SUPREME COURT OF CANADA

CITATION: Canadian Western Bank *v.* Alberta, 2007 SCC 22

DATE: 20070531
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BETWEEN:

Canadian Western Bank, Bank of Montreal, Canadian Imperial Bank of Commerce, HSBC Bank Canada, National Bank of Canada, Royal Bank of Canada, Bank of Nova Scotia and Toronto-Dominion Bank

Appellants

and

Her Majesty The Queen in Right of Alberta

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Alberta Insurance Council, Financial Advisors Association of Canada, AIG Life Insurance Company of Canada, Canada Life Assurance Company, La Capitale Civil Service Insurer Inc., La Capitale Insurance and Financial Services Inc., CUMIS Life Insurance Company, Desjardins Financial Security Life Assurance Company, Empire Life Insurance Company, Equitable Life Insurance Company of Canada, Great-West Life Assurance Company, Industrial Alliance Insurance and Financial Services Inc., Industrial-Alliance Pacific Life Insurance Company, London Life Insurance Company, Manufacturers Life Insurance Company, Standard Life Assurance Company of Canada, Sun Life Assurance Company of Canada and Transamerica Life Canada

Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 110)	Binnie and LeBel JJ. (McLachlin C.J. and Fish, Abella and Charron JJ. concurring)
CONCURRING REASONS: (paras. 111 to 129)	Bastarache J.

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canadian western bank *v.* alberta

Canadian Western Bank, Bank of Montreal, Canadian Imperial Bank of Commerce, HSBC Bank Canada, National Bank of Canada, Royal Bank of Canada,

Bank of Nova Scotia and Toronto-Dominion Bank *Appellants*

v.

Her Majesty The Queen in Right of Alberta *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Alberta Insurance Council, Financial Advisors Association of Canada, AIG Life Insurance Company of Canada, Canada Life Assurance Company, La Capitale Civil Service Insurer Inc., La Capitale Insurance and Financial Services Inc., CUMIS Life Insurance Company, Desjardins Financial Security Life Assurance Company, Empire Life Insurance Company, Equitable Life Insurance Company of Canada, Great-West Life Assurance Company, Industrial Alliance Insurance and Financial Services Inc., Industrial-Alliance Pacific Life Insurance Company, London Life Insurance Company, Manufacturers Life Insurance Company, Standard Life Assurance Company of Canada, Sun Life Assurance Company of Canada and Transamerica Life Canada *Interveners*

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Neutral citation: 2007 SCC 22.

File No.: 30823.

2006: April 11; 2007: May 31.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

on appeal from the court of appeal for alberta

Constitutional law — Division of powers — Banking — Interjurisdictional immunity — Federal Bank Act authorizing banks to engage in promotion of certain types of insurance — Alberta's insurance legislation purporting to make federally chartered banks subject to provincial licensing scheme governing promotion of insurance products — Whether provincial legislation constitutionally inapplicable to banks' promotion of insurance by virtue of doctrine of interjurisdictional immunity.

Constitutional law — Division of powers — Banking — Federal paramountcy — Federal Bank Act authorizing banks to engage in promotion of certain types of insurance — Alberta's insurance legislation purporting to make federally chartered banks subject to provincial licensing scheme governing promotion of insurance products — Whether provincial legislation constitutionally inoperative in relation to banks' promotion of insurance by virtue of doctrine of federal paramountcy.

Constitutional law — Division of powers — Doctrine of interjurisdictional immunity — Scope.

In 2000, Alberta enacted changes to its *Insurance Act* purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products. Upon the coming into force of that Act, the appellant banks brought an application for a declaration that their promotion of certain insurance products authorized by the *Bank Act* was banking within the meaning of s. 91(15) of the *Constitution Act, 1867* and that the *Insurance Act* and its associated regulations were constitutionally inapplicable to the banks' promotion of insurance by virtue of the doctrine of interjurisdictional immunity or, alternatively, inoperative by virtue of the doctrine of federal paramountcy. The trial judge dismissed the application. He found that the challenged provisions of the *Insurance Act* were valid provincial legislation related to the province's property and civil rights power under s. 92(14) of the *Constitution Act, 1867*. He also found that the doctrine of interjurisdictional immunity was inapplicable because the promotion of authorized insurance was not at the core of banking, and that the doctrine of federal paramountcy was inapplicable because there was no operational conflict between the federal and provincial legislation. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and **Binnie**, **LeBel**, Fish, Abella and Charron JJ.: The *Insurance Act* and its associated regulations apply to the banks' promotion of insurance. The fact that Parliament allows a bank to enter into a provincially regulated line of business such as insurance cannot, by federal statute, unilaterally broaden the scope of an exclusive federal legislative power granted by the *Constitution Act, 1867*. When promoting insurance, the banks are participating in the business of insurance and only secondarily furthering the security of their loan portfolios. The banks' claim to

interjurisdictional immunity must therefore be rejected, and they have to comply with both federal and provincial laws because the paramountcy doctrine is not engaged in this case. [4]

The resolution of a case involving the constitutionality of legislation in relation to the division of powers must begin with an analysis of the pith and substance of the impugned legislation. This analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates. If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers. The corollary to this analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis, the dominant purpose of the legislation is still decisive. Merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law. The pith and substance doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. The double aspect doctrine, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on

the perspective from which the legislation is considered, that is, depending on the various aspects of the matter in question. In certain circumstances, however, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed the doctrines of interjurisdictional immunity and federal paramountcy. [25-32]

The doctrine of interjurisdictional immunity recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. It is a doctrine of limited application which should be restricted to its proper limit. A broad use of the doctrine would be inconsistent with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Interjurisdictional immunity should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. While in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will

generally justify a court proceeding directly to the consideration of federal paramountcy. [32-33] [42] [77-78]

Even in situations where the doctrine of interjurisdictional immunity is properly available, the level of the intrusion on the core of the power of the other level of government must be considered. To trigger the application of the immunity, it is not enough for the provincial legislation simply to affect that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. In the absence of impairment, interjurisdictional immunity does not apply. It is when the adverse impact of a law adopted by one level of government increases in severity from affecting to impairing that the core competence of the other level of government or the vital or essential part of an undertaking it duly constitutes is placed in jeopardy, and not before. [48-49]

According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers. In order to trigger the application of the doctrine, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. [69-70] [75]

In the instant case, the pith and substance of the Alberta *Insurance Act* relates to property and civil rights in the province under s. 92(14) of the *Constitution Act, 1867*, and is a valid provincial law. The mere fact that the banks now participate in the promotion of insurance does not change the essential nature of the insurance activity, which remains a matter generally falling within provincial jurisdiction. [80-81]

The banks did not demonstrate that credit-related insurance is part of the basic, minimum and unassailable content of the banking power. While banking certainly includes the securing of loans by appropriate collateral, a bank in promoting optional insurance is not engaged in an activity vital or essential to banking. There is a difference between requiring collateral (a banking activity) and promoting the acquisition of a certain type of product that could then be used as collateral. The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but also deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities. Furthermore, while s. 416(1) of the *Bank Act* allows bank corporations to engage in some insurance activities, it recognizes insurance as a business separate from banking. The banks themselves do not consider the insurance to be vital to their credit granting since apart from s. 418 mortgages, the loan agreement is not, in practice, made contingent on obtaining insurance. The bank cannot therefore be protected from operation of the *Insurance Act* by virtue of the doctrine of interjurisdictional immunity. [85-86] [89-92]

The doctrine of federal paramountcy is also inapplicable because neither operational incompatibility nor the frustration of a federal purpose have been made out. Since 2000, the banks have been promoting insurance in Alberta while complying with

both the federal *Bank Act* and the provincial *Insurance Act*. This is not a case where the provincial law prohibits what the federal law permits. The federal legislation is permissive not exhaustive, and compliance by the banks with the provincial law complements, not frustrates, the federal purpose. [4] [98-100] [103]

Per **Bastarache** J.: All constitutional legal challenges to legislation should follow the same approach. First, the pith and substance of the provincial law and the federal law should be examined to ensure that they are both validly enacted laws and to determine the nature of the overlap, if any, between them. Second, the applicability of the provincial law to the federal undertaking or matter in question must be resolved with reference to the doctrine of interjurisdictional immunity. Third, only if both the provincial law and the federal law have been found to be valid pieces of legislation, and only if the provincial law is found to be applicable to the federal matter in question, then both statutes must be compared to determine whether the overlap between them constitutes a conflict sufficient to trigger the application of the doctrine of federal paramountcy. [112]

The *Insurance Act* is clearly a law in pith and substance about the regulation of the insurance industry within the province, and the particular provisions at issue are concerned with the licensing and regulation of insurance providers, promoters and agents. The provincial law applies to all persons providing or promoting insurance services, including banks. It is therefore valid legislation of general application enacted under the provincial legislative authority over property and civil rights in the province under s. 92(13) of the *Constitution Act, 1867*. As for the validity of the 1991 amendments to the *Bank Act*, they were not challenged by the parties. [116-117] [121]

The federal head of power in issue here is "banking" under s. 91(15) of the *Constitution Act, 1867*. While deposit taking, credit granting in the form of loans and the taking of security for those loans are core elements of banking, clearly, the promotion of authorized insurance does not fall within that core because it is not essential to the function of banking. Insurance can never be security; it is rather the collateral created in relation to the granting of a bank loan. The insurance promoted is optional and can be cancelled at any time. In enacting the amendments to the *Bank Act*, Parliament intended banks to promote insurance, not as an expansion of the core of the banking power, but rather as a limited exception to the general prohibition against the promotion of certain lines of insurance. Parliament thereby drew a clear distinction between the business of banking and the business of insurance. Since the promotion of insurance does not come within the core of banking, the *Insurance Act* is not affecting that core in any important way. Therefore, no immunity arises in the circumstances. [118-123]

The doctrine of paramountcy does not apply in this case as there is no conflict between the provincial law and the federal law. The interaction between the two statutory schemes is one of harmony and complementarity, rather than frustration of Parliament's legislative purpose. The aim of the amendments to the *Bank Act* and the associated regulations was to permit the banks to engage in the promotion of authorized insurance products and to spell out the types of products which could be validly promoted, not to set out the precise manner in which the promotion of insurance would be governed and regulated. Conversely, the aim of the provincial legislation was to provide a regulatory scheme for the promotion of insurance, but not to exercise any control over the kinds of insurance that banks may promote, or the extent to which they may do so, thereby maintaining the integrity of Parliament's legislative purpose. [124] [128]

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By Binnie and LeBel JJ.

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By Bastarache J.

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APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Hunt and Berger JJ.A.) (2005), 39 Alta. L.R. (4th) 1, 361 A.R. 112, 249 D.L.R. (4th) 523, [2005] 6 W.W.R. 226, 18 C.C.L.I. (4th) 161, [2005] A.J. No. 21 (QL), 2005 ABCA 12, affirming a decision of Slatter J. (2003), 21 Alta. L.R. (4th) 22, 343 A.R. 89, [2004] 5 W.W.R. 108, 4 C.C.L.I. (4th) 59, [2003] A.J. No. 1166 (QL), 2003 ABQB 795. Appeal dismissed.

Neil Finkelstein, *Jeffrey Galway* and *Catherine Beagan Flood*, for the appellants.

Robert Normey, *Christine Enns* and *Nick Parker*, for the respondent.

Peter M. Southey, for the intervener the Attorney General of Canada.

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Thomson Irvine and *James Hall*, for the intervener the Attorney General for Saskatchewan.

Katharine L. Hurlburt and *Dale Gibson*, for the intervener the Alberta Insurance Council.

L. David Roebuck, *David Stratas*, *Sara Gelgor* and *Brad Elberg*, for the intervener the Financial Advisors Association of Canada.

Terrence J. O'Sullivan and *M. Paul Michell*, for the interveners AIG Life Insurance Company of Canada et al.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

BINNIE AND LEBEL JJ. _

I. Introduction

1 The framers of the *Constitution Act, 1867* must have thought that the content of the federal power over "Banking, Incorporation of Banks, and the Issue of Paper Money" (s. 91(15)) was tolerably clear. Banking, according to one early authority, is more or less what "com[es] within the legitimate business of a banker" (*Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.), at p. 46). Bankers today are not limited in their activities to the activities their predecessors pursued in the nineteenth century. In recent years, they have persuaded Parliament to open the door to lines of business formerly closed to them, such as the promotion (though not underwriting) of certain lines of insurance. Indeed, more generally, there has been a blurring of the traditional "four pillars" of the Canadian financial services industry, which formerly were neatly divided into banks, trust companies, insurance companies, and security dealers, the first under federal regulation and the last three regulated by the provinces.

2 The question that arises on this appeal is the extent to which banks, as federally regulated financial institutions, must comply with provincial laws regulating the promotion and sale of insurance. Specifically, we are required to consider whether and to

what extent the market conduct rules enacted for consumer protection in Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, govern the promotion of credit-related insurance by banks as now permitted under the *Bank Act*, S.C. 1991, c. 46, as amended.

3 The appellant banks say that the provincial insurance regulations strike at the core of what banking is all about, namely enhancing the security of loan portfolios. As the appellants' counsel puts it, "the primary character of this insurance, tied as it is to the provision of loans by banks of their own loans, is security collateral for bank loans" (transcript, at p. 23) and such promotion therefore "lies at the core of what the bank does, lend money and take security" (transcript, at p. 11). Further, "the lending of money and the promotion of security are intimately tied together and together go to the core of banking" (transcript, at p. 13). The regulations cannot, the appellants say, be allowed to affect such a vital part of their banking undertaking. Alternatively, the appellants argue, the provincial regulations are in operational conflict with the *Bank Act* and its regulations, and the application of the provincial law would frustrate Parliament's purpose.

4 We agree with the conclusion of the courts in Alberta that the appellants' claim to interjurisdictional immunity should be rejected. The fact that Parliament allows a bank to enter into a provincially regulated line of business such as insurance cannot, by federal statute, unilaterally broaden the scope of the exclusive legislative power granted by the *Constitution Act, 1867*. When promoting insurance, the banks are participating in the business of insurance and only secondarily furthering the security of their loan portfolios, as the evidentiary record clearly established. This means, it is true, that banks will have to comply with both federal and provincial laws, but when federally regulated entities take part in provincially regulated activities there will inevitably result a measure of jurisdictional overlap. Nevertheless, the paramountcy doctrine is not engaged. Absent

conflict with a valid federal law, valid provincial legislation will apply. Here there is no operational conflict. Compliance by the banks with provincial insurance laws will complement, not frustrate, the federal purpose. On both branches of the appellants' argument, the appeal should be dismissed.

II. Facts

5 Revisions to the *Bank Act* in 1991 permitted banks to engage in the promotion of certain types of insurance, an activity from which, historically, they had been excluded. The Canadian Bankers Association chronicled this evolution in a consumer information booklet *Your Guide to Financial Services: An overview of Canadian financial products and services* (1999), as follows:

> Up until the mid-20th century, the bank's main function was to act as society's "financial intermediary," pooling the funds of savers through deposit-taking and making them available to borrowers. While their core services are still deposits and loans, banks have expanded to offer hundreds of different products and services to a diverse clientele. Offerings include basic savings and chequing accounts, RRSPs, money orders, foreign exchange, letters of credit, mortgages, financial planning, insurance products such as creditor life insurance and investment products. [Emphasis added; p. 5.]

6 Specifically, the *Bank Act* and its *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330 ("*IBR*s"), now authorize banks to promote at their branches eight kinds of insurance ("authorized insurance") as follows:

(a) *credit or charge card-related insurance*: this insurance covers damage to goods acquired with a credit card, including rented vehicles.

(b) *creditors' disability insurance*: the insurer will pay all or part of a bank loan if a borrower becomes disabled. The beneficiary of the policy is the bank. The amount of the insurance usually corresponds to the amount of the payments that fall due during the period of disability.

(c) *creditors' life insurance*: this is a group insurance policy which pays off the loan when the borrower dies. The beneficiary is the bank, and the amount of the insurance is the amount of the loan outstanding from time to time, subject to any limits in the policy.

(d) *creditors' loss of employment insurance*: the insurer pays all or part of the debt owed to the bank if the borrower becomes unemployed. The beneficiary is the bank, and the amount of the insurance would generally be the amount of payments falling due while the borrower is unemployed.

(e) *creditors' vehicle inventory insurance*: the insurer covers damage to vehicles held as inventory by customers of the bank (usually dealerships) where the vehicles have been financed by the bank and pledged as collateral for repayment of the bank loan.

(f) *export credit insurance*: the insurer protects an exporter against non-payment by the purchaser of the goods. Where the bank has provided financing to the exporter's business, the insurance will generally be assigned to the bank as collateral for the loan.

(g) *mortgage insurance*: this insures the bank against default by one of its mortgagors. The beneficiary of the policy is the bank, the amount payable under the policy is the balance outstanding on the mortgage (usually the net after proceeds of foreclosure), and the insured risk is default by the mortgagor.

(h) *travel insurance*: the insurer will pay losses arising from the cancellation of trips, the loss of personal property while on a trip, the loss of baggage, as well as medical expenses incurred on a trip.

7 The evidence showed that a large percentage of the banks' customers purchase credit-related insurance. Therefore, even though the purchase is optional, the fact is that promotion of insurance as collateral may to some extent increase the security of the banks' overall loan portfolio. The trial judge considered this effect to be small. He found that banks generally insist on adequate collateral *before* the loan is made, and the decision to grant credit is not afterwards reconsidered if the borrower declines the offer of optional insurance. From the bank's perspective, its position is already fully protected. The availability of yet more collateral in the form of after-acquired insurance may therefore simply pile Mount Pelion on Olympus.

8 The trial judge noted that of these eight types of insurance "products" only mortgage insurance and export credit insurance actually insure against the risk of default in the payment of a loan. In contrast, credit-card related insurance and travel insurance, including personal accident insurance, have no significant connection to the amount of a loan owed to a bank and are payable irrespective of any default. While he recognized that insurance against the risk of a customer's disability or of loss of life or of employment enhances the safety of the bank's loan portfolio, the risk insured against is not default on

the payment of the loan but the insured's disability or loss of life or of employment. The insurance, which is entirely optional for the borrower, is promoted on the basis of providing the borrower (not the bank) with peace of mind. The insurer will generally be required to pay the proceeds of the insurance directly to the bank in the event the risk materializes, even if the loan remains in good standing and there is no question about the insured's ability to pay. As the trial judge noted, "[r]emoving the necessity for the bank to pursue widows and orphans can undoubtedly improve the bank-customer relationship, although it is difficult to determine how big a factor this would be ((2003), 21 Alta. L.R. (4th) 22, 2003 ABQB 795, at para. 41).

9 The trial judge added that the way in which banks promote insurance varies somewhat from product to product. Credit card and travel insurance coverage are generally sold as a feature of credit cards. Mortgage insurance is promoted in concert with the granting of mortgages (although it is mandatory under s. 418 of the *Bank Act* in the case of a high-ratio mortgage worth more than 75 percent of the value of the mortgaged residence). The insurance relating to a calamity in the life of a debtor (disability, unemployment and death) is sometimes promoted at the time the loan is taken out but is also promoted quite independently by direct mail or through telemarketers. If the borrower answers certain health questions in the negative, the insurance is automatically approved through a group policy.

10 In 2000, Alberta enacted changes to its *Insurance Act* purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products. Under s. 454, a bank wanting to promote insurance must obtain a "restricted insurance agent's certificate of authority". The banks thereby became subject to market standards regulation including, for example, s. 486 that requires

training procedures to be in place, s. 500 that targets misrepresentations about the levels of premiums and ss. 480 and 764 that provide sanctions for non-compliance and improper market conduct. In addition, the statute empowers the provincial Minister of Finance to make regulations respecting the ethical, operational and trade practices of agents. It is consumer protection legislation.

11 Upon the coming into force of the *Insurance Act*, the appellant banks sought a declaration that their promotion of insurance is "banking" under s. 91(15) of the *Constitution Act, 1867* and that the *Insurance Act* and its associated regulations are constitutionally inapplicable and/or inoperative to the banks' promotion of insurance.

III. Judicial History

A. *Court of Queen's Bench of Alberta* (2003), 21 Alta. L.R. (4th) 22, 2003 ABQB 795

12 Slatter J. noted that, except for mortgages for an amount in excess of 75 percent of the home value, the purchase of insurance by a bank customer is optional. Being optional, it is obviously not considered by the bank as vital and essential to its undertaking. The trial judge concluded, on the evidence, that in the majority of cases where the loan is paid by insurance, the borrower would in any event have been able to retire the loan without the insurance. The trial judge found as fact that "[t]he overall effect on portfolio strength is small and is not the main reason why the banks promote insurance" (para. 48). Instead, he concluded:

> On this record it is clear that the primary reason the banks want to promote authorized types of insurance is because they make a profit from it.

> The sale of insurance is simply another product line, no more and no less. [para. 53]

13 Slatter J. held that the *Insurance Act* was not rendered inapplicable to the banks under the doctrine of interjurisdictional immunity. He reviewed the evidence in detail. The insurance is not part of the credit-making decision and, on the evidence, has almost nothing at all to do with the granting of loans. He ruled:

> On this record it is not possible to say that the promotion of insurance is an "unassailable part" of the credit [granting] process or banking. It is collateral or "subsidiary" to both; a new product and profit centre unrelated to core banking. The promotion of insurance is analogous to mortgage lending and the sale of registered retirement savings plans which, while carried on by banks, are not a part of "banking" for constitutional purposes. This conclusion is particularly compelling for those types of insurance that have no relation to loan balances, but it applies to all insurance. [para. 173]

14 As to the doctrine of federal paramountcy, Slatter J. held that "the provincial regulatory scheme does not frustrate Parliament's intentions in empowering the banks to promote insurance; the provincial regulations complement the new powers of the banks. There is no operational conflict. The doctrine of paramountcy is not engaged on this record" (para. 204).

B. *Court of Appeal of Alberta (McFadyen, Hunt and Berger JJ.A.)* (2005), 39 Alta. L.R. (4th) 1, 2005 ABCA 12

15 Hunt J.A., writing for herself and McFadyen J.A., agreed with the trial judge's conclusion that the impugned provisions of the *Insurance Act* apply to banks. Only the "basic, minimum and unassailable core" of a matter under federal jurisdiction is immune from provincial regulations. The banks' insurance products are (except in the case of certain mortgage loans) not mandatory, can be cancelled independently by the consumer, are often not promoted until after the loan arrangement has been finalized, are not triggered by default on the loan and are often terminated by default on loan payments. They agreed with the trial judge that "the insurance is mostly optional and outside the Banks' control. Borrowers' insurance-related decisions do not affect the Banks' credit-granting decisions" (para. 81).

16 Hunt and McFadyen JJ.A. also rejected the application of federal paramountcy. There was no conflict between the provincial and federal laws. The insurance provisions contained in the *Bank Act* and *IBR*s are permissive rather than exhaustive. Nothing in the federal enactments or the legislative history suggests a parliamentary intent to authorize banks to promote insurance without complying with otherwise valid provincial laws. There is no operational incompatibility.

17 In concurring reasons, Berger J.A. emphasized that overlap of federal and provincial legislation is to be expected and accommodated, and that courts should exercise restraint in applying interjurisdictional immunity and paramountcy. The provincial *Insurance Act* does not restrict the banks' lending operations, nor does it restrict the ability of the banks to take any type of security at any time they choose. The banks remain free to promote insurance, and compliance with the impugned provincial legislation does not result in a sterilization or frustration of the parliamentary purpose.

IV. Relevant Statutes and Regulations

18 See Appendix.

V. Constitutional Questions

19 On September 19, 2005, the Chief Justice stated the following constitutional questions:

1. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inapplicable to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of interjurisdictional immunity?	1. Est-ce que la loi de l'Alberta intitulée *Insurance Act*, R.S.A. 2000, ch. I-3, et les règlements pris en vertu de cette loi, sont pour tout ou partie constitutionnellement inapplicables, par l'effet de la doctrine de l'exclusivité des compétences, à la promotion par les banques d'« assurance autorisée » et d'« assurance accidents corporels » au sens du *Règlement sur le commerce de l'assurance (banques et société de portefeuille bancaires)*, DORS/92-330?
2. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inoperative in relation to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of federal legislative paramountcy?	2. Est-ce que la loi de l'Alberta intitulée *Insurance Act*, R.S.A. 2000, ch. I-3, et les règlements pris en vertu de cette loi, sont pour tout ou partie constitutionnellement inopérants, par l'effet de la doctrine de la prépondérance des lois fédérales, à l'égard de la promotion par les banques d'« assurance autorisée » et d'« assurance accidents corporels » au sens du *Règlement sur le commerce de l'assurance (banques et société de portefeuille bancaires)*, DORS/92-330?

VI. Analysis

A. *The Issues*

20 In the present appeal, we are not confronted with a dispute between the federal government and Alberta. Rather, the appellant banks are independently making the claim to carry on their insurance activities in Alberta free of the insurance regulations imposed on all other promoters and vendors of insurance products in the province. The banks assert that as federal undertakings they are "immune" from provincial insurance regulation aimed generally at fair market practices and consumer protection in the province. At the same time, the appellants acknowledge that for 125 years the regulation of insurance has been held generally to be a matter of "Property and Civil Rights in the Province" within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*; see *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.); *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; and *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433. The appellants' argument is that when banks promote credit-related insurance, they are carrying on the business of banking, not the business of insurance. As the Attorney General of Canada put it in oral argument, the issue is "whether the authorized creditor insurance products are themselves so vital and essential to lending that they join lending at the core of banking" (transcript, at p. 34). On that issue, as stated, the Alberta courts flatly rejected the banks' position. We agree.

B. *Principle of Federalism*

21 The disposition of this case requires the consideration and application of important constitutional doctrines governing the operation of Canadian federalism. Despite the doubts sometimes expressed about the nature of Canadian federalism, it is

beyond question that federalism has been a "fundamental guiding principle" of our constitutional order since the time of Confederation, as our Court emphasized in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 55.

22 As the Court noted in that decision, federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

23 To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution — this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 114 (P.C.), at p. 136 — the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which

include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.

24 As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" (*Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56, at para. 10; *Husky Oil Operations Ltd. v. Canada Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162). We will now turn to the issue of how, in our view, the main constitutional doctrines and the interplay between them should be construed so as to facilitate the achievement of the objectives of Canada's federal structure.

C. *Constitutional Doctrines and How They Interrelate*

(1) <u>"Pith and Substance" Doctrine</u>

25 It is now well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the "pith and substance" of the impugned legislation (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 52). The analysis may concern the legislation as a whole or only certain of its provisions.

26 This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. As Rand J. put it in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:

> [t]he courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism. . . . [Emphasis in original.]

If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.

27 To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Firearms Reference*, at para. 16). To assess the purpose, the courts may consider both intrinsic

evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).

28 The fundamental corollary to this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23). By "incidental" is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature: see: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In *Bank of Toronto v. Lambe*

(1887), 12 App. Cas. 575, by way of further example, and in contrast to the *Alberta Banks* case already mentioned, the Privy Council upheld the validity of legislation levying a tax on banks, holding that the pith and substance of the legislation was indeed to generate revenue for the province, and its essential purpose was therefore in relation to direct taxation, not banks or banking. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at para. 15.5(a).

29 The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example, as Brun and Tremblay point out, it would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights, or for provincial legislatures to make effective laws in relation to civil law matters without incidentally affecting the status of foreign nationals (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 451).

30 Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence: *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la securité du travail)*, [1988] 1 S.C.R. 749 ("*Bell Canada (1988)*"), at p. 765. The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. A classic example is that of dangerous driving: Parliament may make laws in relation to the "public order" aspect, and

provincial legislatures in relation to its "Property and Civil Rights in the Province" aspect (*O'Grady v. Sparling*, [1960] S.C.R. 804). The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.

31 When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.

32 That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed two doctrines. The first, the doctrine of interjurisdictional immunity, recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution. The second, the doctrine of federal paramountcy, recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails. We will now discuss these doctrines, beginning with interjurisdictional immunity.

(2) The Doctrine of Interjurisdictional Immunity and its Sources

33 Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government. Immunity from such intrusion, Beetz J. observed in the context of a federal undertaking, is

> an integral and vital part of [Parliament's] primary legislative authority over federal undertakings. If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. [p. 840]

34 The doctrine is rooted in references to "exclusivity" throughout ss. 91 and 92 of the *Constitution Act, 1867*. The opening paragraph of s. 91 refers to the "exclusive [l]egislative [a]uthority of the Parliament of Canada" in relation to matters coming within the listed "classes of subjects" including "Banking, Incorporation of Banks, and the Issue of Paper Money" (s. 91(15)). If that authority is truly exclusive, the reasoning goes, it cannot be invaded by provincial legislation even if the federal power remains unexercised. "The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the [*Constitution Act, 1867*]":

Union Colliery Co. of British Columbia Ltd. v. Bryden, [1899] A.C. 580 (P.C.), at p. 588. Equally, s. 92 (headed "Exclusive Powers of Provincial Legislatures") is introduced by the words "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated", including "Property and Civil Rights in the Province" (s. 92(13)) and "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)). The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[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" (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354). Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences (*Bell Canada (1988)*, at p. 766). At the same time, the doctrine of interjurisdictional immunity seeks to avoid, when possible, situations of concurrency of powers (Laskin C.J., in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at p. 764).

(3) The Dominant Tide of Constitutional Interpretation Does Not Favour Interjurisdictional Immunity

35 Despite the efforts to find a proper role for the doctrine, the application of interjurisdictional immunity has given rise to concerns by reason of its potential impact on Canadian constitutional arrangements. In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings

from provincial encroachment. However, it would appear that the jurisprudential application of the doctrine has produced somewhat "asymmetrical" results. Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of "reading down" the federal enactment or federal power without too much doctrinal discussion, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In general, though, the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation: Hogg, at p. 15-34.

36 A view of federalism that puts greater emphasis on the legitimate interplay between federal and provincial powers was championed by the late Chief Justice Dickson, who described the doctrine of interjurisdictional immunity as "not . . . particularly compelling" (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 17):

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. [p. 18]

This statement was reproduced in Dickson C.J.'s judgment (for a unanimous bench that included Beetz J.) in *General Motors*, at p. 669.

37 The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that

> the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.
>
> (Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307, at p. 308.)

38 In our view, the sweeping immunity argued for by the banks in this appeal is not acceptable in the Canadian federal structure. The argument exposes the dangers of allowing the doctrine of interjurisdictional immunity to exceed its proper (and very restricted) limit and to frustrate the application of the pith and substance analysis and of the double aspect doctrine. The latter have the ability to resolve most problems relating to the validity of the exercise of legislative powers under the heads of power applicable to the activities in question.

39 It is not without interest that the present doctrine of interjurisdictional immunity, which is the result of a long process of constitutional evolution, was originally

developed in a very special context, namely to protect federally incorporated companies from provincial legislation affecting the essence of the powers conferred on them as a result of their incorporation (*John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.); *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91 (P.C.)). Since the creation of corporations by letters patent issued by the Crown constituted an exercise of the Crown's prerogative to create corporations, it would have seemed natural to the Privy Council to extend the Crown's immunity to the entities it incorporated. Thus, to apply a province's general statutes to these corporations could be conceived as interfering with the exercise of the prerogative of incorporation.

40 The doctrine of interjurisdictional immunity was subsequently applied to protect "essential" parts of federal "undertakings" (*Attorney-General for Ontario v. Winner*, [1954] 4 D.L.R. 657 (P.C.); see also *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C.) ("*Toronto Corporation*")). Still later, the courts resorted to interjurisdictional immunity to shield Aboriginal peoples and their lands from provincial legislation of general application affecting certain aspects of their special status (*Natural Parents*; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285).

41 Thus, broadly speaking, the doctrine of interjurisdictional immunity was used to protect that which makes certain works or undertakings things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction. As Gonthier J. observed in *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838:

> The immunity pertaining to federal status applies to things or persons falling within federal jurisdiction, some specifically federal aspects of which would be affected by provincial legislation. This is so because these specifically federal aspects are an integral part of federal jurisdiction over such things or persons and this jurisdiction is meant to be exclusive. [Emphasis added; p. 853.]

Of course, what is of specific federal interest may well be the federally regulated activity itself rather than the identity of the participants. In *Natural Parents*, at p. 760, Laskin C.J. observed:

> It cannot be said therefore that because a provincial statute is general in its operation, in the sense that its terms are not expressly restricted to matters within provincial competence, it may embrace matters within exclusive federal competence. . . . This is because to construe the provincial legislation to embrace such activities would have it encroaching on an exclusive federal legislative area.
>
> (Cited with approval by Beetz J. in *Bell Canada (1988)*, at p. 834)

In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, in the course of considering federal jurisdiction over maritime law, the Court acknowledged that the doctrine could potentially apply to all "activities" within Parliament's jurisdiction. See also *McKay v. The Queen*, [1965] S.C.R. 798, where the issue was the applicability of a municipal sign law to a federal activity, namely a federal election; *OPSEU*, Beetz J., at p. 30; and *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, La Forest J., at p. 257.

42 While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities"; nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much

greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. See F. Gélinas, "La doctrine des immunités interjuridictionnelles dans le partage des compétences : éléments de systématisation", in *Mélanges Jean Beetz* (1995), 471, and Hogg, at para. 15.8(c). It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

43 Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizen's Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in

interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.

44 Moreover, as stated, interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called "core" of jurisdiction. This increases the risk of creating "legal vacuums", as this Court recognized in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at para. 52. Generally speaking, such "vacuums" are not desirable.

45 Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The "asymmetrical" application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism. Commentators have noted that an extensive application of this doctrine to protect federal heads of power and undertakings is both unnecessary and "undesirable in a federation where so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level" (Hogg, at p. 15-30; see also Weiler, at p. 312; J. Leclair, "The Supreme

Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411). The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 3).

46 Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation. As we shall see, sufficient confirmation of this can be found in the history and operation of the doctrine of federal paramountcy.

47 For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.

D. *A More Restricted Approach to Interjurisdictional Immunity*

(1) Impairment Versus Affects

48 Even in situations where the doctrine of interjurisdictional immunity is properly available, we must consider the level of the intrusion on the "core" of the power

of the other level of government which would trigger its application. In *Bell Canada (1988)*, Beetz J. wrote, at pp. 859-60:

> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking without necessarily going as far as impairing or paralyzing it. [Emphasis added.]

Our colleague Bastarache J. agrees with the substitution in *Bell Canada (1988)* of "affects" for "impairs". He writes:

> . . . the meaning of the word "affects" should be interpreted as a kind of middle ground between the perhaps overly vague or broad standard of "touches on" and the older and overly restrictive standard of "sterilizes" or "impairs". Without requiring complete paralysis of the core of the federal power or the operations of the undertaking, the impact of the application of the by-law must be sufficiently severe and serious to trigger immunity.
>
> (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, at para. 48)

With great respect, we cannot agree. We believe that the law as it stood prior to *Bell Canada (1988)* better reflected our federal scheme. In our opinion, it is not enough for the provincial legislation simply to "affect" that which makes a federal subject or object of rights specifically of federal jurisdiction. The difference between "affects" and "impairs" is that the former does not imply any adverse consequence whereas the latter does. The shift in *Bell Canada (1988)* from "impairs" to "affects" is not consistent with the view subsequently adopted in *Mangat* that "[t]he existence of a double aspect to the subject matter . . . favours the application of the paramountcy doctrine rather than the doctrine of

interjurisdictional immunity" (para. 52). Nor is the shift consistent with the earlier application by Beetz J. himself of the "impairment" test in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at pp. 323-24. It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

49 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ. observed in passing that a distinction could be drawn between the *direct* application of provincial law (where the operative verb is "affects") and the *indirect* application (where the operative verb may still be "impairs") (p. 957). This further exercise in line drawing signalled a measure of dissatisfaction with the "affects" test without doing anything about it. At this point, we should complete the reassessment begun in *Irwin Toy* and hold that, in the absence of impairment, interjurisdictional immunity does not apply.

(2) Identification of the "Basic, Minimum and Unassailable" Content of a Legislative Power

50 One of the important contributions of *Bell Canada (1988)* was to limit the scope of the doctrine to the "basic, minimum and unassailable content" (p. 839) sometimes referred to as the "core" of the legislative power in question. (By "minimum", we understand that Beetz J. meant the minimum content necessary to make the power effective for the purpose for which it was conferred.) This is necessary, according to Beetz J., to give effect to what he called "the principle of federalism underlying the

Canadian Constitution" (p. 766). Thus, the success of the appellants' argument in this appeal depended in part on locating the promotion of "peace of mind" insurance at the core of banking. For the reasons already discussed, and particularized below, we do not believe that this aspect of the appellants' argument can be sustained.

(3) The Vital or Essential Part of an Undertaking

51 In the exercise of their legislative powers, federal and provincial legislators bring into existence "undertakings". The appellant banks are "federal undertakings" constituted pursuant to the s. 91(15) banking power. In *Bell Canada (1988)*, Beetz J. spoke of interjurisdictional immunity in relation to "essential and vital elements" of such undertakings (pp. 839, 859-60). In our view, some text writers and certainly the appellants have been inclined to give too wide a scope to what should be considered "vital or essential" to a federal undertaking. We believe that Beetz J. chose his words carefully and intended to use "vital" in its ordinary grammatical sense of "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial" (*Shorter Oxford English Dictionary* (5th ed. 2002), vol. 2, at p. 3548). The word "essential" has a similar meaning, e.g. "[a]bsolutely indispensable or necessary" (vol. 1, at p. 860). The words "vital" and "essential" were not randomly chosen. The expression "vital part" was used as a limitation on the scope of interjurisdictional immunity by Abbott J. in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, at p. 592, and by Martland J. in *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 ("*Bell Canada (1966)*"), at p. 774. Martland J. also referred to an "essential part of the operation of such an undertaking", at p. 777. What is "vital" or "essential" is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation. In the

case of federal undertakings, Beetz J. referred to a "general rule" that there is *no* interjurisdictional immunity, provided that "the application of [the] provincial laws does not bear up on those [federal] subjects in what makes them specifically of federal jurisdiction" (*Bell Canada (1988)*, at p. 762 (emphasis added)). In the present appeal, for example, the appellants' argument inflates out of all proportion what could reasonably be considered "vital or essential" to their banking undertaking. The promotion of "peace of mind" insurance can hardly be considered "absolutely indispensable or necessary" to banking activities unless such words are to be emptied of their ordinary meaning.

52 In this respect, following the sage common law adage that it is wise to look at what the courts do as distinguished from what they say, a useful approach to understanding the limited scope of the doctrine of interjurisdictional immunity in respect of undertakings is to see how it has been applied to the facts. A comparison between *Bell Canada (1988)* and the present case is instructive. In *Bell Canada (1988)*, the Court concluded that the application of a provincial *Act respecting occupational health and safety* could not apply to a federal telephone undertaking because such application would "enter directly and massively into the field of working conditions and labour relations . . . and . . . management and operation" of the federal utility (p. 798). Amongst other things, the provincial Act would impose "a system of partial co-management of the undertaking by the workers and the employer" (p. 810), thereby regulating the federal undertaking in a manner not sanctioned by Parliament. To the same effect is *Canadian National Railway Co. v. Courtois*, [1998] 1 S.C.R. 868, released concurrently with *Bell Canada (1988)*, where the same provincial Act was declared inapplicable to a federally regulated railway (p. 890). In the third case of the 1988 trilogy, *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897, the Court held that the preventative (as distinguished from compensatory) aspects of the B.C. provincial

Workers' Compensation Act could not apply to an interprovincial and international trucking undertaking because to do so would intrude on the management of the federally regulated undertaking, including the "B.C. Board's power to order an employer to close down all or part of the place of employment to prevent injuries" (p. 911). These cases may usefully be contrasted with *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.), where it was held *not* to be vital or essential for the federal government to regulate the clearance of trash and debris from the ditch on the south side of the railway undertaking's roadbed. (See also *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028.) Yet it seems that clearing debris from the roadbed is at least as essential to the operations of a rail service as is selling optional "peace of mind" insurance to bank borrowers.

53 Nor do the other authorities relied on by the appellants, in our view, justify their expansive view of the elements that are vital and essential to their banking operations. It is simply not credible, in our view, to suggest that the promotion of "peace of mind" insurance is "absolutely indispensable or necessary" to enable the banks to carry out their undertakings in what makes them specifically of federal jurisdiction.

E. *The Interjurisdictional Immunity Case Law Relied on by the Appellants*

(1) <u>The Federal Transportation Cases</u>

54 The appellants rely on *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. refused, [2001] 1 S.C.R. ix, in which it was held that a neighbouring municipality could not impose its land-use development controls (and charges) on the planned expansion of terminal facilities at

Toronto's Pearson Airport. Of course interprovincial and international carriers have a vital and essential interest in being able to land at an airport or having access to a safe harbour. Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation. See *Johannesson v. Rural Municipality of West St. Paul*, [1952] S.C.R. 292, *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.), and *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.). Equally, a provincial law that purported to regulate the access of its residents to banks would likely meet the same constitutional objections as provincial laws that purported to regulate the collection and discharge of international or interprovincial cargo and passengers. In *Winner*, the Judicial Committee held that a provincial law which required a particular licence to be obtained before a bus company operating an interprovincial and international bus service could "embu[s] or debu[s]" passengers would "destroy the efficacy" of the federal undertaking (pp. 668 and 675). For a province to regulate that part of the undertaking would be to usurp the regulatory function of the federal government. Access to passengers and cargo, in other words, was absolutely indispensable and necessary to the carriers' viability: see to the same effect *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811, and *R. v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.).

55 On the other hand, courts have consistently held that there is no vital or essential federal interest that would justify holding transportation undertakings immune from the rules of the road or legislation dealing with safety in the transportation industry. See, e.g., *R. v. Greening* (1992), 43 M.V.R. (2d) 53 (Ont. Ct. (Prov. Div.)); *National Battlefields Commission*, at p. 860; *R. v. TNT Canada Inc.* (1986), 37 D.L.R. (4th) 297

(Ont. C.A.), at p. 303. These cases, in our view, are more closely analogous to the facts here.

56 In *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, the Court held that it was not vital or essential to the federal interest to regulate the wages and working conditions of employees of an independent contractor (not itself a federal undertaking) constructing an airport building. In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, provincial liquor laws were held applicable to airlines because the sale of liquor was a benefit but not essential to the airline undertaking. The same could be said of the relationship between the promotion of insurance and the banking business.

(2) The Federal Communication Undertakings

57 Reference has already been made to the appellants' reliance on *Bell Canada (1966)* and *Bell Canada (1988)*. One of the first cases to find a valid provincial law inapplicable to a federal undertaking was *Toronto Corporation*. The province purported to authorize the municipality to regulate the construction of Bell's conduits, poles and cables, but the court held that "no provincial legislature . . . is competent to interfere with [Bell's] operations, as authorized by . . . Parliament" (p. 57). Reference should be made to *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.), to the same effect. The federal interest extends not only to the management of the undertaking but also to ensuring that the undertaking can fulfill its fundamental mandate "in what makes them specifically of federal jurisdiction" (*Bell Canada (1988)*, at p. 762). Unimpeded access to conduits and poles was, in other words, absolutely indispensable and necessary to allow Bell to fulfill its federal mandate.

58 These cases do not assist the appellants. Alberta's insurance law does not deny banks access to insurance as collateral. Just because banks require collateral does not mean they must have an essential role as an insurance agent or promoter. Banks can simply indicate their requirements to the prospective borrower, and let the borrower find its own insurance. Of course, profits from the promotion of insurance support the bottom line of banks just as advertising dollars support broadcasters, yet the Court found a provincial law regulating advertising applicable to a company seeking to advertise on a federal broadcast undertaking in *Attorney-General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.

(3) The Maritime Law Cases

59 The appellants rely on *Ordon Estate*, citing the proposition that maritime negligence law is considered part of the unassailable core of Parliament's exclusive jurisdiction over navigation and shipping and this was in part

> because of the intrinsically multi-jurisdictional nature of maritime matters, particularly claims against vessels or those responsible for their operation. This concern for uniformity is one reason, among others, why the application of provincial statutes of general application to a maritime negligence claim cannot be permitted. [para. 93]

We would have thought that in the case of insurance, the concern for uniformity favours the provincial law so that all promoters of insurance within the province are subject to uniform standards of marketing behaviour and fair practices.

(4) The Indian Cases

60 The appellants relied on certain observations about interjurisdictional immunity in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, but of course the actual holding in that case was that notwithstanding exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians", a provincial Forest Appeals Commission could properly consider questions relating to aboriginal rights arising in the execution of its valid provincial mandate respecting forestry resources. In *Kitkatla Band*, our Court held that a provincial law relating to the preservation of heritage objects applied because its application did not affect aboriginal rights or title. These cases further demonstrate that the Court has taken a strict view of the "basic, minimum and unassailable content" of the federal power in relation to "Indians" who are, in limited respects, federal "persons", and to that extent these cases undermine rather than advance the banks' argument.

61 In some cases, it is true, the Court has found a vital or essential federal interest to justify federal exclusivity because of the special position of aboriginal peoples in Canadian society or, as Gonthier J. put it in the *National Battlefields Commission* case mentioned earlier, "the fundamental federal responsibility for a thing or person" (p. 853). Thus, in *Natural Parents*, Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents "would be to touch 'Indianness', to strike at a relationship integral to a matter outside of provincial competence" (pp. 760-61). Similarly, in *Derrickson*, the Court held that the provisions of the British Columbia *Family Relations Act* dealing with the division of family property were not applicable to lands reserved for Indians because

"[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*" (p. 296). In *Paul v. Paul*, [1986] 1 S.C.R. 306, our Court held that provincial family law could not govern disposition of the matrimonial home on a reserve. In these cases, what was at issue was relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival. On the other hand, in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, this Court held that a non-Indian business on a reserve that was partly owned and operated by Indians (but not the band) was subject to provincial labour regulation. The Court could not discern a need for federal exclusivity in a matter so remote from its special responsibilities for aboriginal peoples. In other words, in their federal aspect ("Indianness"), Indian people are governed by federal law exclusively, but in their activities as citizens of a province, they remain subject to provincial laws of general application. As it is with Indians, so it must be with chartered banks.

(5) The Management of Federal Institutions

62 The cases relied upon by the appellants dealing with the management of federal undertakings, including the 1988 trilogy, belong in fact to a broader line of cases dealing with federal institutions, where management has been considered an absolutely indispensable and necessary element of federal jurisdiction. These include the post office: *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248 (province cannot fix wages of postal employees); *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (province cannot regulate labour relations in the post office); and the RCMP: *Attorney General of Quebec v. Attorney General of Canada*, [1979] 1 S.C.R. 218 (circumscribing a provincial public enquiry because "no provincial

authority may intrude into its management" (p. 242)), and *Attorney General of Alberta v. Putnam*, [1981] 2 S.C.R. 267 (holding inapplicable a provincial police complaints procedure). Yet RCMP officers are obliged to observe, for example, provincial highway traffic laws. Such laws do not affect the core of "what they do and what they are" that is specifically of federal interest.

63 Viewed in this larger context, it seems evident that the 1988 trilogy, focussed as it is on management, cannot be read as broadly as the appellant banks urge. The optional sale of borrowers' "peace of mind" insurance is not connected to a "basic, minimum and unassailable element" of the federal banking power or a "vital" part of the *banking* undertaking of the appellant banks.

(6) The Regulation of Federal Companies and Undertakings

64 The respondent, for its part, relied on *Canadian Indemnity*. In that case, British Columbia had introduced a universal compulsory automobile insurance plan to be administered by the Insurance Corporation of British Columbia to the exclusion of the appellants who were insurance companies incorporated federally or abroad. The Court held that "[t]he fact that a federally-incorporated company has, by federal legislation, derived existence as a legal person, with designated powers, does not mean that it is thereby exempted from the operation of such provincial regulation" (p. 519). In the present case, of course, the exclusive federal power is in relation to "banking" as well as "the incorporation of banks".

65 As to what constitutes "banking", however, the Court has taken the view that it does *not* include "every transaction coming within the legitimate business of a banker" because taken literally such a definition

> would then mean for instance that the borrowing of money or the lending of money, with or without security, which come[s] within the legitimate business of a great many other types of institutions as well as of individuals, would, in every respect, fall under the exclusive legislative competence of Parliament. Such a result was never intended.
>
> (*Canadian Pioneer Management*, at p. 468, *per* Beetz J.)

This observation takes on particular relevance here. Section 409(2) of the *Bank Act* provides that "[f]or greater certainty, the business of banking includes (*a*) providing any financial service". The appellants cannot plausibly argue that banks are immune from provincial laws of general application in relation to "any" financial service, as this would not only render inapplicable elements of the *Insurance Act* but potentially render inapplicable provincial laws relating to mortgages, securities and many other "services" as well.

66 Of greater relevance to the present appeal is the line of cases that have applied provincial environmental law to federal entities engaged in activities regulated federally. In *Ontario v. Canadian Pacific*, the federally regulated railway was held to be subject to the Ontario *Environmental Protection Act* with respect to smoke it caused by burning dead grass along its right-of-way, despite the fact that the fires were set by the railway company to comply with the federal *Railway Act*. The Ontario Court of Appeal held that the principle of interjurisdictional immunity did not apply (see (1993), 13 O.R. (3d) 389), and an appeal to this Court was unanimously dismissed with brief reasons. In *TNT Canada*, an interprovincial trucking company was held bound by provincial regulations governing the carriage of PCB waste. As Mackinnon A.C.J.O. observed, at p. 303:

> In the same way that the province can regulate speed limits and the mechanical conditions of vehicles on the roads of the province for the protection and safety of other highway users, it can set conditions for the carriage of particular toxic substances within the province, provided that the conditions do not interfere in any substantial way with the carrier's general or particular carriage of goods, and are not in conflict either directly or indirectly with federal legislation in the field.

(7) Conclusion

67 In our view, the above review of the case law cited by the appellants and other parties and interveners shows that not only *should* the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it *has* been so applied. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.

68 We turn, then, to the second branch of the appellants' argument, namely that they are relieved of compliance with provincial insurance regulations by the doctrine of federal paramountcy.

F. *Doctrine of Federal Paramountcy*

69 According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent

of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers. This doctrine is much better suited to contemporary Canadian federalism than is the doctrine of interjurisdictional immunity, as this Court has expressly acknowledged in the "double aspect" cases (*Mangat*, at para. 52).

70 Of course, the main difficulty consists in determining the degree of incompatibility needed to trigger the application of the doctrine of federal paramountcy. The answer the courts give to this question has become one of capital importance for the development of Canadian federalism. To interpret incompatibility broadly has the effect of expanding the powers of the central government, whereas a narrower interpretation tends to give provincial governments more latitude.

71 In developing its approach, this Court, despite the problems occasionally caused by certain relevant aspects of its case law, has shown a prudent measure of restraint in proposing strict tests: *General Motors*, at p. 669. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, the Court defined the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy. Dickson J. stated:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being

> told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

72 Thus, according to this test, the mere existence of a duplication of norms at the federal and provincial levels does not in itself constitute a degree of incompatibility capable of triggering the application of the doctrine. Moreover, a provincial law may in principle add requirements that supplement the requirements of federal legislation (*114957 Canada Ltée (Spraytech, Société d'arrosage*). In both cases, the laws can apply concurrently, and citizens can comply with either of them without violating the other.

73 Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

74 That being said, care must be taken not to give too broad a scope to *Hall*, *Mangat* and *Rothmans*. The Court has never given any indication that it intended, in those cases, to reverse its previous decisions and adopt the "occupied field" test it had clearly rejected in *O'Grady* in 1960. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any

possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*" (*Rothmans*, at para. 21).

75 An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356). To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

G. *Order of Application of the Constitutional Doctrines*

76 The above review of constitutional doctrines inevitably raises questions about the logical order in which they should be applied. It would be difficult to avoid beginning with the "pith and substance" analysis, which serves to determine whether the legislation in question is in fact *valid*. The other two doctrines serve merely to determine whether a valid law is *applicable* or *operative* in specific circumstances.

77 Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to *always* begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of "cores" and "vital and essential" parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.

78 In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.

H. *Application to the Facts of this Case*

79 While the particular factual elements of this case have already been canvassed for the purpose of the legal analysis, we will address them in greater depth out of respect for the detailed arguments of the parties.

(1) The Pith and Substance of the Alberta *Insurance Act* Relates to Property and Civil Rights in the Province

80 The Alberta *Insurance Act* is a valid law. As the banks acknowledge, the business of insurance in general falls within the authority of the provinces as a matter of property and civil rights. See, e.g., *Parsons* and *Canadian Pioneer Management*. As noted earlier, a federally incorporated company remains subject to provincial regulation in respect of its insurance business: *Canadian Indemnity*. The banks say however that the promotion of their eight lines of "authorized" insurance products is integral to their lending practices, and thus to banking, which is a federally regulated activity.

81 Nevertheless, banks, as such, are not exempt from provincial law. In *Bank of Toronto v. Lambe*, as mentioned earlier, it was held that the bank was subject to a provincial tax aimed at banks. In *Gregory Co. v. Imperial Bank of Canada*, [1960] C.S. 204, it was held by the Quebec Superior Court that a bank is subject to provincial securities laws. Accordingly, the mere fact that the banks now participate in the promotion of insurance does not change the essential nature of the insurance activity, which remains a matter generally falling within provincial jurisdiction.

82 In this respect, the banks' argument is also that while insurance is generally a provincial matter, when used as collateral for bank loans, credit-related insurance is "integrated" into banking in the same way that negligence law was held to be "integral" to shipping and navigation in *Ordon Estate*. This integration contention fails on the facts, as discussed here.

(2) The onus lies on the proponent of interjurisdictional immunity on the facts of a particular case to demonstrate that credit-related insurance is part of the basic, minimum and unassailable content of the banking power.

83 The purpose of allocating "Banking, Incorporation of Banks and the Issue of Paper Money" to Parliament under s. 91(15) of the *Constitution Act, 1867* was to create an orderly and uniform financial system, subject to exclusive federal jurisdiction and control in contrast to a regionalized banking system which in "[t]he years preceding the Canadian Confederation were characterized in the United States by 'a chaotic era of wild-cat state banking'" (P. N. McDonald, "The B.N.A. Act and the Near Banks: A Case Study In Federalism" (1972), 10 *Alta. L. Rev.* 155, at p. 156; B. Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power* (3rd ed. 1969), at p. 603).

84 At least in part, the importance of national control was because of "the peculiar status of bankers [as financial intermediaries], their importance at the centre of the financial community [and] the expectation of the public that it can grant them implicit and utmost confidence" (*Canadian Pioneer Management*, at p. 461). In 1914, the High Court of Australia said:

> The essential characteristics of the business of banking . . . may be described as the collection of money by receiving deposits upon on loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. . . .
>
> (*Commissioners of the State Savings Bank of Victoria v. Permewan Wright & Co.* (1914), 19 C.L.R. 457, at p. 471)

85 It is unnecessary, for present purposes, to delve deeply into the notoriously difficult task of defining banking. It includes the incorporation of banks. It certainly includes, as the banks argue, the securing of loans by appropriate collateral. At issue is the difference between *requiring* collateral (a banking activity) and promoting the acquisition of a certain type of product (e.g. insurance) that could then be *used* as collateral. The respondent, for its part, complains that the appellants' argument would render the "basic, minimum and unassailable" content of the banking power more or less co-extensive with what bankers are authorized to do. There is no doubt that banking is crucial to the economy and that even the basic, minimum and unassailable content of the exclusive power conferred on Parliament in this regard must not be given a cramped interpretation. Banks are institutions of great importance. The federal authorities monitor all aspects of their activities to ensure that they remain safely solvent and that they do not abuse their privileged position as takers of deposits and granters of credit. Courts have recognized that in its regulation of banks, Parliament may well trench on matters that would otherwise lie within provincial jurisdiction such as property and civil rights in the province, including insurance. As early as 1894, it was held that the federal banking power allowed Parliament to confer upon a bank privileges which had "the effect of modifying civil rights in the province" (*Tennant*, at p. 47). (See also *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), and *Bank of Montreal v. Hall*, at pp. 132-33.) Such considerations, however, should not lead to confusion between the scope of the federal power and its basic, minimum and unassailable content.

(3) Credit-related insurance is not a vital or essential element of the banking undertaking

86 The appellants rely on *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, for the proposition that when a bank takes insurance as security for a loan, it is engaged in the business of banking. But that too is not the issue. The question is whether the bank in *promoting* optional insurance is engaged in an activity vital or essential to banking. The answer, as found by the courts in Alberta, is no. We agree with that conclusion.

87 The appellants rely on the decision in their favour by the British Columbia Court of Appeal in *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206 ("*Optima*" case), leave to appeal to S.C.C. refused, [2003] 3 S.C.R. viii. That case dealt with the sale by a telemarketer of Scotia Visa Balance Insurance. The question was whether the telemarketers could be required by provincial law to obtain a provincial licence. The B.C. Court of Appeal held:

> A provincial licensing regime which allows the province to say who gets a licence and under what conditions, and which could prevent the bank from obtaining security in a certain way, would affect a vital part of a federal enterprise. . . . [I]t is sufficient to say that the taking of security generally is a core aspect of the banking power. [Emphasis added; paras. 90-91.]

88 In this appeal, as well, the appellants centred their argument on the provincial licensing requirement. However if, as we conclude, the promotion of insurance is not vital or essential to the banking activity, there is no reason why the banks *should* be shielded from the consequences of non-compliance with the provincial *Insurance Act*. If a bank were to misrepresent the amount of a policy premium, or wrongfully disclose confidential information to third parties, or engage in other market practices considered by the Alberta Legislature to be unfair, there is no reason why it should escape the

regulatory discipline to which all other promoters of insurance in the province are subject. Of course, if the Minister should single out banks for discriminatory treatment, the banks would have recourse to judicial review in the ordinary way. (We note parenthetically, as much stress was laid by the appellants on the refusal by this Court of leave to appeal the *Optima* case, that refusal of leave should not be taken to indicate agreement with the judgment sought to be appealed, from any more than the grant of leave can be taken to indicate disagreement. In the leave process, the Court does not hear or adjudicate a case on the merits. The notation "leave to appeal to S.C.C. refused" is inserted in law reports for editorial convenience.)

89 The appellants also then rely on this Court's holding in *Bank of Montreal v. Hall* in which it was held

> ... beyond dispute that the federal banking power empowers Parliament to create an innovative form of financing and to define, in a comprehensive and exclusive manner, the rights and obligations of borrower and lender pursuant to that interest. [p. 150]

However, it must be repeated that just because Parliament *can* create innovative forms for financing does not mean that s. 91(15) grants Parliament *exclusive* authority to regulate their promotion. If provincial legislation were held to be inapplicable to all forms of security held as collateral by banks, then the application of provincial legislation such as the *Personal Property Security Act*, R.S.A. 2000, c. P-7 ("*PPSA*"), would also be in jeopardy. The appellants claim that the *Insurance Act* differs from the *PPSA* because the *Insurance Act* may lead to a prohibition of the activity (promoting insurance), whereas the *PPSA* deals only with *how* the creditor realizes on a security. However, the *Insurance Act*

does not prohibit the promotion of insurance any more than the *PPSA* prohibits realization on a security provision. In both cases, compliance with provincial rules is a pre-condition to obtaining the benefit of the statute. The rigid demarcation sought by the banks between federal and provincial regulations would not only risk a legal vacuum, but deny to lawmakers at both levels of government the flexibility to carry out their respective responsibilities.

90 Other circumstances of this case, some of them previously noted, also support the rejection of the appellants' position by the courts in Alberta.

91 First, while s. 416(1) of the *Bank Act* allows bank corporations to engage in some insurance activities, it recognizes insurance as a business separate from banking. Section 416(1) reads: "A bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations." Parliament itself appears not to consider the promotion of insurance to be "the business of banking". While Parliament cannot unilaterally define the scope of its powers, the fact is that Parliament has always treated insurance and banking as distinct and continues to do so.

92 Second, on the facts, the insurance promoted by the banks is not mandatory, can be cancelled at any time by the customer and is often not promoted until after the loan agreement has been finalized. The banks themselves therefore do not consider the insurance to be vital to their credit granting since apart from high-ratio s. 418 mortgages, the loan agreement is not, in practice, made contingent on obtaining insurance, as found by the trial judge. This is to be contrasted with *mandatory* mortgage insurance. As Berger J.A. observed:

> [M]andatory loan insurance is not promoted by the bank, is not optional, generates no fee for the bank, is a part of the credit granting decision, and cannot be cancelled without defaulting on the loan. The authorized types of insurance are to the opposite effect on all these points. [para. 129]

93 Third, the insurance at issue is only loosely connected to the eventual payment of the debt. The triggering event for the "personal calamity" insurance is not default on the loan but rather an event in the life of the insurer. As the trial judge rightly noted, no prudent banker would extend credit if repayment was only guaranteed by a catastrophic event in the debtor's life. Further, some of the life insurance coverage is terminated by default on the loan payments, which makes the insurance worthless to the banks when it is most needed to ensure repayment of the loan.

94 Fourth, the banks operate their insurance business as a separate profit centre completely distinct from their banking operations. Promotion of insurance may be a significant source of profit for banks and may enhance their competitive edge, but commercial convenience does not transform the promotion of insurance into a core banking activity.

95 Fifth, the appellants contend that the promotion of insurance helps reduce their overall portfolio risk. However, the evidence shows that loans are secured in other ways and then insurance is offered so that the bank need not resort to that security. The banks' evidence of the number of customers who carry insurance (or the value of the loans insured) is not helpful because most of those loans are secured by other means. Section 416 of the *Bank Act* does not lay out a manner in which the banks may realize on

collateral (as in *Hall*) but merely allows the banks to promote an insurance product which they do for profit.

96 The banks' final argument is that the promotion of insurance is vital to banking because it provides a means of realizing on a debt without having to enforce security in times of customer distress. However, as pointed out by the trial judge, this is a matter of customer relations and retention, which is no more or less important to the business of banking than it is to any other.

97 As the constitutional questions stated in this case are expressly limited to "authorized type of insurance" and "personal accident insurance", this opinion is not to be taken to deal with constitutional issues that may arise in relation to mandatory mortgage insurance.

(4) Federal Paramountcy Does Not Apply on the Facts of this Case

98 The banks' alternative argument is that if the provincial law is applicable to the promotion of insurance by banks, it is nevertheless rendered inoperative by virtue of the doctrine of paramountcy. They argue that the federal *Bank Act* authorizes the banks to promote insurance, subject to enumerated restrictions, and that these enactments are comprehensive and paramount over those of the province. In our view, neither operational incompatibility nor the frustration of a federal purpose have been made out.

(a) *No Operational Incompatibility*

99 Since 2000, the banks have been promoting insurance in Alberta while complying with both the federal *Bank Act* and the provincial *Insurance Act*. All of the appellants presently hold the provincial restricted certificates of authority and are actively

promoting insurance in Alberta. It cannot be said, in the words of Dickson J., that one enactment says "yes" and the other says "no"; or that compliance with one is defiance of the other: *Multiple Access*, at p. 191.

100 The appellants say there is conflict between s. 416(2) of the *Bank Act*, which *prohibits* banks from acting as "agents", and the provincial *Insurance Act* which *requires* the banks to hold a "restricted insurance agent's certificate" (s. 454(1)). However, it is apparent that the term "agent" is not used in the same sense in the two enactments. The term "agent" in the *Bank Act* is undefined and bears the common law meaning of a person who can legally bind his or her principal. This the banks cannot do. They cannot bind an insurance underwriter. They merely "promote" insurance. By contrast, the term "insurance agent" is a defined term in the provincial *Insurance Act* and includes a person "who, for compensation, . . . solicits insurance on behalf of an insurer, insured or potential insured" (s. 1). Accordingly, the banks may properly act as an insurance agent within the meaning of the provincial *Insurance Act* by promoting (soliciting) insurance and transmitting applications without binding the insurer or potential insured within the prohibition of the *Bank Act*. This is not a case where the provincial law prohibits what the federal law permits.

(b) *No Frustration of Federal Purpose*

101 A classic example of a provincial law that frustrates a federal purpose is *Mangat*. In that case, the provincial prohibition against non-lawyers appearing before a tribunal for a fee would, if applied, frustrate Parliament's intention to enable non-lawyers to appear before immigration proceedings so as to promote hearings that are informal, accessible and expeditious.

102 The banks argue that the *Bank Act* and its *IBR*s are similar to the legislation in *Mangat* and should be taken to express Parliament's intent that its regulations are exhaustive. However, this is not borne out by the record.

103 Here, as in *Rothmans*, the federal legislation is permissive. Section 416(1) provides that "[a] bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations". This formulation bears some similarity to the law under consideration in *Spraytech* which held the federal law controlling pesticides to be "permissive, rather than exhaustive" (para. 35). Parliament did not intend to fully regulate pesticide use, nor was its purpose to authorize their use. The federal pesticide legislation itself envisioned the existence of complementary municipal by-laws; see paras. 40 and 42. Similarly, the federal legislation at issue in this case, while permitting the banks to promote authorized insurance, contains references that assume the relevant provincial law to be applicable. Section 7(2) of the *IBR*s reads:

> 7. . . .
>
> (2) Notwithstanding subsection (1) and section 6, a bank may exclude from a promotion referred to in paragraph (1)(*e*) or 6(*b*) persons
>
> (*a*) in respect of whom the promotion would contravene an Act of Parliament or of the legislature of a province . . .

104 The relevant legislative history may be used to shed light on Parliament's object and purpose in passing the 1991 amendment. As stated by McIntyre J. in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, in constitutional cases, "extrinsic evidence may be considered to ascertain not only the

operation and effect of the impugned legislation but its true object and purpose as well" (p. 318).

105 Here the relevant legislative record begins with the 1985 Department of Finance Green Paper, *The Regulation of Canadian Financial Institutions: Proposals for Discussion* (at pp. 84-85). While the sale of insurance by banks was not discussed in detail, the Green Paper did endorse the concept of a level playing field for all participants selling a particular product. The Senate Standing Committee responding to the Green Paper agreed, and also recommended a level playing field such that no institution would obtain a competitive advantage as a result of being subject to a different regulatory regime than its competitors (*Towards a More Competitive Financial Environment* (1986), Sixteenth Report of the Standing Committee, at p. 64).

106 Because of the extent of the reforms eventually enacted in 1991, it was agreed that a review of the changes would occur in five years. The review of the Task Force on the Future of the Canadian Financial Services Sector, *Change Challenge Opportunity* (1998) ("MacKay Task Force") postdates the enactment of the 1991 amendments. For that reason, it is not entitled to much weight, but it does represent a considered after-the-fact statement by some Parliamentarians of their legislative purpose. To that extent, it provides some after-the-fact confirmation of the respondent's position. The MacKay Task Force discussed the role of provincial regulation and stated

> . . . that employees of deposit-taking institutions engaged in the sale of insurance should comply with applicable provincial requirements with respect to the education and licensing of insurance salespersons, so long as such requirements are non-discriminatory. [Emphasis added.]

> (Mackay Task Force, Background Paper No. 2, *Organizational Flexibility for Financial Institutions: A Framework to Enhance Competition* (1998), at p. 93)

A statement in the final report of the Mackay Task Force specifically addressed licences such as the Alberta's restricted insurance agent's certificate of authority:

> 19) Employees of deposit-taking institutions who are engaged in the sale of insurance should comply with applicable provincial requirements with respect to the education and licensing of insurance salespersons, so long as such requirements are non-discriminatory.
>
> (MacKay Task Force, Report, Recommendation 19, p. 197)

107 The House of Commons Standing Committee on Finance considered the MacKay Task Force Report and agreed with this proposition: "Those selling insurance products must be licensed and meet all of the qualifications that are required of others selling similar products" (*The Future Starts Now: A Study on the Financial Services Sector in Canada* (1998), p. 130).

108 We do not place much weight on the post-enactment activities in Parliament. The intention of the 1991 amendments is clear on their face. The appellants argue that Parliament intended to create a unified national "banking" scheme for the promotion of insurance, but there is nothing in the record to support such a conclusion. Parliamentarians were concerned as early as 1985 to maintain a level playing field among all financial service providers participating in the same business. To hold the banks immune from provincial market conduct regulation would give them a privileged position in the marketplace. Every indication is that Parliament wished to avoid this result.

109 These reasons focus, as did those of Hunt J.A., on the banks' arguments on paramountcy related to the provincial requirement of licences and the alleged conflict in the definition of agent. Other more specific conflicts were argued before the trial judge, and rejected by him. Those objections were not carried forward in the Court of Appeal or this Court. Should an issue arise in future with respect to a conflict not dealt with here or in the reasons of the courts below, it would, of course, be open to the banks to pursue a paramountcy argument on the basis of the facts as they may then appear.

VII. Conclusion

110 For these reasons, we would dismiss the appeal with costs and answer the constitutional questions as follows:

1. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inapplicable to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of interjurisdictional immunity?

   Answer: No.

2. Are Alberta's *Insurance Act*, R.S.A. 2000, c. I-3, and the regulations made thereunder, in whole or in part, constitutionally inoperative in relation to the promotion by banks of an "authorized type of insurance" or "personal accident insurance" as defined in the *Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR/92-330, by reason of the doctrine of federal legislative paramountcy?

   Answer: No.

The following are the reasons delivered by

BASTARACHE J. —

111 I have read the reasons of Justices Binnie and LeBel and concur in the result. I disagree, however, with their approach to the doctrine of interjurisdictional immunity and with their appreciation of the doctrine within the general methodological approach to division of powers questions. In my view, their approach severely restricts the doctrine and that is unwarranted. As discussed in my reasons in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, there is both a doctrinal and a practical need to conserve the doctrine of interjurisdictional immunity (see paras. 10-16). Though I will not revisit in detail my defence of the doctrine, I note that in *Lafarge* I did address the serious concern that the doctrine unnecessarily and unfairly creates a much wider scope for centralization of federal power at the expense of the principles of federalism and regionalism. I concluded that the best way to address this concern was to clarify the meaning of "affects" in the "affects a vital part" test to require a sufficiently severe impact by the impugned provincial law on the core of a federal head of legislative power in order to justify a finding of immunity (para. 17). In my view, this approach promotes an incremental development of the doctrine, avoids a significant departure from this Court's recent jurisprudence in this area and is better adapted to the practical needs that must always concern us in constitutional matters. Thus, I propose to resolve this case according to the principles and approach I set down in *Lafarge*. For this purpose, I do, however, accept the facts as stated by Binnie and LeBel JJ. in paras. 5-11 of their reasons.

1. The Correct Methodological Approach

112 The starting point of my analysis in *Lafarge* was to set out the proper methodological approach to division of powers questions. As I noted at para. 10, all

constitutional legal challenges to legislation should follow the same pattern. First, the pith and substance of the provincial statutory provisions and the federal statutory provisions should be examined to ensure that they are both validly enacted laws and to determine the nature of the overlap, if any, between them. Second, the applicability of the provincial law to the federal undertaking or matter in question must be resolved with reference to the doctrine of interjurisdictional immunity. Third, only if both the provincial law and the federal law have been found to be valid pieces of legislation, and only if the provincial law is found to be applicable to the federal matter in question, then both statutes must be compared to determine whether the overlap between them constitutes a "conflict" sufficient to trigger the application of the doctrine of federal paramountcy.

113 These steps should take place in the sequence listed, such that if the impugned law is found to be invalid on the pith and substance test, there is no need to move on to consider applicability. Similarly, as demonstrated in my reasons in *Lafarge*, where an impugned law is found inapplicable to a federal matter or undertaking on account of interjurisdictional immunity, there is no need to go on to consider operability. I cannot agree with Justices Binnie and LeBel's suggestion at paras. 76-78 that considerations of operability should generally precede considerations of applicability in the division of powers analytical framework absent "situations already covered by precedent" and that the interjurisdictional immunity analysis should be exceptional to the general methodological approach. In my view, it is impossible to find a federal law paramount over a provincial law, or to conclude that the provincial law is inoperable, if the provincial law is not even applicable to the federal matter at issue. This is a matter of practicality as much as it is one of logic.

114 Regarding the option of considering paramountcy first, J. E. Magnet, in "Research Note: The Difference Between Paramountcy and Interjurisdictional Immunity" in *Constitutional Law of Canada: Cases, Notes and Materials* (8th ed. 2001), at p. 338, convincingly notes the differences between the doctrines of immunity and paramountcy. He writes that immunity "is different from the paramountcy doctrine in that even where there is no contradiction or meeting of legislation, the provincial legislation offers significant obstruction to the federal thing, person or undertaking, affects its status, or drains off essential federal attributes which make them within federal jurisdiction" (p. 339). I agree that there is clearly a need for different types of constitutional legal inquiries. I will now proceed to apply the steps of the correct methodological approach to the case at bar.

2. Application to the Facts

2.1. *The Validity of the Provincial and Federal Laws*

115 We must first consider whether the impugned law in question, the *Insurance Act*, R.S.A. 2000, c. I-3, is in pith and substance related to a provincial matter. As I suggested in *Lafarge*, it is also useful at this stage to determine the validity of the federal legislation in question — in this case the *Bank Act*, S.C. 1991, c. 46 — in order to properly consider the application of the doctrine of federal paramountcy, should the analysis proceed that far (see *Lafarge*, at para. 25).

116 The *Insurance Act* is clearly a law "in pith and substance" about the regulation of the insurance industry within the province, and the particular provisions at issue are concerned with the licensing and regulation of insurance providers, promoters

and agents. The provincial law applies to all persons providing or promoting insurance services, including banks. It is therefore valid legislation of general application enacted under the provincial legislative authority over "property and civil rights" in the province under s. 92(13). Nevertheless, the effects of the provincial law do create some overlap with federal areas of jurisdiction, given that it is potentially applicable to banks as one class of persons or institutions involved in the business of insurance. Thus, the provincial law has some "incidental effects" on banks and, by implication, on the federal banking power; such overlap is generally permissible and should not disturb the constitutionality of an otherwise *intra vires* statute: see *Kitkala Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 54. The extent of these incidental effects, however, and whether they affect the "core" of the banking power and whether they frustrate Parliament's purpose in amending the *Bank Act* to permit banks to promote certain types of authorized insurance, will be discussed under the application of the doctrine of interjurisdictional immunity and the doctrine of federal paramountcy.

117 The validity of the *Bank Act* was not challenged by the parties and the trial judge was prepared to assume its constitutionality under s. 91(15) for the purposes of this challenge ((2003), 21 Alta. L.R. (4th) 22, at para. 86). I am equally prepared to do so. However, I agree with Hunt J.A., who differed from the trial judge in finding that it was the federal power of "banking" itself, and not the power to legislate in respect of the "incorporation of banks" in s. 91(15), which empowered Parliament to amend the *Bank Act* to permit banks to engage in the promotion of authorized insurance products ((2005), 39 Alta. L.R. (4th) 1, at para. 35). The federal incorporation power for certain companies or undertakings involves bringing a company into existence, conferring a legal personality on it, the creation of its corporate structure and the authority over its legal capacity and

status. However, this federal incorporation power, according to Hogg, "does not authorize regulation of the activities of federally-incorporated companies, and therefore there can be no immunity from provincial laws regulating the activities of such companies" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at para. 15.8(c), footnote 116 (emphasis added)). Thus, for Parliament to have amended the federal statutory scheme to permit an enlargement of the activities and operations banks are allowed to undertake, it must have done so pursuant to its "banking" power, rather than its "incorporation" power. If there is any federal immunity to be enjoyed by banks as federal undertakings and federally incorporated companies, it will derive from an impermissible impact of the provincial law on the federal power to regulate the activities of banks as part of the banking power, not from any impact on the incorporation power.

2.2. *The Applicability of the Provincial Law*

118 The proper analytical approach to the applicability analysis was set out at para. 27 of my reasons in *Lafarge*:

> The first step is to identify the "core" of the federal head of power; that is, to determine what the federal power encompasses within its primary scope, and then to determine whether the impugned federal undertaking or matter at issue falls within that core. The second step is to determine whether the impugned provincial law . . . impermissibly affects a vital aspect of the federal core of [the] head of power, so as to render it inapplicable to the federal undertaking or matter (see *Bell Canada (1988)*; see also Hogg (loose-leaf ed.), at pp. 15-25 to 15-28, and Monahan, at pp. 123-26).

Thus, the first step is to identify the "core" of the federal head of power in issue, which here is "banking" under s. 91(15). I do not support a concept of the "core" that is overly restrictive; nor do I support a concept of the "core" that is defined too widely (para. 36 of

my reasons in *Lafarge*). Ultimately, my view is that the extent of the "core" is very context specific; it depends on the federal head of power in question. For example, in *Lafarge*, I concluded that the federal power over navigation and shipping (s. 91(10)) is broad and comprehensive and as a result its core must be defined in a more global and comprehensive fashion (para. 40). While the federal power over "banking" in s. 91(15) has similarly been found to be quite extensive (see Hogg, at para. 24.2(a)), I do not think its core is so imprecise. Certainly, just because something is permitted by the *Bank Act* does not make it essential to the core of banking. What will be protected under the core from impermissible intrusions by the provinces are only those elements of federal jurisdiction which are "essential and vital" to the proper functioning of the federal undertaking or matter: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 955. After a thorough examination of the jurisprudence, the trial judge found that the lending of money, the taking of deposits, the extension of credit in the form of granting loans, as well as the taking of security for those loans were core elements of banking (paras. 129-30). I agree. When one considers these "essential" elements of the federal banking power, one is naturally drawn towards a consideration of the activities and operations performed by banks which are central to the reasons why they fall under federal jurisdiction. Thus, deposit taking and credit granting easily fall at the heart of this core set of operations and activities, since these activities constitute in many ways the *raison d'être* of banks. It is also possible to see these activities as part of the core of banking because this is so clearly and palpably the "domain" of banks as federal undertakings. The question thus becomes whether the particular matter in issue falls within this core.

119 Here I endorse the characterization of the particular matter in issue as the promotion of authorized insurance. It may appear that I am focussing on a specific

activity as opposed to a subject matter or jurisdiction — a position I criticized in *Lafarge* (para. 18). However, the problem with Justices Binnie and LeBel's analysis in *Lafarge* was that they focused on the Vancouver Port Authority's regulatory power over land-use planning *as exercised in a particular case by deciding to approve the Lafarge proposal*. The corresponding "prohibited" line of inquiry here would thus be a focus on the power of banks to promote the sale of authorized insurance products *as exercised in a particular factual context* (such as a specific manner in which the insurance is promoted, or a specific insurance product or type of insurance). Just as the particular activity of the Vancouver Port Authority approving the development was technically not relevant to the immunity analysis in *Lafarge*, the particular way in which the banks promote the authorized insurance products or the particular type of authorized insurance would not be relevant to the immunity analysis here. Thus, the particular subject matter or power at the heart of this interjurisdictional immunity analysis is the ability of the banks to promote the purchase of authorized insurance products, regardless of whether or how they actually exercise that power.

120 In my view, the courts below were correct to conclude that the promotion of authorized insurance does not come within the "core" of banking. This is so for many reasons. First, the nature of the promotion of authorized insurance products renders it "one step removed" from generally-accepted "core" areas of banking identified above, to use the language of the trial judge (para. 164). While the granting of credit in exchange for collateral and the taking of "security" can be seen as being clearly at the core of the banking power (see *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.); and *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.)), the promotion, sale or creation of insurance as collateral for the exercise of such security is not part of the core of the

banking power. As recognized by the trial judge, at para. 118, insurance can never be "security". The insurance is rather the collateral created in relation to the granting of a bank loan. Thus, the provincial law in question cannot be interpreted as affecting the promotion of security, but rather the promotion of collateral (see the trial judge's reasons, at para. 121). The trial judge was therefore correct to disagree with the British Columbia Court of Appeal's position on this point in *Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions)* (2003), 11 B.C.L.R. (4th) 206.

121 Second, although not a determinative factor (because Parliament cannot, for constitutional purposes, determine the content of the core of a federal head of power), the structure and language of the federal statutory provisions which permit banks to engage in the promotion of insurance suggests that Parliament clearly intended to allow only a limited participation in the insurance industry, recognizing that such participation would in fact constitute an encroachment of banks into an area not traditionally associated with the core of "banking". In addition, the trial judge's review of extrinsic secondary source materials concerning Parliament's legislative intent in enacting the 1991 amendments to the *Bank Act* supports the notion that Parliament intended banks to promote insurance, not as an expansion of the core of the banking power, but rather as a limited exception to the general prohibition (paras. 75-84). Thus, Parliament appears to have drawn a clear distinction between the business of banking and the business of insurance.

122 Third, the aim of promoting insurance yields another clue as to its exclusion from the core of the banking power. Matters that fall within the core of a federal head of power would normally be expected to have a purpose or goal which is consistent with the exercise of that head of power and consistent with its maintenance and use. Here, the promotion of insurance by the banks does not seek to permit the continued use and

maintenance of the federal banking power; rather, the sole purpose of engaging in the promotion of insurance appears to be to generate additional revenue as a separate product line and profit centre, thereby maintaining and enhancing a bank's competitive edge in an economic world of "universal banking". I would also raise the fact that the insurance promoted is optional and can be cancelled at any time, as well as the fact that the overall impact of the promotion of insurance on the banks' portfolio risk is quite minimal, as further evidence that the matter does not come within the core of banking. Clearly, the promotion of authorized insurance is not part of the core of banking because it is not essential to the function of banking.

123 The analysis should not stop here, however, because the second step set out in *Lafarge* is to determine whether the impugned provincial law impermissibly affects a vital aspect of the federal core of the head of power, so as to render it inapplicable to the federal undertaking or matter. The benefit of such a two-step inquiry, rather than focussing almost exclusively on the question of whether a federal matter comes within the "core" to determine immunity, is that it promotes greater flexibility in assessing whether immunity should arise. Even if a matter is found to be essential to a federal undertaking, immunity from a provincial law will not arise unless its "affect" on the federal power is "sufficiently severe": the federal legislative authority needs to be "attacked", "hindered" or "restrained" (paras. 17 and 48 of my reasons in *Lafarge*). Because the promotion of insurance does not go to the core of banking, it is obvious that in the present case, Alberta's *Insurance Act* is not affecting in any important way the core of banking. If the promotion of insurance did go to the core of banking, a more in-depth analysis would have to be undertaken, as was done in *Lafarge* (see paras. 48-50), to determine the severity of the impact. Therefore, no immunity arises in the circumstances, and we can move on to the final consideration of operability.

2.3. *The Operability of the Provincial Law*

124 As noted above, the doctrine of paramountcy is triggered when there is "conflict" between a provincial law and a federal law, and this only *after* they have both been found valid and the provincial law found to be applicable. The meaning of "conflict" was disputed between the parties, but it is fairly clear in the jurisprudence. Conflict should be considered equivalent to "inconsistency" between the statutes, and inconsistency is generally present when Parliament's legislative purpose has been frustrated or displaced, either by making it impossible to comply with both statutes or through some other means notwithstanding the theoretical possibility of complying with both statutes: see *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at paras. 11-14; *Bank of Montreal v. Hall*, at pp. 151-55; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at para. 52, where Gonthier J. first excluded the application of the immunity doctrine in the context of that case because it "might lead to a bifurcation of the regulation and control of the legal profession in Canada". If there is conflict or inconsistency, the provincial law will be inoperable to the extent of the conflict or inconsistency, and the federal law will be paramount.

125 In this case, it is clear that there is no express conflict between the provincial and federal schemes concerning the promotion of insurance by banks and that on the face of the relevant statutory provisions involved, dual compliance with both schemes is possible and in fact is to be encouraged. This is in large part due to the fact that the federal scheme is in fact permissive and empowering, rather than a complete regulatory code concerning the banks' ability to promote authorized forms of insurance. There is in fact virtually nothing in the *Bank Act* or in the regulations about the conduct of such

promotion of insurance and how it is to be regulated and governed. The appellants were therefore in error to allege that this case is markedly different from the situation in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, where no conflict was found in light of the fact that the federal scheme in question was merely permissive and not exhaustive.

126 Nor is there any express or "operational" conflict between the federal prohibition on banks acting as an "agent" at s. 416(2) of the *Bank Act* and the requirement in the provincial legislation that banks promoting insurance must hold a "restricted insurance agent's certificate" at s. 454 of the *Insurance Act*. As noted by the trial judge at para. 202, there is no definition of "agent" in the federal legislation. This implies that the narrow common-law meaning of "agent" as a person acting with the authority to bind his or her principal must have been intended. In contrast, the term "agent" in s. 1(bb) of the provincial law has a much wider and expansive meaning and includes a person who merely "solicits" or promotes insurance on behalf of an insurer, an insured or a potential insured. Thus, it is technically possible to be an "agent" for the purposes of compliance with the provincial *Insurance Act*, while not being an "agent" for the purposes of compliance with the federal *Bank Act*.

127 Finally, there is no evidence here that the application of the provincial law to the banks' promotion of authorized insurance products would frustrate Parliament's legislative intent in allowing banks to engage in this activity. There is nothing to indicate that Parliament enacted the legislative amendments to the *Bank Act* with the intent that the promotion of authorized insurance products should be immune from provincial regulation. In fact, what little evidence there is concerning Parliament's intent with respect to the applicability of provincial law tends to support the opposite conclusion. The

evidence discloses specific instances of Parliamentary committees and reports explicitly recommending that the banks' promotion of authorized insurance products continues to be subject to valid provincial regulatory regimes (see paras. 80-82 of trial reasons).

128 Overall, the application of the provincial law in this case would not frustrate Parliament's legislative intent in enacting the amendments to the *Bank Act* and the associated regulations, because the aim of those amendments was to permit the banks to engage in the promotion of authorized insurance products and to spell out the types of products which could be validly promoted, not to set out the precise manner in which the promotion of insurance would be governed and regulated. Conversely, the aim of the provincial legislation is to provide a regulatory scheme for the promotion of insurance, but not to exercise any control over the kinds of insurance that banks may promote, or the extent to which they may do so, thereby maintaining the integrity of Parliament's legislative purpose. The interaction between the two statutory schemes is therefore one of harmony and complementarity, rather than frustration or displacement of legislative purpose.

3. Conclusion

129 For all of the foregoing reasons, I would dismiss the appeal and answer the constitutional questions in the negative.

Appendix

Bank Act, S.C. 1991, c. 46	*Loi sur les Banques*, L.C. 1991, ch. 46
409. (1) Subject to this Act, a bank	**409.** (1) Sous réserve des autres

shall not engage in or carry on any business other than the business of banking and such business generally as appertains thereto.

(2) For greater certainty, the business of banking includes

(*a*) providing any financial service;

...

416. (1) A bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations.

(2) A bank shall not act in Canada as agent for any person in the placing of insurance and shall not lease or provide space in any branch in Canada of the bank to any person engaged in the placing of insurance.

...

(4) Nothing in this section precludes a bank from

(*a*) requiring insurance to be placed by a borrower for the security of the bank; or

(*b*) obtaining group insurance for its employees or the employees of any bodies corporate in which it has a substantial investment pursuant to section 468.

Insurance Business (Banks and Bank Holding Companies) Regulations SOR/92-330

2. In these Regulations,

"authorized type of insurance" means:

dispositions de la présente loi, l'activité de la banque doit se rattacher aux opérations bancaires.

(2) Sont notamment considérés comme des opérations bancaires :

a) la prestation de services financiers;

...

416. (1) Il est interdit à la banque de se livrer au commerce de l'assurance, sauf dans la mesure permise par la présente loi ou les règlements.

(2) Il est interdit à la banque d'agir au Canada à titre d'agent pour la souscription d'assurance et de louer ou fournir des locaux dans ses succursales au Canada à une personne se livrant au commerce de l'assurance.

...

(4) Le présent article n'empêche toutefois pas la banque de faire souscrire par un emprunteur une assurance à son profit, ni d'obtenir une assurance collective pour ses employés ou ceux des personnes morales dans lesquelles elle a un intérêt de groupe financier en vertu de l'article 468.

Règlement sur le commerce de l'assurance (banques et sociétés de portefeuille bancaires) DORS/92-330

2. Les définitions qui suivent s'appliquent au présent règlement.

« assurance autorisée » Assurance de l'un des types suivants :

(*a*) credit or charge card-related insurance,

(*b*) creditors' disability insurance,

(*c*) creditors' life insurance,

(*d*) creditors' loss of employment insurance,

(*e*) creditors' vehicle inventory insurance,

(*f*) export credit insurance,

(*g*) mortgage insurance, or

(*h*) travel insurance;

a) assurance carte de crédit ou de paiement;

b) assurance-invalidité de crédit;

c) assurance-vie de crédit;

d) assurance crédit en cas de perte d'emploi;

e) assurance crédit pour stocks de véhicules;

f) assurance crédit des exportateurs;

g) assurance hypothèque;

h) assurance voyage.

Insurance Act, R.S.A. 2000, c. I-3

1 In this Act,

(n) "deposit-taking institution" means

(i) Alberta Treasury Branches or a bank, credit union, loan corporation or trust corporation, or . . .

(bb) "insurance agent" means a person who, for compensation,

(i) solicits insurance on behalf of an insurer, insured or potential insured,

. . .

454(1) The Minister may issue a restricted insurance agent's certificate of authority to a business

(a) that is a deposit-taking institution . . .

. . .

(2) A restricted insurance agent's certificate of authority authorizes the holder and the holder's employees to act or offer to act, subject to prescribed conditions and restrictions, as an insurance agent in respect of classes or types of insurance specified by the Minister.

. . .

468(1) The Minister may refuse to issue an applicant's new certificate of authority if the requirements of this Act and the regulations relating to the certificate have not been met.

. . .

482 A decision of the Minister under this Part to refuse to issue, renew or reinstate a certificate of authority, to impose terms and conditions on a certificate of authority, to revoke or suspend a certificate of authority or to impose a penalty on the holder or former holder of a certificate of authority may be appealed in accordance with the regulations.

Insurance Agents and Adjusters Regulation, A.R. 122/2001

12(1) The holder of a restricted certificate

(a) may not use personal information given by a person buying insurance unless it is used for the purpose for which it is given and the person signs a consent that meets the requirements of subsection (2), and

(b) may not release the information described in clause (a) to someone who is not an employee of the holder unless the person signs a consent that meets the requirements of subsection (3).

. . .

[Insurance application]

14(1) When a holder of a restricted certificate negotiates or enters into a transaction with a person for credit-related insurance at the same time as a credit arrangement is being negotiated or entered into with the person, the holder must provide the person with a separate application for the insurance coverage.

(2) A holder of a restricted certificate must, on request, provide a person making an application for insurance with a copy of the completed insurance application.

[Disclosure]

15(1) A holder of a restricted certificate, at the time the person applies for insurance coverage, must

(a) provide to a person buying insurance

(i) a summary of the terms, including limitations and restrictions, of the insurance offered, and

(ii) a summary of the circumstances under which the insurance commences or terminates and the procedures to follow in making a claim,

and

(b) notify a person buying insurance that the policy will be sent to the person, or in the case of a contract of group insurance, a certificate will be sent to the person.

(2) A holder of a restricted certificate who is marketing credit-related insurance, at the time of application for insurance coverage

(a) must provide to a person buying insurance

(i) a statement that sets out the right to rescind the insurance contract and obtain a full refund of the premium pursuant to section 18, and

(ii) a statement that the duration of the insurance is less than the term of the amortization period of any related loan, or that the amount of the insurance is less than the indebtedness, if that is the case,

and

(b) must inform a person buying insurance that the person may contact the insurer for further information or clarification, the name of the insurer that is providing the insurance and how that insurer may be contacted.

(3) The insurer on behalf of which the holder of the restricted certificate is marketing insurance must ensure that procedures are in place to effect the requirements of this section.

(4) Where a holder of a restricted certificate receives any compensation, inducement or benefit from an insurer, directly or indirectly, for selling insurance, the holder of a restricted certificate must disclose that fact to any person who is considering buying insurance from that holder.

[Loan offers]

16(1) A holder of a restricted certificate may not, when offering to make a loan to, or arrange a loan for, a person, inform the person that the person must, or require the person to, purchase insurance before the loan can be made.

(2) Despite subsection (1), a holder of a restricted certificate may, when offering to make a loan to, or arrange a loan for, a person, inform the person that the person must, or require the person to, purchase insurance if the insurance is to protect the lender against default of the borrower and the insurance is from an insurer licensed to do business in Alberta.

(3) For the purpose of subsection (2), a holder of a restricted certificate may not inform the person that the person must, or require the person to, purchase insurance from the holder or an insurer or insurance agent, specified by the holder.

[Information certificate]

17 A holder of a restricted certificate must

(a) ensure that purchasers or potential purchasers of insurance are informed that they are contracting or considering contracting with an insurer and not with the holder, and

(b) ensure that written documentation is provided to the purchaser of insurance evidencing the insurance and setting out the information required to be disclosed by clause (a) and section 15(1)(b) within 30 days of the insurance coming into force.

[Right of rescission]

18(1) A person who buys life insurance through the holder of a restricted certificate has 10 days, or any longer period specified in the policy or certificate, after receiving the written documentation referred to in section 17 to rescind the insurance.

(2) A person who rescinds insurance in accordance with subsection (1) is entitled to receive from the insurer a refund of the whole premium that has been paid.

Appeal dismissed.

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