autonomy," *ibid* at 597. See also Ryder, "Promoting Autonomy," *ibid* at 310.

impoverished for its lack of legal restraint on unilateral action by one.¹⁹³ Since co-operative federalism does not impose a “duty to co-operate” that would guide the exercise of legislative authority, it fails to deliver on the actual benefits of co-operation.¹⁹⁴ Here, they view co-operative federalism as in tension or competition with parliamentary sovereignty in a way that relegates the former to a “mere interpretive principle.”¹⁹⁵ They rightly point out that absent a strict (legal) duty to co-operate, the incentives for federal-provincial co-operation may be ambiguous at best.¹⁹⁶ The more robust application of co-operative federalism as an interpretive principle in recent jurisprudence, however, suggests that there is a legal norm of presumptive harmony with existing law that inheres to unilateral legislative action. In other words, co-operative federalism does provide some guidance on the exercise of legislative authority — at least in the way courts approach such exercise — even when rationalized as “merely” an interpretive principle. While this approach does not go as far as Gaudreault-Desbiens and Poirier, it arguably allows normative space for co-operative federalism and parliamentary sovereignty to act in concert, broadly permitting both co-operative and unilateral action by federal and provincial sovereigns.

This approach to co-operative federalism, however, is not without other normative critique. The Supreme Court of Canada’s assertion that co-operative federalism’s application may foster intergovernmental co-operation — at least in conjoint schemes — has been criticized as unproven,¹⁹⁷ and possibly counterproductive, including with respect to delegation.¹⁹⁸ Further to this critique, Nigel Bankes has observed that there is a “common assumption that co-operative federalism is something to be striven for.”¹⁹⁹ Eric Adams notes that without precise normative definition, a judicial conception of co-operative federalism may be counterproductive, forcing courts to evaluate policy choices best left to the political process, and disincentivizing co-operation to the extent it could be seen to impose positive obligations: “governments may choose to forgo administrative cooperation in the first place to avoid limitations on their future legislative capacities.”²⁰⁰

This having been said, this article has demonstrated that the bases for co-operative federalism’s application can be supported by existing constitutional principles. Thus, these critiques may serve as a guide to courts in outlining co-operative federalism’s normative edges.

¹⁹³ See Gaudreault-Desbiens & Poirier, *supra* note 26 at 407–408

¹⁹⁴ For example, negative externalities associated with policy changes by one order of government. *Ibid* at 408–11. See e.g. *Patriation Reference*, *supra* note 2; *Quebec (Attorney General)*, *supra* note 25; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525.

¹⁹⁵ Gaudreault-Desbiens & Poirier, *supra* note 26 at 411.

¹⁹⁶ *Ibid* at 410.

¹⁹⁷ See Wade K Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada” (2010) 51 SCLR 625 at 638–39.

¹⁹⁸ See Marc-Antoine Adam, “The Spending Power, Co-operative Federalism and Section 94” (2008) 34:1 *Queen’s LJ* 175 at 204. See also Honickman, *supra* note 34 at 250–51.

¹⁹⁹ Nigel Bankes, “Co-operative Federalism: Third Parties and Intergovernmental Agreements in Canada and Australia” (1991) 29:4 *Alta L Rev* 792 at 797. For a detailed and critical account of the impacts of co-operative federalism and administrative delegation in the context of environmental protection, see Franklin S Gertler, “Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection” in Steven A Kennett, ed, *Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1993) 254.

²⁰⁰ Eric M Adams, “Judging the Limits of Cooperative Federalism” (2016) 76 SCLR (2d) 27 at 40.

B. DOCTRINAL IMPLICATIONS

In the abstract, Canada's judiciary has generally seemed vexed on how to ascribe a functional meaning to co-operative federalism. In the concrete, judgments engaging substantively with co-operative federalism have tended to fixate as much on what it is *not* as what it is.²⁰¹ Courts have often invoked co-operative federalism as a platitude or nod to the impugned legislature before restating the rhetorical escape valve that it cannot override sections 91 and 92 of the *Constitution Act, 1867*.²⁰² But, the contours of a doctrinal or substantive application in analyses of validity and operativity can begin to be delineated in the wake of both the *Pan-Canadian Securities Reference* and *Orphan Well Association*. In general, these come in the form of judicial presumptions when courts are reviewing the constitutionality of legislation.

When assessing the *validity* of conjoint legislative or administrative schemes entered into by provincial and federal partners, courts ought to presume that both legislative orders enacted valid regimes. This is largely just a restatement of the presumption of compliance with limits on jurisdiction,²⁰³ but, this presumption ought to go further to favour interpretations of impugned legislation that are consistent with subject matters within the authority of the relevant legislature.²⁰⁴ Consequently, where conjoint schemes delegate power to a subordinate entity, courts should also presume that both Parliament and the provincial legislature delegated the necessary and sufficient power to fulfill their objective. Writing for the majority in *British Columbia (Milk Board) v. Grisnich*, Justice Iacobucci held that it is unnecessary for a subordinate body with delegated authority from both federal and provincial sources to specify the source of any particular action: “the only requirement is to possess jurisdiction.”²⁰⁵ In *Pelland*, the Supreme Court confirmed this principle to mean that, barring some legislative defect, “[s]o long as a [subordinate body] is properly endowed with both federal and provincial powers, the court will not look behind any given decision.”²⁰⁶ The implication is that the operation of a conjoint scheme, in this case the exercise of statutory power, is presumptively valid within the scope of authority necessary to give expression to the scheme's legislative objective.²⁰⁷ Should Parliament or the province withdraw from the agreement, however, this implication or presumption would no longer be true, pursuant to the admonition from *Rogers*.²⁰⁸

²⁰¹ See *Quebec (Attorney General)*, *supra* note 25; *Rogers Communications*, *supra* note 42 at para 39.

²⁰² See e.g. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 135; *GGPPA Reference SKCA*, *supra* note 181 at paras 64, 394; *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643 at para 138.

²⁰³ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at 525. See also *McKay v The Queen*, [1965] SCR 798.

²⁰⁴ See *Rogers Communications*, *supra* note 42 at para 38; *Canadian Western Bank*, *supra* note 20 at para 37.

²⁰⁵ [1995] 2 SCR 895 at para 8.

²⁰⁶ *Pelland*, *supra* note 93 at paras 46–47.

²⁰⁷ See also *Comeau*, *supra* note 1 (accepting *Pelland* as an exemplar of co-operative federalism influencing the Supreme Court's consideration of validity at para 87).

²⁰⁸ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have” at para 56). See also *Gendis Inc v Canada (Attorney General)*, 2006 MBCA 58 (with the Manitoba Court of Appeal rejecting that administrative interdelegation can properly be effected through unilateral legislative action and that “administrative interdelegation can only be accomplished within the framework of the Constitution” at para 51), Scott CJM.

When assessing the *operativity* of provincial legislation when looking to conjunctive scenarios, courts ought to presume that Parliament intends its laws to co-exist with those of provincial legislatures, rebuttable only by clear evidence to the contrary.²⁰⁹ Fenner Stewart has suggested that this presumption would mean:

If no interpretation in favour of concurrent operations of both laws exists, then the triggering party must establish an interpretation of the laws in question that proves on the balance of probabilities that the provincial law is in operational conflict with the federal law, or frustrates the purpose of the federal law. However, if an alternative interpretation exists that allows for the concurrent operation of both laws, the triggering party must meet an additional evidentiary burden: the triggering party must also establish that the interpretation offered is so clearly superior to the alternative interpretation that it defeats the presumption against it.²¹⁰

Justice Suzanne Côté seems to have taken up this understanding in *Orphan Well Association*, summarizing the law (though dissenting in the result) as:

Properly understood, cooperative federalism operates as a straightforward interpretive presumption ... that courts should “favour an interpretation of the federal legislation that allows the concurrent operation of both laws” on the basis of a presumption “that Parliament intends its laws to co-exist with provincial laws.” But where “the proper meaning of the provision”—one that is not limited to “a mere literal reading of the provisions at issue”—cannot support a harmonious interpretation, it is beyond this Court’s power to create harmony where Parliament did not intend it.²¹¹

Thus, co-operative federalism engages with how deciding courts are to interpret legislation, whether being considered as part of an inquiry into validity, or operativity.²¹² Indeed, when rationalized as a principle of statutory interpretation, it comprises a consequential tool for courts (and potential litigants),²¹³ even if “merely an interpretive aid.”²¹⁴ Whether or not these applications for co-operative federalism promote co-operation among Canada’s governments,²¹⁵ or whether such co-operation is even desirable,²¹⁶ they certainly allow the juridical room for it to occur, allowing for flexibility and diversity of policy action without recourse to the *Constitution Act, 1867*’s amending formula.²¹⁷

²⁰⁹ See *Orphan Well Association*, *supra* note 28 at para 66; *Moloney*, *supra* note 41 at para 27. See also *Lemare Lake*, *supra* note 33 at para 23.

²¹⁰ Stewart, *supra* note 130 at 254 [citations omitted].

²¹¹ *Orphan Well Association*, *supra* note 28 at para 185, Côté J, dissenting [citations removed]. See also *Moloney*, *supra* note 41 at para 23; *Pan-Canadian Securities Reference*, *supra* note 27 at para 18; *Lemare Lake*, *supra* note 33 at paras 78–79, Côté J, dissenting.

²¹² A “co-operative” assessment of applicability arguably follows the same logical structure as operativity, with a judicial presumption favouring interpretations of provincial law that do not trench on a core of federal authority, thereby exposing it to interjurisdictional immunity. Such a model has not been tested, and the Supreme Court has signaled the use of this doctrine may be circumscribed by precedent. See *Canadian Western Bank*, *supra* note 20 at para 77. But see Newman, “Subsidiarity,” *supra* note 71 (suggesting that subsidiarity, a principle related to and with similar normative considerations as co-operative federalism, may influence the consideration of interjurisdictional immunity at 28); and *AHRA Reference*, *supra* note 101 (“[i]f subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces’ jurisdiction ... not [federal jurisdiction]” at para 273).

²¹³ See Stewart, *supra* note 130 at 253.

²¹⁴ *GGPPA Reference SKCA*, *supra* note 181 at para 394.

²¹⁵ See Wright, *supra* note 197; Adams, *supra* note 200.

²¹⁶ See Bankes, *supra* note 199.

²¹⁷ See Cameron & Simeon, *supra* note 62 at 55; Hogg, *Constitutional Law*, *supra* note 20 at 5–46.

Moreover, this flexibility avoids inadvertent centralization and promotes provincial autonomy over legislative matters falling to provincial competence.²¹⁸

VI. CONCLUSIONS

Co-operation amongst Canada's federal polities has been an aspect of governance since even before the *British North America Act* became Imperial law in 1867. The degree to which co-operation is both necessary, or can be achieved, however, has been in dispute for just as long. This dispute often centred on the centralizing character of the interpretive doctrines that Canadian courts have used when looking to the division of powers between Parliament and the provincial legislatures.

However, centralization of power in Parliament is no longer the "dominant tide" of Canadian federalism.²¹⁹ Indeed, Canadian courts can now be said to have refined a principle of co-operative federalism that recognizes how Parliament and the provincial legislatures can coordinate their laws, and even make law jointly. Unlike earlier principles of interpretation that have favoured Parliament, this principle can be used to support provincial autonomy, and favour concurrent operation of both federal and provincial law to the greatest extent possible. In the wake of the Supreme Court of Canada's decisions in *Pan-Canadian Securities Reference* and *Orphan Well Association*, this principle has been given more robust legal meaning in judicial assessments of validity and operativity, though with a basis in other traditional interpretive principles in Canadian constitutional law. In general, co-operative federalism acts as a judicial presumption that federal and provincial laws complement one another in conjoint schemes and co-exist in independent ones, manifesting as a principle of statutory interpretation.

These conceptions of co-operative federalism hold enormous potential to unlock Canada's "constitutional creativity and cooperative flexibility," and recent history suggests that this model has worked to ensure space for intergovernmental co-operation and to support policy diversity across the federation.²²⁰ The principle of co-operative federalism affords the constitutional space for coordinative schemes like a co-operative securities regulator,²²¹ as well as conjunctive schemes for provincial regulatory governance.²²² With this space now open, all that remains is what form constitutional creativity will take in the future.

²¹⁸ For example, Stewart has suggested that this conjunctive approach to co-operative federalism in the assessment of federal paramountcy allows for a more robust "disinterested regulator" defence, whereby a provincial regulatory agency can exercise its legal mandate to enforce the law without concern that its actions will be nullified by courts for inconsistency with bankruptcy. See Stewart, *supra* note 130 at 260–63.

²¹⁹ *Canadian Western Bank*, *supra* note 20 at paras 35–37.

²²⁰ Pelland, *supra* note 93 at para 15.

²²¹ See generally *Pan-Canadian Securities Reference*, *supra* note 27.

²²² See generally *Orphan Well Association*, *supra* note 28; *Lemare Lake*, *supra* note 33. See also Stewart, *supra* note 130.