THE CONCURRENT OPERATION OF FEDERAL AND PROVINCIAL LAWS IN CANADA

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I. Definition of Concurrent Fields

The federal distribution of legislative powers and responsibilities in Canada is one of the facts of life when we concern ourselves with the many important social, political, economic or cultural problems of our country. Over the whole range of actual and potential law-making, our constitution distributes powers and responsibilities by two lists of categories or classes — one list for the federal parliament (primarily section 91 of the *B.N.A. Act*),[1] the other for each of the provincial legislatures (primarily section 92 of the *B.N.A. Act*). For instance, the federal list includes regulation of trade and commerce, criminal law, and a general power to make laws in all matters not assigned to the provinces. Examples from the provincial list are property and civil rights in the province, local works and undertakings, and all matters of a merely local or private nature in the province.

These federal and provincial categories of power are expressed, and indeed have to be expressed, in quite general terms. This permits considerable flexibility in constitutional interpretation, but also it brings much overlapping and potential conflict between the various definitions of powers and responsibilities. To put the same point in another way, our community life — social, economic, political, and cultural — is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring.[2] There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution.

Accordingly the courts must continually assess the competing federal and provincial lists of powers against one another in the judicial task of interpreting the constitution. In the course of judicial decisions on the *B.N.A. Act*, the judges have basically done one of two things. First, they have attempted to define mutually exclusive spheres for federal and provincial powers, with partial success. But, where mutual exclusion did not seem feasible or proper, the courts have implied the existence of concurrent federal and provincial

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[1]30 & 31 Victoria (U.K.), c. 3.

[2]". . . It is necessary to realize the relation to each other of ss. 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme."—Viscount Haldane in *John Deere Plow Company Ltd. v. Wharton* [1915] A.C. 330, at 338.

powers in the overlapping area, with the result that either or both authorities have been permitted to legislate provided their statutes did not in some way conflict one with the other in the common area. It is the problems arising from such concurrency that are the primary concern of this article.

But, before proceeding specifically to the problems that arise after concurrency has been found, it is necessary to examine carefully the interpretative process whereby the courts strive first to establish mutually exclusive spheres of federal and provincial law-making powers. The words 'exclusive' or 'exclusively' occur in section 91 of the *B.N.A. Act* respecting federal powers and in section 92 respecting provincial powers, hence the priority for the attempt at mutual exclusion. Only if this attempt fails do the judges then proceed to define by necessary implication certain spheres of common powers to regulate the same matter.

Here we encounter important considerations that go under the name of 'the aspect theory'. As Lord Fitzgerald said long ago in *Hodge v. The Queen*, "subjects which in one aspect and for one purpose fall within Sect. 92, may in another aspect and for another purpose fall within Sect. 91."[3] For instance, a law providing for suspension or revocation of the right to drive a car upon a highway because the driver was drunk has the provincial aspects of control of highways as local works and of the right to drive as a civil right in the province, these things reflecting the provincial responsibility for safe and efficient circulation of traffic. The law mentioned has also the federal aspect of criminal law, reflecting the federal responsibility to forbid and punish such dangerous anti-social conduct.[4] Where does the power to suspend and revoke drivers' licences reside, or do both parties have it? Such laws with double aspects in the logical sense are the usual and not the exceptional case.

In other words, simply as a rational or logical matter, the challenged law displays several features of meaning some one of which at least falls within a federal class of laws, and another one of which falls within a provincial class of laws. Rationally the challenged law is classified both ways — how then do we determine whether power to pass such a law is exclusively federal or exclusively provincial or is something both legislative authorities have? The basic solution here comes by decisions on the relative importance of the federal features and the provincial features respectively of the challenged law in contrast to one another. Respecting the detailed aspects raised by the challenged law, one must ask — when does the need for a national standard by federal law outweigh the need for provincial autonomy and possible variety as developed by the laws of the several provinces, or vice versa? The criteria of relative importance here arise from the social, economic, political, and cultural conditions of the country and its various regions and parts, and of course involve the systems of value that obtain in our society. The answers must be guided

[3](1883-84) 9 A.C. 117, at 130.

[4]See: *Provincial Secretary of P.E.I. v. Egan and A.G. of P.E.I.* [1941] S.C.R. 396; [1941] 3 D.L.R. 305.

by and related to the categories and concepts of the *British North America Act*, and so at this point we find that the two interpretative situations mentioned earlier emerge.

A. Mutual Modification and Exclusive Powers.

If the federal features of the challenged law are deemed clearly to be more important than the provincial features of it, then the power to pass that law is exclusively federal. In other words, for this purpose the challenged law is classified by its leading feature, by its more important characteristic, by its pith and substance. And if, on the other hand, the provincial features are deemed clearly more important than the federal ones, then power to pass the law in question is exclusively provincial.[5]

In some instances, the solution to this dilemma of competing classifications may be grammatically obvious if one simply reads sections 91 and 92 together. For example, the provincial power 'Solemnization of Marriage' (92(12)) is obviously to be read as an exception to the federal power 'Marriage and Divorce' (91(26)). As a matter of construction the former is a particular sub-class completely comprehended by and carved out of the latter as a more general class or category. Only the provincial legislatures then can make law for marriage ceremonies, but only the federal parliament can make divorce law. Another example is afforded by 'Patents' and 'Copyrights' (91(22) and (23)) as small subdivisions of the general category of 'Property' (92(13)). In these cases the *B.N.A. Act* seems explicit enough on the priorities between competing classifications, and to the extent that the words of the Act are clear on such issues they are conclusive.

Nevertheless, most of the problems of competing classifications that arise are not so easily soluble. Take for instance the competition between 'Trade and Commerce' (91(2)) and 'Property and Civil Rights' (92(13)) considered in the *Parsons* case.[6] Neither of these classes of laws is grammatically or logically an all-inclusive general category of which the other is obviously a sub-division. As a matter of construction it can properly be said that each is to be read subject to the other, that neither should be permitted to push the other out of the picture completely, but the question remains: where is the line to be drawn? There is no answer to this to be found by a simple reading of the statutory words. The answer is not grammatically internal to the Act. These are simply two wide or general categories that overlap a large common area — all property or civil rights laws that are also trading or commercial laws fall both ways as a matter of simple logic. From the legal point of view, most trade and commerce is the transfer of property rights by contract, or the provision of services by contract. In the *Parsons* case, the judgment of relative importance called for at this point was a compromise. The general line of distinction

[5]See: *Union Colliery Company of B.C. v. Bryden* [1899] A.C. 580, at 587.

[6]*Citizens Insurance Company v. Parsons* (1881-82) 7 A.C. 96.

between section 91(2) and section 92(13) was drawn as follows: given that the challenged law is both property or contract law and trading or commercial law, if the trade or commerce is internal to a single province, then the property and civil rights aspect is the more important and provincial power is exclusive. But, if the challenged law is property or contract law about interprovincial or international trade or commerce, then its trading or commercial aspect is the more important and the federal power is exclusive. In this way an issue of relative importance originally open so far as the words of the Act are concerned becomes settled as a matter of judicial precedent.

Accordingly, if there is sufficient contrast in relative importance between the competing federal and provincial features of the challenged law, then in spite of extensive overlap the interpretative tribunal can still allot exclusive legislative power one way or the other. Once exclusive power has been determined to exist for either legislature, then the so-called doctrine of abstinence simply expresses the implication of this negatively. If the federal parliament does not choose to use its power of regulation in a particular *exclusive* federal field, nevertheless a province cannot enter the field with provincial legislation. The activity concerned simply remains unregulated.

But what if the federal and provincial aspects of the challenged law seem to be of equivalent importance? What if there is no real contrast in this respect? This leads to the second main interpretative situation.

B. The Double-Aspect Doctrine and Concurrent Powers

If reasoning (A) has been attempted, but it develops that the federal and provincial aspects of the challenged law are of equivalent importance — that they are on the same level of significance — then the allocation of *exclusive* power one way or the other is not possible. For example, in the *Voluntary Assignments* case,[7] the Court pointed out that the federal parliament must be able to deal with priority among the execution creditors of an insolvent debtor from the point of view of effective bankruptcy legislation, but that, equally, provincial legislatures had to deal with priorities among such execution creditors from the point of view of the provincial responsibility for civil procedure and civil rights. Hence the provincial legislation was valid, there being no federal bankruptcy statute at the time.

Accordingly the idea of mutual exclusion if practical, but concurrency if necessary, explains much of Canadian constitutional law. For instance, one may ask, if Quebec was to be denied power to pass the Padlock Law because this invaded the exclusive federal criminal law sphere,[8] how is it that other

[7] *A.G. of Ontario v. A.G. of Canada* [1894] A.C. 189.

[8] *Act Respecting Communistic Propaganda* (Province of Quebec) R.S.Q. 1941, c. 52. Generally speaking, the Act provided that any house or building used by the tenant or owner as a place from which communistic propaganda was distributed could be padlocked on order of the Attorney General for a year and thus withdrawn from any use whatsoever for that period. It was held to be *ultra vires* of the Province. See: *Switzman v. Elbling and A.G. of Quebec* [1957] S.C.R. 285.

provinces were permitted their provincial offences of simple careless driving, these not being considered to be such an invasion?[9] The judicial answers take the lines already suggested. True, the Padlock Law was in a sense property legislation as well as treason legislation, but its treason aspect was much more important than its property aspect, the latter being really a subterfuge. Hence, treason was the 'pith and substance' and federal power was found to be exclusive. But, where the offence of simple careless driving was concerned, the provincial aspect of responsibility for safe and efficient circulation of traffic on highways was real and was deemed equivalent in importance to the federal aspect of responsibility to forbid and punish grave and dangerous anti-social conduct of all kinds. Hence the finding was made that dangerous driving offences are a concurrent matter or field.

There seems a definite increase in the number and importance of concurrent fields being presently established by the courts. Of course, agriculture and immigration are expressly concurrent fields by section 95 of the *B.N.A. Act*, while temperance and insolvency have been with us by judicial implication since the nineteenth century.[10] Recent cases have added concurrency concerning conduct on highways, sale of securities, validity of trading stamps in retail stores, and aspects of Sunday observance.[11] This list is by no means exhaustive. So, precisely what concurrency means requires and deserves careful analysis. In 1907 in the Judicial Committee of the Privy Council, Lord Dunedin said that two propositions were established:[12]

> First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

The word 'meet' is used here in the sense of collision, but there may be joint occupation of a concurrent field without collision necessarily occurring. The different conditions of joint legislative tenancy will be discussed in Part II under the headings *conflict*, *supplement* and *duplication*.

II. Conflict, Supplement and Duplication Respecting Federal and Provincial Laws in Concurrent Fields.

Given that a concurrent sphere or field has been established, what if both the federal parliament and a provincial legislature have entered the field with statutes? What if 'the two legislations meet'?

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[9]See: *The Queen v. Yolles* (1959) 19 D.L.R. (2d) 19; *O'Grady v. Sparling* [1960] S.C.R. 804.

[10]See: *A.G. of Ontario v. A.G. of Canada* [1896] A.C. 348, and footnote 7.

[11]Highways—*P.E.I. v. Egan, supra*, footnote 4; *The Queen v. Yolles, supra*, footnote 9; *O'Grady v. Sparling, supra*, footnote 9. Securities—*Smith v. The Queen* [1960] S.C.R. 776. Trading stamps—*The Queen v. Fleming* (1962) 35 D.L.R. (2d) 483. Sunday observance—*Lord's Day Alliance of Canada v. A.G. of B.C.* [1959] S.C.R. 497.

[12]*G.T. Rlwy Company of Canada v. A.G. of Canada* [1907] A.C. 65, at 68.

If the meeting is a collision, *i.e.* if conflict or inconsistency or repugnancy is the result, the federal statute prevails and the provincial one is displaced and inoperative. But it is far from obvious what amounts to sufficient conflict or inconsistency or repugnance to effect this result.

We start with two statutes that are somehow concerned with the same matter, that matter being the respect in which a concurrent field has been found to exist. The two statutes may differ in what they prescribe about the concurrent matter, or they may be the same in what they prescribe about it. This can soon be discovered by construing and comparing their respective terms, remembering that the search is for substantial differences or substantial identities. As in other constitutional matters, one must not be put off by merely verbal differences or identities. Does the provincial statute differ from the federal one or does it duplicate the federal one? That is the first question, because the reasoning appropriate to difference is not the same as that appropriate to duplication.

And even difference has its variations. The provincial statute may differ from the federal one in either one of two ways — it may be inconsistent with the federal one or it may be merely supplemental to the federal one, adding something to what the federal statute does but not contradicting it. So, in considering the relation of a provincial statute to a federal one in a concurrent field, there are three basic states: (A) conflict, (B) supplement, and (C) duplication. For the sake of developing the analysis clearly, it is assumed to start with that we have provincial statutes that are pure examples of each of these states, *i.e.* first a provincial statute that is purely conflicting, second a provincial statute that is purely supplemental and finally a provincial statute that is purely duplicative. The problems presented by a mixed provincial statute — one that combines any two or all three of these types of provisions — can be disposed of if we know what is appropriate for the pure cases.

A. Conflict

The situation envisaged here is actual conflict between the comparable terms of the provincial statute and the federal one. One finds that the same citizens are being told to do inconsistent things. One statute blows hot and the other cold. For example, a provincial statute says that a certain creditor is a secured creditor, but the federal *Bankruptcy Act* says he is an unsecured creditor. There can only be one scheme for priority among creditors in the event of bankruptcy of the debtor, hence the federal statute prevails and the provincial one is inoperative for repugnancy.[13] Another example is found in the *Local Prohibition* case of 1896.[14] There, Lord Watson compared the details of the Ontario statutory liquor prohibition scheme with the details of the federal liquor prohibition scheme of the *Canada Temperance Act* and found that

[13]*Royal Bank of Canada v. La Rue* [1926] S.C.R. 218; [1928] A.C. 187.

[14]*A.G. of Ontario v. A.G. of Canada* [1896] A.C. 343.

the two differed sufficiently and that it would be impossible for both to be in force in the same county or town at the same time. Had it not been for its local option voting provisions, the *Canada Temperance Act* would automatically have displaced the provincial statutory scheme.

> It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time.[15]

Thus, Lord Watson made it clear that if any district voted the *Canada Temperance Act* into force, the provincial statutory scheme would be precluded or superseded in that district.

Thus the pure case of express conflict is clear on the authorities — the federal statute prevails. At least the doctrine of Dominion paramountcy must go this far, but there has been some suggestion recently that it goes no further — that this is *all* it means. In the recent case of *Smith v. The Queen* (1960),[16] which concerned federal and provincial offences of knowingly issuing a false prospectus to induce the sale of company shares, Mr. Justice Martland of the Supreme Court of Canada said that, unless the federal and provincial provisions in question conflict "*in the sense that compliance with one law involves breach of the other*," they can operate concurrently.[17] If only such patent and positive conflict of comparable terms can invoke the doctrine of Dominion paramountcy, then that doctrine is indeed confined to the narrowest significance it could possibly be given. On this view, any supplemental or duplicative provincial legislation could operate concurrently with the federal legislation it supplemented or duplicated, and our enquiry into the scope of the doctrine of Dominion paramountcy could end right here. But, as we shall see, this does not seem to be the state of the authorities.

In addition to the patent and positive conflict of terms just considered, there is another type of conflict or inconsistency to be examined. The federal legislation in a concurrent field may carry the express or tacit implication that there shall not be any other legislation on the concurrent subject by a province. If this negative implication is present, any supplemental provincial statute would be in conflict with it, though there is no conflict between comparable terms of the two statutes. It would be normal to find this implication in a federal statute that could properly be construed as a complete code for the concurrent subject. To revert to the matter of priority among various kinds of creditors in a bankruptcy, the federal code of priorities would clearly have this negative implication, even if there were gaps in it here or there where something might be added or even if there were room for further refinements.

[15][1896] A.C. 343, at 368; see also 369-70.

[16]*Supra*, footnote 11.

[17][1960] S.C.R. 776, at 800; (italics added). In the context of the *Smith* case it may not be right to fix Mr. Justice Martland with the full implications of these words. Nevertheless, their full implications do mark out the narrowest possible meaning of Dominion paramountcy, and perhaps this *is* what Mr. Justice Martland intended.

It should be noted at this point that Mr. Justice Cartwright of the Supreme Court of Canada has carried this idea of conflict by negative implication to its ultimate limit. In *O'Grady v. Sparling* (1960),[18] the Supreme Court was considering the relation of two different dangerous driving offences. *The Criminal Code of Canada* at this time made it an offence to drive a car with "wanton or reckless disregard for the lives or safety of other persons."[19] *The Highway Traffic Act* of Manitoba made it an offence to drive a car on a highway "without due care and attention or without reasonable consideration for other persons using the highway."[20] The provincial offence is much wider than the federal one, but overlaps and includes it. Mr. Justice Cartwright (dissenting) said:[21]

> In my opinion when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

In other words, he is saying that if there is a federal statute of any kind in a concurrent field, this alone necessarily and invariably implies that there shall be no other legal regulation by a province of the concurrent subject. To carry negative implication this far would ban all supplemental or duplicative provincial legislation. To use the metaphor of the 'field', the effect of this view is that any federal statute touching a concurrent field constitutes total excluding occupation of that field by the federal parliament. This is the opposite extreme from the view of Mr. Justice Martland and thus represents the broadest sweep that could possibly be given the doctrine of Dominion paramountcy. Mr. Justice Cartwright's view is not the law, but, as stated, it does mark out one of the two extreme positions possible and so aids this attempt at analysis.

As suggested earlier, the negative implication discussed here is legitimate and realistic in some circumstances, and when it is present, the rule of Dominion paramountcy operates to cause the exclusion or suspension of any provincial legislation on the subject in hand. But this is by no means automatically the case for every federal statute in a concurrent field.

Finally, if one has a provincial statute that mixes repugnant provisions with supplemental or duplicative ones, it may be that the repugnant provisions can be severed. This depends on the normal tests for severance in a constitutional case — does the provincial statute still constitute a viable and sensible legislative scheme without the obnoxious section or sections?[22] If severance is not proper, then the whole provincial statute becomes inoperative. If severance is possible, then one goes on to the question whether the supplemental or

[18] *Supra*, footnote 11.

[19] *Criminal Code*, 2-3 Eliz. II, S.C. 1953-54 c. 51, ss. 191(1), 221(1).

[20] R.S.M. 1954, c. 112, s. 55(1).

[21] [1960] S.C.R. 804, at 820-21.

[22] See: *Toronto Corporation v. York Corporation* [1938] A.C. 415, at 427; *A.G. for B.C. v. A.G. for Canada* [1937] A.C. 377, at 388-89.

duplicative provisions are respectively valid in their own right. The case of pure supplement is then next.

B. Supplement.

The situation envisaged here is that of a provincial statute which simply adds something to regulation of the concurrent matter without contradicting the federal statute in the field in either the positive or the negative sense explained in (A). A. H. F. Lefroy gives a good example of this.[23]

> Thus, where the Dominion Companies Act provided a method for serving summonses, notices, and other documents on a company incorporated under that Act, this was held not to prevent provincial, or rather North-West Territorial, legislation, providing that such companies must file a power of attorney to some person in the Territories upon whom process might be served, before they could be registered and enabled to carry on their business in the Territories, thus providing another and more convenient method for the service of process upon such company.

Accordingly, provincial supplemental legislation in these circumstances is valid and operates concurrently with the relevant federal legislation. A refinement of this position was approved by the Supreme Court of Canada in the case of *Lord's Day Alliance of Canada v. Attorney-General of British Columbia*.[24] The federal statute in question was the *Lord's Day Act*,[25] section 6(1) of which is as follows:

> 6(1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

If it were not for the words *except as provided in any provincial law now or hereafter in force*, the field of regulation of Sunday commercial sports and movies would be completely occupied by the federal prohibition by virtue of the federal criminal law power. The Supreme Court considered that permissive Sunday observance legislation would also be proper for a province as a matter of civil rights in the province or as a matter of merely a local nature in the province, and that the federal parliament had deliberately and effectively made room for such permissive provincial legislation by the statutory words just quoted. Here then we have the federal parliament explicitly drawing back from full occupation of the concurrent field to allow a different provincial provision on the subject to operate without conflict. It is the strongest possible case for the validity of non-repugnant and supplemental provincial legislation because, on the facts, a prohibition was withdrawn to make room for a permission to operate. The extreme view of the scope of negative implication explained earlier under (A), is inconsistent with the *Lord's Day Alliance* case of 1959.

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[23]A. H. F. Lefroy, *Canada's Federal System* (Toronto, 1913), p. 126.

[24]*Supra*, footnote 11.

[25]R.S.C. 1952, c. 171.

The Saskatchewan *Breathalyser* case of 1957[26] is also a decision of the Supreme Court of Canada upholding the validity of a non-repugnant supplemental provincial statute. The matter involved was the legal status and effect of the result of tests by the breathalyser machine to determine whether a driver on the highway was drunk. The federal *Criminal Code*, addressing itself to the evidentiary problem only, stated that

> No person is required to give a sample of blood, urine, breath or other bodily substance or chemical analysis for the purpose of this section.[27]

but also provided in effect that, if such sample was in fact given, the result of the chemical analysis was admissible evidence in the trial of a relevant charge under the *Criminal Code*.

The Saskatchewan statute provided that a driver suspected of being drunk who refused to take the breathalyser test at the request of a policeman was liable to have his licence to drive suspended or revoked. The Supreme Court of Canada held that the provincial legislation was not inconsistent with the federal legislation and was therefore fully operative, and moreover that breathalyser evidence obtained in Saskatchewan was admissible in the trial of the relevant federal offence.

The writer agrees with Mr. Justice Cartwright in this case that the finding of 'no conflict' here is wrong. As the learned judge put it:[28]

> . . . I am of opinion that a statute declaring that a person who refuses to do an act shall be liable to suffer a serious and permanent economic disadvantage does 'require' the doing of the act. With deference to those who hold a contrary view, it appears to me to be playing with words to say that a person who is made liable to a penalty (whether economic, pecuniary, corporal or, I suppose, capital) if he fails to do an act is not required to do the act because he is free to choose to suffer the penalty instead.

There is at least partial repugnance here, and the better decision would have been that the Saskatchewan requirement could not operate to create evidence admissible in the trial of the relevant federal offences but could operate as the evidentiary basis for a decision by the Saskatchewan Motor Vehicle Board to suspend or revoke a driver's licence. Nevertheless, given the majority finding that there was no conflict between the provincial and federal statutory provisions concerned, the case is authority, as stated earlier, for the proposition that supplemental provincial legislation remains operative. Now, only the final case of pure duplication remains to be examined.

C. Duplication.

The situation envisaged here is that of a provincial statute that literally or in substance duplicates the provisions of the federal statute in the field. (It does not matter which statute was passed first once both are in the field.)

[26] *Reference Re Section 92(4) of The Vehicles Act*, 1957 (*Sask.*), *c.* 93 [1958] S.C.R. 608.

[27] *Supra*, footnote 19, section 224(4).

[28] [1958] S.C.R. 608, at 622.

The authorities establish one of the implications of Dominion paramountcy to be that provincial duplicative legislation is suspended and inoperative. Simple duplication by a province is not permitted.[29] But, given that this *is* the state of the precedents, why *should* it be so? My submission is that there are proper reasons for this result, but they are not explained in the opinions of the judges in Canadian constitutional cases.

Where the provincial statute differs from the federal one, we have seen that the provincial provisions are suspended if they are directly or indirectly repugnant to the federal ones (A), but the provincial provisions are operative if they merely supplement the federal ones (B). Necessity born of repugnance accounts for the former result (A) and the logic of being different for the latter (B). But in the case of simple duplication we have neither repugnance nor difference. *In fact what one now finds by comparing the provincial and federal statutes in question is the ultimate in harmony.* Obviously this is what substantial duplication means. Yet at times the judges persist in saying that there is 'conflict' here, and that such 'conflict' somehow calls for the suspension of the provincial duplicative legislation. For instance, in *Smith v. The Queen*, Mr. Justice Ritchie (dissenting), after concluding that the provincial and federal offences there in question were the same, said: "I am of opinion . . . that there is a direct conflict between the impugned provisions of the provincial statute and those of the *Criminal Code* and that it is not within the competence of the Legislature of Ontario to create the offences here in question."[30] Likewise, Chief Justice Kerwin, giving one of the majority judgments in the same case, said there was "*no repugnancy*" between the provincial and federal offences because it was *not* the same conduct that was being dealt with by the two legislative bodies.[31] Obviously he implies that there would be repugnancy if the offences had been exactly the same.

Nevertheless, though it is not proper at all to speak of conflict or repugnance of terms when a provincial statute simply duplicates a federal one, is there a conflict in some other sense when this happens? Is it somehow an affront to the federal parliament that a provincial legislature should repeat the terms of a federal statute? No doubt the doctrine of Dominion paramountcy means that in a concurrent field the federal parliament is the senior partner, but what is repugnant about the junior partner merely repeating the senior one? In

[29]See: *Home Insurance Co. v. Lindal & Beattie* [1934] S.C.R. 33, *per* Lamont, J. at p. 40; *Lymburn v. Mayland* [1932] A.C. 318, *per* Lord Atkin, at p. 326-27. Also, in the *Yolles*, *O'Grady* and *Smith* cases most of the judges (whether of the majority or dissenting) assumed that if the federal and provincial offences being compared were substantially the same, the provincial offence was suspended and inoperative.

In an excellent note on this subject, Professor Bora Laskin points out that simple duplication of federal legislation by a state is forbidden in both the United States and Australia. See Bora Laskin, *Canadian Constitutional Law* (Toronto, 1960), p. 98.

[30][1960] S.C.R. 776, at 804.

[31][1960] S.C.R. 776, at 780-81. Italics added.

truth there is no conflict or repugnance of any kind in this situation. As seen in Part I, the provincial legislature and the federal parliament are properly making laws in the concurrent field in pursuance of legislative responsibilities and powers conferred by their respective aspects of interest. These aspects are equivalent as a matter of authority stemming from the constitution, so there is no clash of authority in the absence of actual inconsistency of statutory terms as explained earlier. Why then is duplicative provincial legislation suspended? The reason seems a very simple one — economy. It is wasteful of legislative and administrative resources to allow simple duplication, besides being confusing for all concerned. Since the province in effect admits that the federal legislation is in exactly the terms it wants, the federal legislation is serving the provincial interest just as the provincial legislature wishes it to be served. But still the provincial spokesman may ask, why not suspend the federal legislation then and avoid duplication that way? The answer in favour of the federal legislation would seem to be twofold: (a) the federal parliament is in the better position to effect economy and avoid confusion because of its wider territorial jurisdiction, hence the provincial duplicative legislation should be suspended, and, anyway, (b) the nation is greater than its parts, hence when the scales are evenly balanced, as here, the national parliament should be preferred over the provincial legislatures. So, the normal rule is that a provincial statutory provision is suspended and inoperative if it simply duplicates a federal one.

But what if the provincial provision in question is a mixed one in the sense that it both duplicates and supplements the corresponding federal one? This was the position in both *Yolles v. The Queen* and *O'Grady v. Sparling*.[32] In both these cases, the provincial offence was to drive a car on a highway "without due care and attention or without reasonable consideration for other persons using the highway", while the corresponding federal law made it an offence to drive a car with "wanton or reckless disregard for the lives or safety of other persons." Mr. Justice Roach pointed out in the *Yolles* case that the provincial offence as expressed cannot really be severed into its duplicative and its supplemental parts so as to suspend the former and save the latter. "Section 29(1) does not confine the lack of 'due care and attention' or the absence of 'reasonable consideration for others' to an attitude that is less than wanton or reckless. The Court cannot unscramble s. 29(1) or rewrite it. The Legislature alone can do that."[33] Mr. Justice Roach was right to consider this not a proper case for severence, but was he right to conclude that therefore the whole provincial section was suspended? In the latter conclusion he was dissenting, the majority decisions in both the *Yolles* and *O'Grady* cases being to the contrary.

The majority decisions seem correct and justifiable. A provincial section that combines inseverably duplicative and supplemental elements does not

[32] *Supra*, footnote 11.

[33] (1959) 19 D.L.R. (2d) 19, at 44.

necessarily require the same treatment as one that combines inseverably repugnant and supplemental elements. Logically, economy permits exceptions that inconsistency must deny, and in the cases mentioned the majority judges took advantage of this. Here is the importance of elucidating the different reasons for susperseding duplicative provisions on the one hand and repugnant ones on the other. The normal rule is that duplicative provincial provisions are inoperative, but, by way of exception, when a provincial provision is an inseverable combination of duplicative and supplemental elements, the whole provincial provision stands and operates concurrently with the federal provision it both duplicates and supplements. This is the proper rationale of the *Yolles*, *O'Grady*, *Stephens* and *Smith* cases.[34] This exception to the general rule is important but quite limited, and it contrasts of course sharply with the position that obtains when a provincial provision inseverably combines *repugnant* and supplemental elements — the whole of such a provision is necessarily superseded by the federal one. In other words, when the duplicative is in combination with the supplemental, the former is operative because of its combination with the latter, but when the repugnant is combined with the supplemental, the latter goes into suspension with the former.[35]

Unfortunately the reasons for the exception just explained and the limited nature of the exception do not come out too clearly in the majority opinions of the four leading cases just mentioned. There is a tendency among some of the learned judges to deny the existence of the duplicative or overlapping element, and to say that because there is *some* difference between the provincial and federal offences as to the mental state required, this makes them *totally* different, so that the provincial offence is merely supplemental after all. But it does not really make sense to deny the genuine though partial duplicative element in these cases. Also, in the same cases, there is a tendency among some of the learned judges to argue that, because the concurrent matter in issue has a provincial aspect and a different federal aspect, partially overlapping provincial and federal laws enacted respectively under these aspects of authority are themselves entirely different laws because the two aspects of authority involved are different. This does not stand up either. As we saw in Part I, it is the existence of two equivalent but different aspects of authority that establishes a concurrent field in the first place. The double-aspect theory opens two gates to the same field, but there it leaves us. It does not resolve any of the *subsequent* difficulties of conflict, duplication, or supplement being analyzed here.

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[34]*Supra*, footnote 11. *Stephens v. The Queen* [1960] S.C.R. 823.

[35]Of course, a provincial statute may combine provisions exclusively within provincial powers with others in a concurrent field of one or more of the three types discussed here — conflicting, supplemental or duplicative. This was true of both the Ontario and Manitoba *Highway Traffic Acts*. The argument made here is not affected by this circumstance, though the application of the rules for severance might become rather complex in some situations.

There has been a new development since the decision of *O'Grady v. Sparling*, the implications of which serve to illustrate the effect of this group of cases. In the session of 1960-61, the Parliament of Canada added to the *Criminal Code* a new provision making it an offence to drive a motor vehicle "in a manner that is dangerous to the public, having regard to all the circumstances."[36] This is in addition to the federal offence of driving with "wanton or reckless disregard" that was the sole federal provision at the time of the *Yolles* and *O'Grady* decisions. There is really no difference between driving in a manner dangerous to the public, and driving with lack of due care and attention (simple negligence). Negligence is defined by whether a reasonable man would foresee the likelihood of causing harm to others by his conduct, *i.e.* by whether his conduct was *dangerous* to the public. In *O'Grady v. Sparling* the Supreme Court of Canada expressly adopted the twofold distinction of these offences into advertent negligence and inadvertent negligence, pointing out that inadvertent negligence was the respect in which the provincial offence was wider than the federal one of showing wanton and reckless disregard. It follows that the provincial 'lack of due care' offence now merely duplicates the new federal offence of simple dangerous driving. Hence provincial careless driving offences like those of Ontario and Manitoba are now suspended and inoperative, and any charge laid under such a provincial section should be quashed.[37] This is the effect of the general rule that a provincial provision that is severable and merely duplicative is to be severed and superseded by the federal provisions duplicated. Authority for this proposition has already been quoted.

Subject then to the limited exception explained, the general rule requiring the suspension of provincial duplicative legislation is a salutary one. If the possibility of effective provincial duplicative legislation was wide open, then, for example, a provincial legislature could duplicate the whole of the federal law of theft as legislation to protect property rights in the province. Crown attorneys could take their choice of whether to prosecute under the federal theft sections or the provincial onces, and the provincial Attorneys General could control this choice. Awkward questions about double jeopardy or the right to trial by jury could arise. Fortunately, under the present rules, there are two reasons why a province could not duplicate the federal law of theft in the *Criminal Code*. In the first place the federal theft sections are by their

[36] 9-10 Eliz. II, S.C. 1960-61, c. 43, s. 3.

[37] It is true that some authorities consider there are three grades of negligence for these purposes. See the judgment of LeBel, J. A. in the *Yolles* case, (1959) 19 D.L.R. (2d), 19, at 49-50. Mr. Justice LeBel referred to *McLean v. Pettigrew* [1945] S.C.R. 62, as supporting this view. *McLean v. Pettigrew* is a conflict of laws case in tort and such a threefold distinction was unnecessary to the decision. In any event, the Supreme Court of Canada in the *O'Grady* case has adopted two grades of negligence as the governing distinction for purposes of the issues touching Dominion paramountcy — the distinction being that between advertent negligence and inadvertent negligence.

There has also been some suggestion that Lord Atkin sanctioned a threefold distinction in the case of *Andrews v. Director of Public Prosecutions* [1937] A.C. 576, when discussing parallel sections in the English *Road Traffic Act* of 1930. I cannot find any such threefold distinction in Lord Atkin's judgment. See [1937] A.C. at 576, at 584.

nature comprehensive, constituting what purports to be a complete code on the subject of theft. Hence the negative implication discussed under (A) earlier is genuinely present and precludes any provincial theft legislation operating. Even if this were not so, simple duplication is not allowed anyway, as we have seen in the analysis just concluded under (C).

The position of provincial legislation in a concurrent field then may be summarized as follows. Provincial legislation may operate if there is no federal legislation in the field or if the provincial legislation is merely supplemental to federal legislation that is in the field. Duplicative provincial legislation may operate concurrently only when inseverably connected with supplemental provincial legislation, otherwise duplicative provincial legislation is suspended and inoperative. Repugnant provincial legislation is always suspended and inoperative. These are the implications of the doctrine of Dominion paramountcy developed by the courts.[38]

In conclusion, it should be noted that the existence of a concurrent field means that there is room for political agreement between provincial and federal governments about whether the federal parliament or a provincial legislature undertakes the regulation of this or that phase of a concurrent matter. The precise equilibrium point in practice then would become a matter for political and administrative decision. As governmental activities continue to expand in our modern urban and industrial society, we can expect much more concurrent operation of federal and provincial laws in the old areas of joint occupation and in new areas as well. The adjustments involved will continue to call for both judicial and political decisions of a high order.[39]

[38]It should be noted that in one respect, old age pensions, we have a doctrine of provincial paramountcy, by virtue of section 94A of the *B.N.A. Act*, added in 1951 by 14-15 Geo. VI (U.K.), c. 32:

> 94A. It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

[39]As Dr. J. A. Corry has pointed out, our country is increasingly moving away from the older classical federalism of 'watertight compartments' with provincial legislatures and federal parliament carefully keeping clear of one another. We seem to be moving towards a co-operative federalism. "The co-ordinate governments no longer work in splendid isolation from one another but are increasingly engaged in cooperative ventures in which each relies heavily on the other." See J. A. Corry, "Constitutional Trends and Federalism," in the volume of essays *Evolving Canadian Federalism* (Durham, N.C., U.S.A., 1958), p. 96. The multiplication of concurrent fields is one of the facets of this trend. Even if the precise equilibrium point in a concurrent field is reached by political decision or agreement, nevertheless the bargaining position of federal and provincial governments is defined by the judicial decisions about concurrency and the doctrine of Dominion paramountcy.