

BANKING AND THE CONSTITUTION: UNTESTED LIMITS OF FEDERAL JURISDICTION

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This article examines the constitutional framework underpinning the Canadian financial system in relation to what the authors suggest are essentially untested limits of federal jurisdiction over banks and banking pursuant to section 91(15) of the Constitution Act, 1867. After raising the possibility that the constitutional framework in relation to banking can be otherwise explained by different textual bases in the Act of 1867, the authors turn to a consideration of present regulatory concerns emanating from both the significant bifurcation of jurisdiction governing Canadian financial institutions engaged in what can be described as the business of banking, and the failure of Parliament to define comprehensively banking undertakings in functional terms. The article then considers current perceptions on the constitutional limits of federal jurisdiction and discusses case law, which the authors observe is thus far indeterminate. Overall, the authors conclude that the status quo discloses a broad field of concurrent federal and provincial jurisdiction in relation to what could be functionally described as banks and banking activities; that potential remains for a reassertion of federal legislative competence, although gradually established fields of related provincial legislative competence may have modified the reach of federal regulatory authority in practical terms; and that, ultimately, the constitutional scope of banking jurisdiction is as much an affair for Parliament to resolve as it may be a problem for judicial resolution.

Les auteurs de cet article examinent la base constitutionnelle du système financier canadien du point de vue des limites de la juridiction fédérale sur les banques et le système bancaire en vertu de l'article 91(15) de la Loi constitutionnelle de 1867, limites qui, d'après eux, n'ont en général pas fait l'objet de décisions des tribunaux. Après avoir mentionné que la base constitutionnelle concernant les affaires bancaires peut s'expliquer d'une autre façon si on s'appuie sur des parties différentes de la loi de 1867, ils se tournent vers les questions actuelles de réglementation dues à la fois à la double branche juridique qui régit les institutions financières canadiennes s'occupant des affaires bancaires et au Parlement qui n'a pas donné, en termes fonctionnels, une définition complète des entreprises bancaires. Les auteurs passent alors en revue les différentes interprétations des limites de la juridiction fédérale et analysent la jurisprudence qui, d'après eux, est toujours imprécise. Ils en concluent qu'actuellement les juridictions fédérale

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et provinciale ont un vaste domaine commun, que la compétence législative fédérale pourrait se raffermir quoique la compétence législative provinciale, dans certaines branches de ce domaine établies graduellement, ait pu en pratique modifier l'étendue du pouvoir fédéral de réglementation et que finalement il appartient autant au Parlement qu'aux tribunaux de résoudre le problème de l'étendue constitutionnelle de la juridiction sur les banques.

Introduction

At Confederation, the Founding Fathers had in mind an orderly and uniform financial system for the new Dominion, subject to national jurisdiction and control.¹ Conventional wisdom suggests that the Constitution Act, 1867 reflected this governing assumption in granting to the exclusive jurisdiction of Parliament the subject matter of "Banking, Incorporation of Banks and the Issue of Paper Money" pursuant to section 91(15). Corollary heads of legislative power placed 1867 conceptions of the monetary and financial system unequivocally in federal hands.²

Federally chartered banks, regulated under a central statute, have constituted the core of the Canadian financial system since passage of the first Bank Act by Parliament in 1871,³ by which time they had already emerged as the dominant financial institutions in the country. At its inception, the Bank Act "was largely the result of consultations between the legislature and the bankers and was passed with little opposition".⁴ Generally speaking, federal regulatory objectives have coincided with those of the chartered banks; the interests of effective government control over the economy and protection of the business of banking for the benefit of the industry's members have not been mutually exclusive.⁵

¹ See Ian F.G. Baxter, *The Law of Banking and The Canadian Bank Act* (1968), pp. 1-5; D.J. Baum, *Banking in Canada* (1971), 59 Geo. L.J. 1127, at p. 1130.

² Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), ss. 91(16) (Savings Banks); 91(18) (Bills of Exchange and Promissory Notes); 91(19) (Interest); 91(20) (Legal Tender); 91(21) (Bankruptcy and Insolvency).

³ An Act Relating to Banks and Banking, 1871, 34 Vict., c. 5 (Can.).

⁴ Baum, *loc. cit.*, footnote 1, at p. 1128; see also A.B. Jamieson, *Chartered Banking in Canada* (1953), pp. 3-16.

⁵ It has been suggested that the Bank Act has served to maintain a limited or quasi-monopoly for the major players in the banking industry. Baum notes: "From the bankers' desire for maximum growth potential for their institutions and the government's need for effective control over the country's monetary policy, a common interest had developed and this community of interest has continued to exist."; *ibid.*, at p. 1129.

A.W. Rogers provides a more neutrally phrased appraisal, but perhaps to similar effect:

The efforts of parliament have been mainly directed to the perfecting of the banking system as regards the existence of the banks as corporations with special powers and privileges, and the security afforded by them to the public. The general relation of banker and customer and the rights and liabilities therefrom are only incidentally affected.

A.W. Rogers (ed.), *Falconbridge on Banking and Bills of Exchange* (1969), p. 57.

Even though many observers consider that the current system of supervising chartered banks "has for the most part served us very well",⁶ a series of failures of provincially regulated financial institutions⁷ might lead an impartial observer to conclude that a re-examination of the whole spectrum of financial institutions, both federal and provincial, is in order. The recent failures of the Canadian Commercial Bank and the Northland Bank which resulted in a federal Commission of Inquiry under Mr. Justice

⁶ Submission of the Bank of Canada to the Commission of Inquiry on Certain Banking Operations (Bank of Canada, May 1986), at p. 21. This report does not go beyond making recommendations with respect to the mandate of the Bank of Canada to supervise chartered banks.

⁷ The "Crown-Greymac-Seaway Trust" Affair in the Province of Ontario is a notorious example. See Report of the Special Examination by James A. Morrison F.C.A. of Crown Trust Company, Greymac Trust Company, Seaway Trust Company, Greymac Mortgage Corporation and Seaway Mortgage Corporation (to R. Elgie M.D. Minister of Consumer and Commercial Relations, Province of Ontario, June 30, 1983).

This matter sparked litigation as well as an in-depth review of governmental powers in relation to the regulation of loan and trust corporations doing business in Ontario and of the propriety of the governmental actions that were taken.

The following table is reproduced from Canadian Financial Institutions, Report of the Standing Committee on Finance, Trade and Economic Affairs (November, 1985), p. 39.

FAILURES OF FEDERALLY REGULATED FINANCIAL INSTITUTIONS (1923-1985)

Chartered Banks

- 1923 The Home Bank
- 1985 Canadian Commercial Bank
- 1985 Northland Bank

Trust and Loan Companies

- 1980 Astra Trust Company
- 1983 The Fidelity Trust Company
- 1983 AMIC Mortgage Investment Corporation
- 1983 Greymac Mortgage Corporation
- 1983 Seaway Mortgage Corporation
- 1984 Northguard Mortgage Corporation
- 1985 Pioneer Trust Company
- 1985 Western Capital Trust Company
- 1985 Continental Trust Company

Property and Casualty Insurance Companies

- 1966 North American General Insurance Company
- 1976 Underwriters National Assurance Company
- 1977 American Reserve Insurance Company
- 1981 Pitts Insurance Company
- 1981 Strathcona General Insurance Company
- 1982 Cardinal Insurance Company
- 1985 Ideal Mutual Insurance Company
- 1985 Northumberland General Insurance Company

Estey⁸ lend further support to such a notion. In this connection, it is noteworthy that the first Bank Act of 1871 came about not long after the failures of two prominent regional banks.⁹

History has a habit of repeating itself, although not always for the same reasons. This article examines the question of whether Parliament continues to retain the same comprehensive constitutional powers over the panoply of contemporary Canadian financial institutions that it might have exercised under its original mandate in 1867. Federal authorities have elected to refrain from comprehensive regulation, notwithstanding their exclusive jurisdiction over federally chartered banks. At the same time, and under the rubric of property and civil rights in the province,¹⁰ provincial regulation has supported a framework of competitive institutions that are functionally equivalent to the banks and other federally regulated institutions in many of the services which they provide.¹¹

From a constitutional viewpoint, the financial services industry encompasses the chartered banks on the exclusively federal side of the regulatory spectrum, trust companies, mortgage and loan companies, insurance companies and cooperative credit institutions in the area where federal and provincial powers overlap, and registered investment dealers within the exclusive domain of provincial law.¹²

⁸ The Estey Commission of Inquiry was appointed on September 29, 1985 by Order-in-Council P.C. 1985-2932 to conduct "an examination of all of the circumstances and factors contributing to the condition of the banks and resulting in the cessation of their operations", including "regulatory action in dealing with these conditions and circumstances taken by the Government of Canada and its agencies, including the Bank of Canada". The Commission Hearings commenced in October, 1985; as of the time of writing (June, 1986) Mr. Justice Estey has not yet submitted his report to the Governor-in-Council.

⁹ In 1866 the Bank of Upper Canada failed, while in 1867 the Commercial Bank of Canada was forced to suspend its operations for a period of time. In this context, one of the factors which may have strongly influenced Parliament to create a comprehensive statutory framework for banking in Canada is our proximity to the United States where a vastly different set of rules prevails and where bank failures are not uncommon. See Baxter, *op. cit.*, footnote 1, pp. 2-3.

¹⁰ Constitution Act, 1867, s. 92(13). The provisions have no particular enumerated powers in relation to financial institutions.

¹¹ See P.N. McDonald, *The B.N.A. Act and the Near Banks: A Case Study in Federalism* (1972), 10 *Alta. L. Rev.* 155; D.J. Baum, *The Near-Banks: Trust Companies of Canada* (1971), 45 *Tulane L. Rev.* 546.

¹² For a tabular division of financial institutions making up major segments of the industry with the percentage of assets in each category held by federally regulated companies, see *The Regulation of Canadian Financial Institutions: Proposals for Discussion* (Canada, Dept. of Finance Green Paper, 1985), [hereinafter *The Green Paper*] at p. 58, Table I; e.g.: as of December 31, 1983, 66 per cent of the assets of trust and mortgage loan companies were held by federally regulated institutions; as of December 31, 1984, this latter category included 59 CDIC-insured federal institutions, 63 CDIC-insured and non-CDIC insured provincial institutions.

Whether the scope of financial business undertakings falling within either the field of shared federal and provincial jurisdiction or exclusively provincial fields also engages the business of banking in a sense that does violence to the federal sphere is a question that has so far eluded comprehensive judicial scrutiny. This is so largely because Parliament has chosen not to define its jurisdiction in such a way as to provoke occasions for authoritative determinations. The Bank Act continues to say generally that "[a] bank may engage in and carry on such business generally as appertains to the business of banking",¹³ and not that certain defined functions of financial institutions are the exclusive prerogative of federally chartered banks.

Thus far, constitutional problems have not burgeoned for banking law *per se*.¹⁴ If the subject is defined in terms of the activities of federally chartered banks and their regulation, then such issues never arise. However, formally distinguishable *institutional* categories for constitutional purposes do not address the problem of *functional* overlap. For example, defining competing federal and provincial financial institutions as "banks" and "trust companies" respectively does little to advance our understanding of the extent to which these seemingly different institutions are attempting to capture the same market for essentially similar services such as deposit accounts, mortgages and loans. To the extent that such overlap no longer serves the public interest, then the apparent harmony of shared federal and provincial jurisdiction in a field for which the operational frontiers have yet to be established may require some profound rethinking. In the absence of such a requirement, however, do we wish the constitutional imperatives surrounding the business of banking to be fleshed out? The politics of Canadian federalism suggest that we should not want to do so simply for its own sake, if only for fear of generating unnecessary federal-provincial controversy.

The purpose of this article is not to invent a problem, but, rather, to canvass the inadequacy of our current constitutional understanding of banking jurisdiction as a federal subject matter. Therefore, we propose to discuss the following: first, alternative conceptions of what conventional wisdom has suggested to be the original nature of federal banking jurisdiction under the British North America Act; second, some basic concerns which have been expressed recently concerning the current framework of mixed regulatory jurisdiction; third, the governing perceptions that have attached to the generally untested jurisdictional limits of federal authority; and, fourth, a jurisprudential analysis of relevant constitutional limitations on federal and provincial jurisdiction in a modest predictive effort toward informing the outcome of future controversy.

¹³ Bank Act, S.C. 1980-81-82-83, c. 40, s. 173(1) (repealing R.S.C. 1970, c. B-1).

¹⁴ Ian F.G. Baxter, *The Law of Banking* (3rd ed., 1981) (law of banking treated exclusively in relation to the regulation of federal chartered banks: constitutional jurisdiction not in issue).

I. *Alternative Conceptions of Federal Banking Jurisdiction*¹⁵

Quite apart from any general consideration of the allocation of legislative power between Parliament and the provincial legislatures, one might well question the validity of the conventional view that section 91(15) is the axis around which the financial system of Canada revolves. Both the historical accuracy of this view and the wisdom of relying on a provision which seems to have a more limited reach than other related heads of legislative power in section 91 are subject to challenge.

In this context, it is not unreasonable to argue that a certain amount of confusion has arisen concerning the interplay of the various heads of power which govern both the structure and functioning of Canada's financial system. Monetary control through banks has been inappropriately characterized as an exercise of the banking power under section 91(15), thus directing the analytical focus more to the method of creation of a financial institution as the decisive criterion in the allocation of federal and provincial legislative competence.

Whether "Canada" be seen as a federal, political, economic or industrial unit, a textual appraisal of the language of section 91 does not appear to enshrine head 15 as a centrepiece in the financial system of Canada. The matters of "The Borrowing of Money on the Public Credit" (section 91(4)), "Currency and Coinage" (section 91(14)), "Legal Tender" (section 91(20)), and "Bills of Exchange and Promissory Notes" (section 91(18)), taken together with the broad federal tax power (section 91(3)) and the power relating to interest (section 91(19)), form a comprehensive instrument for control of the conditions governing the quantity of money and the availability of credit. As such, they are arguably of greater overall significance than section 91(15). The issuing of currency and the raising of revenue by public debt or taxation, coupled with the regulation of credit, debt management and interest rates through the Bank of Canada; influence employment, expenditures, prices and output in modern society. In this regard, the "Issue of Paper Money" is the only aspect of head 15 which has close affinity with the comprehensive currency and legal tender powers and which comes near to their level of significance.

¹⁵ This section offers, as its title implies, an alternative analytical conception to that underlying the balance of the article which, both authors concede, is generally explanatory of Canadian constitutional history and experience in the banking law field. The views offered here are essentially those of Mr. Binavince. While they are not necessarily shared by Mr. Fairley as a tenable basis for argument in contemporary constitutional discourse, both authors agreed that the reader should not be deprived of some extra food for thought.

In this respect, the most promising alternative jurisdictional footing for comprehensive federal banking legislation may be the apparently resurrected general trade and commerce power. See *A.G. Canada v. Canadian National Transportation, Ltd. et al.*, [1983] 2 S.C.R. 206; for comment see H. Scott Fairley, *Developments in Constitutional Law: The 1983-84 Term* (1985), Supreme Court L. Rev. 63, at pp. 98-104. Development of that argument, however, is the subject for a separate article. *Cf.*, footnotes 74-79, *infra*, and accompanying text.

From this perspective, "Banking" and "Incorporation of Banks" are tangential and relatively minor powers. In addition, there is a plausible argument to be made from the language of section 91 that some banks, considered as institutions and not in terms of the function of "banking" nor of their "incorporation", may *not* be within the exclusive domain of Parliament. The generally accepted argument is based on section 91(15) and holds that all manner of banks fall within federal competence. This argument ignores the fact, however, that "savings banks" in section 91(16) are the only kind of bank expressly brought within federal competence. On this view, the apparent ambiguity in the opinion of Beetz J. in *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*¹⁶ becomes all the more comprehensible and obvious. If, as Beetz J. states, the concept of banking as a business and the meaning of the word "'banking' in section 91(15) are not necessarily co-extensive" such that the term "might very well be wider than the concept of banking as a business",¹⁷ then the only other additional meaning that can be assigned to "banking" is that of "banking entities".

In any event, the conventional viewpoint appears not to fully consider the historic role of banks in an industrial society. Throughout history, banking and the operation of a bank have not been functions of great public significance and, as a result, have never been assumed as a direct function by the state. It was currency and not banking which attracted the interest of government. In ancient Rome, for example, the facilitation of external and internal trade required the establishment of a state-guaranteed system of coinage and the standardization of measures and weights. Banking, then transacted in the temples, was not a state function.¹⁸

In feudal England as in continental Europe, the king and the lords exercised the right of mintage but they never acted as banks. The financing of commerce and of the various enterprises of royalty, the nobility, and the church was provided by professional financiers: the "Lombards", "Fuggers", and "Cahorsians" in Italy, Germany and England respectively. Whereas in continental Europe, banking originated in the activities of the money-changers who bought and sold the numerous official currencies in circulation, in England, banking grew out of the practice of London goldsmiths who took gold deposits in exchange for interest bearing notes.¹⁹ The goldsmiths also lent money to the Exchequer by purchasing

¹⁶ [1980] 1 S.C.R. 433. This case is discussed at greater length in Part III of this paper.

¹⁷ *Ibid.*, at p.466.

¹⁸ T. Mommsen, *Roemisches Staatsrechts*, vol. 3 (1887, reprinted 1963), pp. 709-714.

¹⁹ T.E. Plucknett, *A Concise History of the Common Law* (1956), p.68. For a more detailed account, see R.D. Richards, *Early History of Banking in England* (1929, reprinted 1965), p.37 ff., and H. Binhammer, *Money, Banking and the Canadian Financial System* (3rd ed., 1977), pp. 47-48.

“tallies” (exchequer bills),²⁰ thereby becoming the sources of short term loans for government. The Bank of England was organized in 1694 primarily to finance the French War. The founders lent large sums of money to the government and then, in turn, used the government debt as part of their capital.²¹

In colonial North America, the English restriction on the use of English coinage deprived the colonies of any official medium of exchange. Parliament had refused to allow the export of English coins to the English colonies and they were not permitted to mint coins in their own right from the bullion which they possessed. For this reason, internal trade was conducted largely on the basis of barter goods or on some form of evidence of such goods such as receipts. In the American colonies, colonial assemblies attempted to circumvent these restrictions by accepting a currency of account called “lawful money”, using the Spanish milled dollar as a standard. The English merchants responded with higher prices for English goods so as to bring about a higher consignment of bullion to England to pay for goods purchased in the colonies. Since the colonies could neither revalue the Spanish dollar used as a standard nor devalue English sterling, they had to resort to other circumventions to carry on internal trade. Accordingly, “bills of credit” such as promissory notes, tobacco receipts and bills of exchange gained wide circulation. From this device, the practice emerged of issuing official promissory notes for government expenses in anticipation of tax revenues. It may fairly be said that “bills of credit” were the predecessors of paper money in North America. Hence, the dollar “bills” which we circulate now.²²

²⁰ Black's Law Dictionary (1968), describes the “tallies of loan” as follows (at p. 1627):

A term originally used in England to describe exchequer bills, which were issued by the officers of the exchequer when a temporary loan was necessary to meet the exigencies of the government, and charged on the credit of the exchequer in general, and made assignable from one person to another.

²¹ Plucknett, *op. cit.*, footnote 19, pp. 68-69. See also, Binhammer, *op. cit.*, footnote 19, pp. 49-50; and F.A. Mann, *The Legal Aspect of Money* (4th ed., 1982), p. 16, where he describes the origins of the Bank of England as follows:

When in 1694 the Bank of England was created, it was not a bank of issue in the modern sense. The Statute did ‘not confer any exclusive privilege whatever on the Bank. . . and the Statute is silent as to the intention of the legislature whether the Bank should be a bank of circulation and issue or merely a bank of deposit’. Nevertheless, immediately after its incorporation, the Bank began to act as a bank of circulation and issue, ‘probably to a very considerable extent’, and, in addition, various country banks continued to issue notes without government control.

²² S.E. Morison, *The Oxford History of The American People* (1965), pp. 143-145; Binhammer, *op. cit.*, footnote 19, pp. 37-38. See also, J.K. Galbraith, *Money: Whence It Came, Where It Went* (1975), pp. 57-70, where he offers a very colourful history of the origins of paper money in colonial North America.

As already mentioned, even in England, the practice of banking was a matter for professional financiers. Because the frontier condition did not stimulate the emergence of such a profession, before the Revolution there was not a single bank in the Thirteen Colonies. If a man needed capital, he borrowed from another individual. The Bank of North America was the first bank, and was established by Robert Morris in Philadelphia in 1781.²³ The Bank of the United States was proposed by Alexander Hamilton, using the Bank of England as a model.²⁴ Thus, it was less a money-lending institution than an instrument of monetary policy, and when it ceased to exist in the 1830's as a result of political controversy monetary control was left to chance. Its successor, the Federal Reserve Board, was not established to supervise monetary policy until nearly a century later, in 1913, under the administration of Woodrow Wilson.²⁵

The same story obtained in colonial British North America with the government role in the financial system being largely supervisory. The reason for including "banking and incorporation of banks" in section 91 was simply to avoid a problem that had arisen earlier in the United States. *M'Culloch v. the State of Maryland*²⁶ involved the federally chartered Second Bank of the United States which the state of Maryland attempted to tax under state legislation enacted in 1818. One argument asserted by the state was that, since the Union was one of "enumerated powers" and the constitution did not specifically enumerate the word "bank" or "incorporation", then the Union government could not have the power to incorporate banks. However, Chief Justice Marshall found the power to be one which was implied:²⁷

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Under Marshall's view of constitutional interpretation, it could be said that the problem of fleshing out our own section 91(15) arises from attempts to read it as the primary source of federal power to control credit and currency, or, in other words, as the source of general federal monetary control as exercised by the Bank of Canada.²⁸ In the alternative,

²³ Morison, *ibid.*, pp. 283-284. Robert Morris was the superintendent of finance of the revolutionary United States and has been described as the "Financier of the Revolution"; Galbraith, *ibid.*, p. 72.

²⁴ Morison, *ibid.*, p. 325; Galbraith, *ibid.*, pp. 88-89.

²⁵ Morison, *ibid.*, pp. 843. Apparently, the "Fed.", as it is often referred to, "sprang from the panic of 1907, with its alarming epidemic of bank failures: the country was fed up once and for all with the anarchy of unstable private banking"; P.A. Samuelson, *Economics* (6th ed., 1970), p. 272.

²⁶ 17 U.S. (4 Wheat) 316 (1819).

²⁷ *Ibid.*, at p. 321.

²⁸ From this point of view, the Alberta Court of Appeal judgment in *Breckenridge Speedway Ltd. v. The Queen* (1967), 61 W.W.R. 257 (Alta. App. Div.) would typify this

notions of implied powers would allow that federal monetary control is attainable through general measures: the power to set the required reserves that banks must hold; the terms under which banks may replenish a deficiency in required reserves by borrowing from the Bank of Canada; and the engagement in open market sales of government securities which, in turn, affect the volume of actual reserve balances available to banks. These general instruments of monetary control do not necessarily entail the regulation of banking. They would seem, rather, to involve the following: public debt, borrowing of money on public credit, currency, interest, and, more broadly and appropriately, peace, order and good government. The management of the conditions governing the quantity of money, though presently achieved partly through the banking system, is an important and inevitable aspect of governing in a modern industrial state. But monetary control may be implemented by government actions directed not only toward banks but also toward individuals, corporations, and governments. The generally accepted position that the source of such power is "banking" as set out in section 91(15) not only narrowly states what might otherwise be viewed from the vantage point of a much broader jurisdictional focus, but may also prove in future to be insufficiently comprehensive to support the measures which may be required to control Canada's overall financial and monetary system.²⁹

II. *Some Basic Concerns Over the Current Regulatory Framework*

A. *Uniform Regulation*

The Porter Commission of 1964 recommended major changes in the banking laws.³⁰ For the most part, the Commission's Report suffered the same fate as those of other Royal Commissions, with the singular exception of the recommendations which led to the passage of the Canada Deposit Insurance Corporation Act³¹ in 1967. Under this scheme, the

misconception. There, The Treasury Branches Act of Alberta, R.S.A. 1955, c. 344, was found to be invalid because its effect would have been to hamper the federal government's power to regulate credit and currency under section 91(15). A fuller discussion of this case and its implications follows in Part III of the present paper.

²⁹ This conclusion may, however, be arguable in view of the manner in which Beetz J. concluded his judgment in *Pioneer Management*, *supra* footnote 16. He seemed to leave open the possibility of a further expansion of the scope of section 91(15) in the following terms (at p. 469):

Parliament having chosen to exercise its jurisdiction over Banking and the Incorporation of Banks from an institutional aspect rather than in functional terms, as was perhaps unavoidable, did not necessarily exhaust its exclusive jurisdiction. . .

³⁰ Report of the Royal Commission on Banking and Finance (D. Porter Chairman) (1964); hereinafter, the Porter Commission Report.

³¹ S.C. 1966-67, c. 70; now R.S.C. 1970, c. C-3.

federal government provides deposit insurance directly to the depositors of eligible deposit-taking institutions by levying "premiums" from them in proportion to the amount of their insurable deposits. Currently, depositors are insured to the extent of \$60,000 *per* depositor, *per* institution, although this amount as well as other aspects of the scheme are now under review as a result of the recommendations contained in a recent study of the program.³² The Canada Deposit Insurance Corporation continues to provide deposit insurance directly to federally regulated financial institutions, and, by way of a contractual relationship, to those provincially regulated institutions which choose to be part of the program.³³ This Act has been described as having facilitated "greater consistency in the application of trust and mortgage loan company rules relating to capital adequacy and acceptable business practices".³⁴ However, apart from this legislation, as the Department of Finance candidly states in a 1985 report on the regulation of Canadian financial institutions, "there has been little change" since the Porter Commission criticized the untidy division of

³² Final Report of the Working Committee on the Canada Deposit Insurance Corporation (CDIC) (Ottawa, Ministry of Supply and Services, April 1985).

³³ The scope of the Act (R.S.C. 1970, *supra*, footnote 31) is set out in sections 8, 9 and 10 as follows:

8. The objects of the Corporation are

(a) to provide, for the benefit of persons having deposits with member institutions, insurance (herein referred to as "deposit insurance") against the loss of part or all of such deposits, by making payment to such persons to the extent and in the manner authorized by this Act;

(b) to provide the deposit insurance required by this Act for federal institutions and to enter into contracts of deposit insurance with provincial institutions;

(c) to examine into the affairs of member institutions for the purpose of obtaining information relative to deposit insurance; and

(d) to accumulate, manage and invest a deposit insurance fund and any other funds accumulated as the result of its operations.

9. For the purposes of this Act, the following are federal institutions:

(a) a bank;

(b) a company incorporated by or pursuant to an Act of the Parliament of Canada that accepts deposits from the public and to which the *Trust Companies Act* or the *Loan Companies Act* applies; and

(c) a company the incorporation of which is continued by or pursuant to an Act of the Parliament of Canada that accepts deposits from the public and to which the *Trust Companies Act* or the *Loan Companies Act* applies.

10. For the purposes of this Act, an incorporated company that carries on, under a provincial Act or a constating instrument under provincial jurisdiction, the business of a trust company within the meaning of the *Trust Companies Act* or the business of a loan company within the meaning of the *Loan Companies Act*, or both such businesses, and that accepts deposits from the public is a provincial institution.

³⁴ The Green Paper, *op.cit.*, footnote 12, p. 58; McDonald, *loc. cit.*, footnote 11, at p. 200: "The Bank Act revision of 1967 did nothing to restrict the creators of near-money as the [Porter] Commission had recommended. Its chief thrust was a strengthening of the chartered banks to enable them to compete effectively with unchartered institutions."

jurisdictional responsibilities over essentially similar business undertakings in the financial sector.³⁵

The Porter Commission noted that "there is no definition of banking [in the Constitution] or in any other Act, governments having neatly sidestepped the issue",³⁶ and that this was largely a product of federal acquiescence.³⁷

The basic regulatory pattern in Canada can be traced back almost 100 years to the time when the provincial governments first enacted legislation governing the deposit-taking and related activities of loan and trust companies. The result of the federal government's acceptance of such provincial legislation—partly perhaps from a view that banking was confined to institutions with note-issuing powers—has been the emergence of a mixed and sometimes confused pattern of regulation . . . As a result of this rather haphazard approach there are illogical differences in legislation which prevent some institutions from contributing as they might to an efficient financial system and which lead to unevenness and inadequacies in the regulation and supervision of institutions now dealing with a large segment of the public.

The distinction mentioned in the Porter Commission Report between institutions with note-issuing³⁸ powers and those without may in the past have been a valid way of distinguishing banks from non-banks.³⁹ The distinction has, however, ceased to be meaningful, since banks are no longer permitted to issue notes intended to circulate as money.⁴⁰ Fifteen years ago, Professor Patrick McDonald provided a comprehensive critique of this notion that note-issuing powers sufficiently distinguished

³⁵ The Green Paper, *ibid.*, pp. 57-58.

³⁶ Porter Commission Report, *op. cit.*, footnote 30, p. 362.

³⁷ *Ibid.*

³⁸ Apart from the provisions relating to bank notes contained in the Bank Act and the Bank of Canada Act, a bank note, as regards its form and essential requirements, is simply the promissory note of a bank payable to bearer on a demand. . . A special feature of bank notes is that they are, in the language of the Bank Act and the Bank of Canada Act, "intended for circulation", that is, they are intended to afford a supply of paper currency.

See Falconbridge, *op. cit.*, footnote 5, pp. 127-128.

³⁹ See, e.g., E.P. Neufeld, *Canadian Financial Intermediaries: A Century of Development* (1967), 74 *The Canadian Banker* 143, where the author states quite categorically (at p. 144) that "historically it was the banks' note issuing powers that set them apart as 'banking' institutions". See also V. Ross, *A History of the Canadian Bank of Commerce*, vol. 2 (1920) where, with respect to banks in Canada, it is stated (p. 129) "that the chief reason for their existence was the service they performed by exchanging their own credit obligations in the form of bank-notes for the credit obligations of their customers. . .".

⁴⁰ Chartered banks have not had the right to issue their own notes in Canada since 1945: The Bank Act, S.C. 1944, c. 30, ss. 60, 61. As already mentioned (*supra*, footnote 39), note-issuing had been an important privilege enjoyed by the chartered banks in Canada. This came to an end in 1934, with The Bank Act, S.C. 1934, c. 24, providing in ss. 60-63 for the reduction from year to year of such privately issued bank notes intended for circulation in favour of notes issued by the Bank of Canada. The prohibition on the issue of notes by the chartered banks is now contained in s. 311 of The Bank Act, *supra*, footnote 13.

banks from competing financial institutions for constitutional purposes.⁴¹ Without repeating his argument in detail, it suggests that provincially regulated "near banks"—trust companies, mortgage companies and credit unions—have operated as "financial intermediaries"⁴² in the same way that the chartered banks have. Furthermore, on the basis that modern demand deposits held in provincially regulated financial institutions also serve as "near money" in the same way as deposits held in chartered banks, he argued further that the uniqueness of banks ultimately breaks down on that ground as well.⁴³

These developments point to a partial abrogation of section 91(15) and to a consequent abdication of federal jurisdiction by Parliament. "Thus", it was argued, "federal legislation contains provisions for the chartering of institutions authorized to engage in the 'business of banking', and prohibits the use of the word 'bank' by institutions not so chartered, but nowhere prohibits others from engaging in banking activities".⁴⁴ The result suggested by McDonald was uncontrolled competition within a hybrid jurisdictional framework which posed the danger of debilitating the Canadian monetary system.⁴⁵ This 1973 prediction did not come to pass, but the resulting observations remain useful.⁴⁶

⁴¹ McDonald, *loc. cit.*, footnote 11.

⁴² McDonald, *ibid.*, at pp. 158-161. This was the 19th century view which still applies today. See J.A. Galbraith, *The Economics of Banking Operations* (1963), p. 61 ("Although a banking firm does many things, its main activity is to supply funds to the community") (emphasis added); P. Sraffa, *The Works and Correspondence of David Ricardo*, vol. 4 (1951), p. 108 ("A Bank would never be established, if it obtained no other profits but those from the employment of its own capital: its real advantage commences only when it employs the capital of others."); W. Bagehot, *Lombard Street: A Description of the Money Market* (1902), p. 21.

⁴³ McDonald, *ibid.*, at pp. 188-95. Something similar has been occurring in the United States according to at least one observer: "Banking has undergone a revolution in the past decade. One can no longer recognize a bank just by looking at its housing. Many enterprises offering banklike services turn out not to be banks at all."; G.P. Miller, *Interstate Banking in the Court*, [1985] *The Supreme Court Review* 179, at p. 179.

⁴⁴ McDonald, *ibid.*, at p. 202. The relevant provisions of the 1980 Bank Act, read as follows:

s. 173(1) A bank may engage in and carry on such business generally as appertains to the business of banking . . .

s. 310(1) Every corporation that, after the coming into force of this Act, acquires, adopts or retains a name that, in any language, includes the word "bank", "banker" or "banking", either alone or in combination with other words, or any word or words of import equivalent thereto, and every person who, in any language, uses the word "bank", "banker" or "banking", either alone or in combination with other words, or any word or words of import equivalent thereto, to indicate or describe a business in Canada or any part of a business in Canada, without being authorized so to do by this or any other Act of Parliament, is guilty of an offence against this Act.

⁴⁵ McDonald, *ibid.*, at pp. 211-215.

⁴⁶ *Ibid.*, at pp. 216-217.

Concern over the rapid expansion of financial intermediaries other than federal chartered banks goes well beyond the academic. The emerging pattern of regulation is at best haphazard and leaves considerable room for inadequate regulation. The regulated persons can choose the jurisdiction, federal or provincial, to which they will be subject; the severity of the control offered at the competing levels of government is a factor to be weighed in making the choice. The federal Parliament, convinced of the need for more vigorous regulation of a particular type of financial institution, limits its controls to those members of the group which happen fortuitously to have been incorporated federally. Obligations having all the characteristics of money are issued by institutions beyond the reach of the national government.

Professor McDonald's argument reiterated the recommendations of the Porter Commission for a *functional* approach to banking regulation within a uniform legislative scheme. The Commission had suggested that the definition of banking "should be less arbitrary . . ." and, subject to limited exceptions, "should encompass all financial institutions issuing demand liabilities, transferable and short-term deposits, and other short-term banking claims". In addition to the chartered banks, that definition would have included many trust and loan companies, some finance companies, caisses populaires and credit unions.⁴⁷ Accordingly, the Commission concluded:⁴⁸

. . . federal regulation and supervision should apply to all institutions deemed to be banking institutions, and . . . all institutions not chartered or licensed by the authorities should not be permitted to engage in banking activities. Provincially incorporated companies desiring banking powers would thus have two alternatives open to them—to apply to the federal parliament for a charter or to apply to the federal authorities for a license to operate as banks . . .

An alternative approach would be to make federal regulation voluntary while offering inducements to institutions to submit themselves. Unfortunately, however, those few institutions which are now virtually unregulated are precisely the ones which are likely to remain outside the regulatory framework. In fact, the inducements of coming under good regulation and of using the name "bank" are probably not strong enough to lead all banking institutions to accept federal charters or licences.

The Porter Commission may have been mistaken in its lack of faith in voluntary submission to jurisdiction. The Canada Deposit Insurance Corporation scheme for trust and mortgage loan companies, for example, has attracted an overwhelming preponderance of the provincially regulated institutions—a phenomenon which appears to be repeating itself with respect to the newer Canadian Payments Association.⁴⁹ But then

⁴⁷ Porter Commission Report, *op. cit.*, footnote 30, p. 363.

⁴⁸ *Ibid.*

⁴⁹ In 1985, the CDIC had 194 member institutions, of which 63 were provincially regulated. These 63 institutions, however, represented 85 per cent of all of the CDIC-eligible provincial sector. See The Green Paper, *op. cit.*, footnote 12, p. 58.

In the same year, the CPA had 127 member institutions, including 25 central co-operatives representing more than 3,000 individual credit unions and caisses populaires. All of the local credit unions and caisses populaires are chartered and regulated provincially.

again, the Porter Commission had a far more comprehensive agenda in mind which has yet to be fully accepted by the provincial side of this debate.

Although the 1964 Porter Commission Report did not lead to the massive changes which its authors had called for, it did have an immediate practical impact on the federal side of the banking regulation issue. Federal government policy since the first Bank Act of 1871 has been to overhaul the legislation every ten years. The 1967 Bank Act⁵⁰ was the tenth of these decennial revisions and was the most extensive, leading to changes in many areas.⁵¹ The establishment of the Canada Deposit Insurance Corporation, which has already been mentioned, was a particularly successful result of the Commission recommendations.

Further problems remained to be resolved, however. Thus, in 1974 the then Minister of Finance, John Turner, invited submissions from interested parties with a view to meeting the scheduled date for the next Bank Act revision in 1977.⁵² In 1976, a federal White Paper resulted which contained proposals with respect to the resolution of these problems.⁵³ The first such proposal dealt with the question of a national cheque clearing system, and was eventually passed into law as the Canadian Payments Association Act⁵⁴ in 1980.

John S. Roberts, *The Canadian Payments Association: An Update*, Address at the Cash Management Conference, Vancouver, B.C., Oct. 8, 1985, p. 2.

⁵⁰ S.C. 1966-67, c. 87; R.S.C. 1970, c. B-1.

⁵¹ See, e.g., Bank Act '77: The Industry's Brief (presentation of the Canadian Bankers' Association on the 1977 revision of the Bank Act, October, 1975), p. 2. The authors refer to the 1967 revision of the Bank Act as one "that far exceeded in importance any of the previous revisions", and go on to list the principal changes in the 1967 Act.

⁵² The Bank Act is itself the Charter for the banks, and sets out the date at which the Charter expires. In the 1967 Act the relevant provisions, ss. 5 and 6, read as follows:

5. Each bank named in Schedule A is a body politic and corporate and this Act is its Charter.

6. Subject to this Act

(a) if Parliament sits on at least twenty days during the month of June, 1977, the bank may carry on the business of banking until the first day of July, 1977, and no longer, and

(b) if Parliament does not sit on at least twenty days during the month of June, 1977, the bank may carry on the business of banking until the sixtieth sitting day of Parliament next thereafter, and no longer.

The relevant provisions in the 1980 Act are sections 4 and 6 respectively, and refer to April, 1991 as the date at which the current Charter expires.

As is well known, the revision to the 1967 Act was not passed until 1980, so that the 1967 Act had to be extended a number of times by special act of Parliament in order to allow the banks to continue functioning legally until the 1980 Act was passed.

⁵³ White Paper on the Revision of Canadian Banking Legislation (Canada, Dept. of Finance, August 1976) [hereinafter *The White Paper*].

⁵⁴ S.C. 1980-81-82-83, c. 40, Part IV, ss. 54-89.

Prior to 1983,⁵⁵ the national system of clearing cheques was operated by the Canadian Bankers' Association. "Near banks" participated in the program but had no say at all in how the system operated or was governed. The proposal in the White Paper concerning what eventually became the Canadian Payments Association was extremely wide: "All institutions in Canada accepting deposits transferable by order will be required to join the Association."⁵⁶ Local credit unions and caisses populaires, which are under provincial regulatory jurisdiction, would have been required to join a central body which would itself have been required to join the Association.

By the time the new Bank Act was enacted in 1980, the scope of the original White Paper proposal had been considerably reduced. Only the Bank of Canada, all chartered banks and Quebec savings banks were required to join; the program was voluntary for all eligible provincially regulated institutions.⁵⁷ In point of fact, most such provincial bodies have become members of the Association—something which the Standing Senate Committee on Banking and Trade and Commerce has referred to as representing "a significant step in the evolution of the Canadian financial system".⁵⁸

⁵⁵ Although the actual Act was passed into law in 1980, the Canadian Bankers Association continued to operate the national cheque clearing and settling system until the Canadian Payments Association was ready to begin actual operations on February 1, 1983; Roberts, *loc. cit.*, footnote 49, at p. 3.

⁵⁶ The White Paper, *op. cit.*, footnote 53, p. 18.

⁵⁷ The list of mandatory and eligible members is set out in the Canadian Payments Association Act, *supra*, footnote 54, as follows:

57.(1) The Association shall consist of the following members:

- (a) the Bank of Canada;
- (b) every bank;
- (c) every savings bank to which the *Quebec Savings Banks Act* applies; and
- (d) any other person who is entitled under this Act to be a member and who, on application to the Association for membership in the Association, establishes that he is entitled to be a member.

(2) A central, a trust company, a loan company and any other person, other than a local that is a member of a central, that accepts deposits transferable by order to a third party is entitled to be a member of the Association if the central, trust company, loan company or other person is able to meet the requirements of section 84 and any requirement set out in the by-laws.

(3) Where at least one of the centrals that belong to a federation is a member, the federation may be a member if the federation meets the requirements of section 84 and the requirements set out in the by-laws but the federation may not vote at any meeting of members.

(4) Where Her Majesty in right of a province or an agent thereof accepts deposits transferable by order to a third party, Her Majesty in right of the province or the agent thereof is entitled to be a member of the Association.

⁵⁸ Towards A More Competitive Financial Environment (Sixteenth Report of the Standing Senate Committee on Banking, Trade and Commerce, May, 1986) (hereinafter The Senate Report), p. 110.

In the words of the Act: "The objects of the Association are to establish and operate a national clearings and settlement system and to plan the evolution of the national payments system."⁵⁹ The mandate is thus twofold: the short-term establishment of a national system for the clearing and settlement of transfers of funds; and the longer term objective of planning the evolution of the national payments system. This latter objective will become an increasingly important one as completely electronic payment systems evolve.⁶⁰

It would appear that the Canadian Payments Association has now successfully met the first part of its mandate.⁶¹ The second part—guiding the evolution of a national payments system—may be more difficult, especially in light of the "mixed and sometimes confused pattern of regulation"⁶² in this area. It is with that in mind that we now turn to an examination of how the federal and provincial partners in Confederation view the task of regulating the financial sector.

B. Harmonization

The Porter Commission agenda, which favoured unilateral disentanglement of the jurisdictional overlap in the Canadian financial system in

⁵⁹ Canadian Payments Association Act, *supra*, footnote 54, s. 58.

⁶⁰ Electronic funds transfer systems are essentially communications systems that allow messages to pay funds or related data to be recorded and transmitted electronically rather than on paper or orally. This is most often done in one of two ways: "on-line", which means by way of a communications link to an institution's computer; or on a magnetic tape or disk which is "read" by the computer at some point after the message is given. The main attribute of EFT systems is the link of a communications facility to the accounting system of a financial institution through its computers.

All EFT systems have as their purpose the transfer of bank deposits. It follows, therefore, that the person making an EFT payment as well as the person receiving the payment must both have bank accounts. EFT serves exactly the same purpose as the cheque—it is used to transfer bank deposits.

Report on the Legal Aspects of Electronic Funds Transfer Prepared for the Department of Consumer and Corporate Affairs (Gowling & Henderson, August 1984), pp. 1/2 - 1/3 (hereinafter The Gowling & Henderson Report).

⁶¹ In 1985, John Roberts, the general manager of the Canadian Payments Association, was able to say the following on this point (*loc. cit.*, footnote 49, at p. 5):

The growth in our membership, the successful automation of the clearing and settlement system, and the speed with which enhancements are being implemented offer some measure of the extent to which we have achieved our first objective—the establishing and operation of the national clearing and settlement system. We are now actively involved in planning the evaluation of the payments system—our second mandate.

For a full discussion of the legal implications of EFTS, see G. David, Electronic Funds Transfer, Technological Developments and Legal Issues, 2 Canadian Computer Law Reporter, Part I: No. 4 at p. 65 (Feb. 1985); Part II, No. 5 at p. 89 (March 1985); Part III, No. 6 at p. 109 (April 1985).

⁶² See text accompanying footnote 37, *supra*.

favour of comprehensive federal regulation of banking functions, does not appear to enjoy political favour at this time. Rather, both federal and provincial authorities are currently pressing for the negotiated "harmonization" of national and local approaches to regulatory reform by way of cooperative federalism.⁶³

Understandably, harmonization, as opposed to enforced uniform regulation, is clearly preferred by the provinces. To this end, the Ontario Task Force on Financial Institutions has proposed the establishment of a federal-provincial Council of Ministers Responsible for Financial Institutions. This body would be staffed by a permanent secretariat, and would "review and consult on all matters pertaining to the policies and regulatory practices governing financial institutions".⁶⁴ At the same time, however, the Ontario Report also asserts that, in the absence of comprehensive industry-wide safeguards, "as a condition of licensing in Ontario, any extra-provincial corporation would have to comply with Ontario law in all of its undertakings, whether in or outside Ontario".⁶⁵ This "equals approach", so-called, which calls for possible extra-territorial compliance with Ontario laws, is relied on "as the only instrument available for the protection of Ontario consumers".⁶⁶ In a similar vein, Ontario, for the purposes of regulation within the province, continues to advocate maintenance of the traditional "four pillars"⁶⁷ of the Canadian financial system and the formal division of functions and responsibilities to the public which that implies.

⁶³ For particularly strong statements of such a desire, see the Ontario Task Force on Financial Institutions (Final Report, 1985) (hereinafter, The Ontario Task Force), at p. 43, where the authors state: "The importance of federal provincial harmony in the area of financial services regulation cannot be overstated." The Senate Report, *op. cit.*, footnote 58, makes a similar point (at p. 116) where it states that "the federal-provincial implications arising from our recommendations call primarily for renewed and creative efforts in reiterating the perennial problems of harmonization and coordination".

⁶⁴ The Ontario Task Force, *ibid.*, at p. 44.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ The term "four pillars" is somewhat misleading in that it gives the impression the financial services industry is divided neatly into four separate and distinct markets for four completely separate types of financial service. This is not quite the case as there is a wide degree of overlap in functions between competing institutions. Nonetheless, it is possible to assign particular institutions to one of four categories in terms of what may be called the "core function":

1. banking (commercial lending);
2. trust and loan (trust and estate services);
3. insurance (insurance underwriting);
4. securities (underwriting and full service brokerage).

For a fuller discussion of these four "pillars" see The Ontario Task Force, *ibid.*, pp. 29-33.

Therefore, to the extent that other jurisdictions permit functional overlap between competing institutions from different sectors of the financial system, the Ontario Report further recommends:⁶⁸

It should be a condition of licensing that every financial institution carrying on business in Ontario must conform to Ontario law in the conduct of its business in Ontario. Every financial institution incorporated in a jurisdiction which permits it to carry out functions denied to Ontario chartered institutions should be required to incorporate an Ontario subsidiary in order to carry on business in Ontario.

Despite its unilateral nature, this approach is considered by the Task Force to be consistent with the objective of harmonization. Little harmony may result, it is suggested, from the potential extra-territorial reach of Ontario laws,⁶⁹ especially if the standards imposed diverge markedly from those of the resident jurisdictions of companies seeking to do business in Ontario.

In fairness to the Task Force members though, their proposed "equals approach" is considered to be a stopgap measure until federal-provincial regulatory harmonization can provide permanent solutions to such consumer protection issues as the proposed industry-wide financial compensation for loss in cases of institutional insolvency. But the realization of harmony necessarily presupposes that everyone will sing the same tune; in that respect, there may very well be too many composers of divergent tastes.

If we again contrast the recent federal and Ontario proposals for discussion,⁷⁰ it will be seen that the federal paper seeks to transcend the four pillars by the umbrella institution of a financial holding company at the very time that Ontario sees merit in preserving the four pillars. The contrasting positions on both sides of what is obviously a shared field of jurisdiction with competing regulatory priorities may change considerably over time. As an illustration of this latter observation, it is to be noted that the recent report of the Standing Senate Committee on Banking, Trade and Commerce appears to be moving away from the position that the federal government ought to have overall jurisdictional control.⁷¹

We believe that one of the distinguishing features of our report. . . is that our recommendations complement fully the existing federal-provincial allocation of powers and responsibilities in the Canadian financial sector. While we were cogni-

⁶⁸ *Ibid.*, p. 45.

⁶⁹ In this regard, the Supreme Court of Canada has had occasion recently to express its disapproval of attempts by one province to extend the reach of its own laws to the jurisdiction of another province: *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477. For a discussion and criticism of this decision, see H. Scott Fairley, *Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect* (1978), 10 *Ottawa L. Rev.* 253, at pp. 267-271.

⁷⁰ The Green Paper, *op. cit.*, footnote 12, and The Ontario Task Force, *op. cit.*, footnote 63.

⁷¹ The Senate Report, *op. cit.*, footnote 58, p. 104.

zant at all times of the federal-provincial implications arising from these recommendations, the principal reason for working within the existing structure, rather than engaging in a process of constitutional or jurisdictional re-design, is our belief that the existing structure has served Canadians well.

Nonetheless, the fact that this particular federal report makes a point of acknowledging the differences between the federal and provincial positions illustrates the point that there still exists a considerable gulf in expectations between the parties.

The nature and extent of the common ground between the federal and provincial jurisdictions will always fluctuate with the ebb and flow of different policies of successive governments. These policies differ markedly not only because the governments concerned operate at different levels under our federal system, but also because they are pursued for the benefit of distinct geo-political constituencies. Nevertheless, the Ontario Task Force of 1985 reads the situation with respect to financial services regulation with a concern which is almost identical to that of the federally appointed Porter Commission twenty-one years earlier.⁷²

The current jurisdictional maze, in which the federal government regulates banking, co-operative credit associations and some segments of the trust and insurance industry while the provinces regulate securities firms, credit unions, independent agents and brokers and the remaining segments of the trust and insurance industry has led to enormous duplication, confusion and, often, conflict between both levels of government.

C. *The Limits of Politics and The Virtues of Clarity*

Both levels of government "have a mutual interest in achieving an equitable resolution",⁷³ of their conflicting regulatory mandates over the Canadian financial system. If the instruments of cooperative federalism can achieve this goal, so much the better. Even so, the ultimate constitutional jurisdiction and responsibility for the pursuit of these policy goals raises a different kind of problem. Despite whatever good intentions may exist on both sides of the federal-provincial bargaining table, the integrity of banks and banking in Canada is still a federal matter of undoubtedly national concern. However, that being said, the limits and extent of that concern remain something of a constitutional mystery.

It becomes useful, therefore, to seek to unravel this mystery in light of the general perception that the banking system eludes adequate definition for purposes of effective regulation.

III. *Judicial Interpretation of Jurisdictional Limits*

The language of section 91(15) of the Constitution Act, 1867 is general and theoretically all-embracing in relation to the subject matter of bank-

⁷² The Ontario Task Force, *op.cit.*, footnote 63, p. 43.

⁷³ *Ibid.*

ing. By contrast, in the United States, no clear-cut mandate existed for national control over the banking system. As a result, it had to be eked out by degrees⁷⁴ from what is still regarded as an "intricate web of state and federal law".⁷⁵ In Canada, however, the apparent mandate for national jurisdiction and control has gradually given way to an increasingly complex field of shared jurisdiction between federal and provincial authorities, as the Canadian financial system has grown and matured.

A more extreme example of this centrifugal phenomenon in Canadian constitutional law, again in contrast to the predominantly centripetal tendencies of American jurisprudence, is the evolution of the trade and commerce power.⁷⁶ For Canada, it may be said that both federal fields—banking and trade and commerce—have been curtailed or "mutually modified",⁷⁷ as a function of the judicial recognition accorded to provincial jurisdiction under the head of "property and civil rights in the province".⁷⁸ The primary difference between constitutional developments in the two federal fields is that, while federal jurisdiction was beaten back by the

⁷⁴ For example, under the U.S. Constitution there is no specific power given to the Congress to create banks, although there is such a power to collect taxes and to borrow money. In 1819 the U.S. Supreme Court upheld the power of Congress to incorporate banks as a necessary incident to this latter power: *M'ulloch v. the State of Maryland*, *supra*, footnote 26. Thus, it may be said that in so far as banking is concerned, the power to regulate developed out of the power to tax in the U.S. This approach is to be compared with that of the Privy Council in connection with the Canadian Constitution. It held that taxing and regulating are to be distinguished for purposes of Constitutional Law, such that the former does *not* imply the latter: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575.

⁷⁵ K.E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation* (1980), 32 Stanford L. Rev. 687, at p. 687.

⁷⁶ For a particularly comprehensive treatment of this aspect of the Constitutional jurisprudence in both countries, see A. Smith, *The Commerce Power in Canada and the United States* (1963).

⁷⁷ Professor W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), pp. 243-244, describes and explains the doctrine of "mutual modification" in the following way:

In the case of many, if not most, particular laws, the overlapping of federal and provincial categories of laws logically relevant is inevitable, no matter how often the B.N.A. Act cries 'exclusive'. The courts have dealt with this overlapping in a number of ways. For one thing, they have limited the generality of the classes of laws in sections 91 and 92 by the so-called principle of 'mutual modification', and have thus eliminated some of the encroachment of one upon the other. For example, consider the relation of the federal class, 'regulation of trade and commerce', with the provincial class, 'property and civil rights'. Trade and commerce is carried on in articles in which persons have property and in respect of which they have civil rights. Obviously, in the logical sense there is here a wide overlapping. However, speaking generally, the courts have said that 'regulation of trade and commerce' is to be reduced in generality and read as 'regulation of interprovincial and international trade and commerce'. Likewise, 'property and civil rights' is to be rendered 'property and civil rights except those involved in interprovincial and international trade and commerce'.

⁷⁸ Constitution Act, 1867, *supra*, footnote 2, s. 92(13).

courts in relation to trade and commerce,⁷⁹ Parliament itself has chosen not to test the limits of its jurisdiction over banking, and, as a result, generally has tolerated incursions by provincially regulated institutions. Moreover, in the case of banking it could not be said that such federal acquiescence was in any sense dictated by judicially imposed constraints—at least not initially.

This is all the more surprising since, as Professor Hogg notes, the constitutional position of banking is something of “a special case in that the normal bifurcation of legislative authority between incorporation and regulation does not apply: the federal Parliament has both the power to incorporate banks and the power to regulate banking”.⁸⁰ What more could be required?

A. *The Expansive but Uncertain Federal Mandate*

At first, it appeared that the comprehensive intent of the framers of our Constitution with respect to banking and monetary matters was virtually unqualified. The spheres of banking and of property and civil rights in the province overlapped and conflicted in the early leading case of *Tennant v. Union Bank of Canada*.⁸¹ At issue was the validity of a warehouse receipt which, according to the Bank Act of the day, provided valid security for a loan. The law of Ontario provided otherwise and, as Lord Watson for the Judicial Committee of the Privy Council frankly conceded:⁸²

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province.

Nevertheless, it further appeared that the disputed transactions embraced an aspect of “banking” within the meaning of section 91(15).⁸³

The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges

⁷⁹ The process of “beating back” federal jurisdiction began with *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.) and continued through such other leading cases as *A.G. for Canada v. A.G. for Alberta*, [1916] 1 A.C. 588 (P.C.); *Re Board of Commerce Act*, [1922] 1 A.C. 191 (P.C.); and *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.). Following the abolition of appeals to the Privy Council, the Supreme Court of Canada hinted at a less hostile attitude towards the federal power, beginning with the *Reference re the Farm Products Marketing Act*, [1957] S.C.R. 198 and culminating most recently with *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

⁸⁰ P.W. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), p. 528.

⁸¹ [1894] A.C. 31 (P.C.).

⁸² *Ibid.*, at p. 45.

⁸³ *Ibid.*, at p. 46 (emphasis added).

which the law of the province does not, and cannot, attach to it. *It also comprehends "banking", an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.*

Tennant became a leading example for the doctrine of the paramountcy of federal legislation in a shared field. Thus, the Bank Act provisions were sustained even though they trenched on an equally valid provincial field. However, the decision did not illuminate the dimensions of either of the competing jurisdictions; it simply said that all that was required was for Parliament to stay within its bounds. In that regard, it was a matter for Parliament to test the limits of its own jurisdiction.

In the absence of ulterior motives or purposes beyond patently *intra vires* pursuits, the courts have sought to accommodate both Parliament and the provincial legislatures where there is no direct conflict between legislative spheres.⁸⁴ Thus, provincial taxation of federally incorporated banks was upheld as valid in *Bank of Toronto v. Lambe*,⁸⁵ yet, in the *Alberta Tax Reference*,⁸⁶ the attempt of the Social Credit movement to effectively displace federally chartered banks doing business in the province through the device of local taxation was not regarded with equal favour. Similarly, a Quebec statute purporting to confiscate all deposits in "credit institutions", which had not been claimed for a period of thirty years or more, was also struck down by the Privy Council in the *Quebec Bank Deposits Reference*⁸⁷ because of its primary impact on banks. Wherever that occurs, the "pith and substance" or overall purpose of the provincial legislative scheme becomes suspect. As Lord Porter noted, "in the vast majority of cases, and primarily, the legislation now in question affects banks and them alone".⁸⁸

Interfering with the business of banking and the status of banking institutions constitutes one form of jurisdictional infringement. The existence of alternative institutional mechanisms, the "near banks", so-called, whose functions are to furnish financial services to a given market in the same way that banks do, may constitute a further form of jurisdictional infringement.

⁸⁴ Professor Hogg, *op. cit.*, footnote 80, p. 324, describes the attempt of the courts to accommodate Parliament and the Legislatures in terms of a "presumption of constitutionality": "Judicial restraint in determining the validity of statutes may be expressed in terms of a 'presumption of constitutionality'. Such a term transfers from the law of evidence the idea that a burden of demonstration lies upon those who would challenge the validity of a statute which has emerged from the democratic process." That this is a new doctrine is evidenced by the paucity of caselaw which Professor Hogg cites (p. 324, n. 71) in support of this presumption. See also J.E. Magnet, *The Presumption of Constitutionality* (1980), 18 *Osgoode Hall L.J.* 87.

⁸⁵ *Supra*, footnote 74.

⁸⁶ *A.G. for Alberta v. A.G. for Canada*, [1939] A.C. 117 (P.C.).

⁸⁷ *A.G. for Canada v. A.G. for Quebec*, [1947] A.C. 33 (P.C.).

⁸⁸ *Ibid.*, at p. 44.

That part of the ongoing Alberta Social Credit legislative program which purported to expand credit in the province,⁸⁹ declared *ultra vires* in the *Alberta Bill of Rights Reference*,⁹⁰ was an infringement of this second type. The credit service offered was not directed at curtailing the business of banks, but, rather, at providing a competitive service on the more favourable terms promised by the Social Credit program.

The licensing scheme was aimed at all credit institutions doing business in Alberta and was to provide credit to customers on the strength of government certificates. It could not be saved merely by including the chartered banks within its scope because the legislation was held to be concerned with banking functions as such. Thus, Viscount Simon concluded:⁹¹

It cannot be disputed that the object and effect of Part II [of the Act] are to interfere with and control the business carried on by a chartered bank in the Province by which (subject to any restrictions imposed by Dominion legislation) it makes loans to customers to a total amount which exceeds the liquid assets which the bank holds. The question, therefore, is whether operations of this sort fall within the connotation of "banking" as that word is used in s. 91 of the British North America Act. Their Lordships entertain no doubt that such operations are covered by the term "banking" in s. 91. *The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act.* To take what may seem a frivolous analogy, if "skating" was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature.

The metaphor employed by Viscount Simon is far from frivolous, as Canadian courts have tended to uphold different styles of "skating" into the functional realm of the banking business without thinking through all the possible consequences for the overall federal jurisdiction. In this regard, while federal acquiescence to these incursions has facilitated the avoidance of controversy, it has done so at the cost of further delaying the ultimate day of reckoning.

B. *The Legitimacy of Provincially Regulated Alternatives*

Judicial recognition that financial institutions other than "banks" are constitutionally entitled to carry on the same kind of business that banks do has been relatively unobtrusive and has not led to any such case being considered a *cause célèbre* as the Social Credit cases have been. In 1918, for example, the British Columbia Supreme Court upheld provincial powers of incorporation in relation to companies whose objects included receiving money on deposit, largely because the federal banking law had

⁸⁹ The Alberta Bill of Rights Act, S.A. 1946, c. 11, Part II.

⁹⁰ *A.G. for Alberta v. A.G. for Canada*, [1947] A.C. 503 (P.C.).

⁹¹ *Ibid.*, at pp. 516-517. (Emphasis added).

no prohibition on institutions carrying on such a business as long as they were not calling themselves banks.⁹² Accordingly, Murphy J. declined "to place a construction on [the Bank Act] which would have disastrous results on the business of numerous provincial companies".⁹³

Some years later, the Manitoba Court of Appeal confirmed the constitutionality of provincially incorporated deposit taking institutions in *Re Bergethaler Waisenamt*.⁹⁴ The majority opinion acknowledged the wide ambit of the Privy council decisions in *Tennant*⁹⁵ and the *Alberta Bill of Rights Reference*,⁹⁶ while at the same time recognizing that "[t]he right of a provincial Legislature to incorporate a loan, trust or financial corporation without authority to do a banking business is not questioned".⁹⁷ While conceding the wide range of financial functions exercised by banks, the majority stressed nonetheless that the salient feature of most such functions was that, in practical terms, they did not *uniquely* fall to the business of banking. Accordingly, Richards J.A. concluded:⁹⁸

The business carried on by most banks includes the totality of the functions I have enumerated, but, of course, a banking business can be carried on without performing all of them and most corporations and individuals engaged in a financial business of any kind are required to carry on or perform some of them, and it does not follow from the fact that banks perform them that every exercise of one or more of the functions is a form of banking.

That being the case, provincial entities were on safe ground so long as they did not hold themselves out to be banks or to do everything that banks could do.

The separate concurring opinion of Coyne J.A. agreed with this basic proposition.⁹⁹ Nevertheless, he did concede that the note-issuing powers of banks distinguished banking from any other business, and that, perhaps, the function of honouring cheques drawn upon an account would be an unwarranted invasion of the federal sphere. But again the key point

⁹² *In re Dominion Trust Company et al.*, [1918] 3 W.W.R. 1023 (B.C.S.C.).

⁹³ *Ibid.*, at p. 1025.

⁹⁴ [1949] 1 D.L.R. 769 (Man. C.A.).

⁹⁵ *Supra*, footnote 81.

⁹⁶ *Supra*, footnote 90.

⁹⁷ *Supra*, footnote 94, at p. 773.

⁹⁸ *Ibid.*, at p. 776.

⁹⁹ *Ibid.*, at pp. 778-779:

Banking is not a technical or legal term but a loose popular one, comprehending activities carried on by those who, likewise popularly, are called bankers. Of these activities some are often and some are usually carried on by bankers. Some are essential to the conception. But very few are exclusive activities of bankers. Chequing privileges accorded depositors, and general dealing in credit, are characteristic of and perhaps essential to banking. But even that does not make them exclusive rights of bankers, even in the absence of prohibition by statute against others carrying them on.

was that Parliament had not tightened up the rules of the game for non-member players. Thus, Coyne J.A. had no objection to letting the non-members continue to play.¹⁰⁰

Grant of legislative power does not disturb general rights. The Parliament of Canada, it is true, has legislated in respect of the so-called "chartered" banks. But it has placed no restriction on what other persons, natural or artificial, may do in respect of any business such as Bergethaller carried on, except that such others may not advertise themselves as banks or bankers and are subject to a fine if they do.

Of course, such reasoning implies that if Parliament decided to assert its jurisdiction under section 91(15) more aggressively the situation would be different. In a similar vein, Saskatchewan credit union legislation passed muster as *intra vires* the province even though it permitted "the setting up of corporations with power in the province to do most things chartered banks can do throughout Canada".¹⁰¹ Tucker J. characterized the Credit Union Act¹⁰² as, in pith and substance, local in character and not a colourable attempt to "interfere with or attempt to regulate chartered banks".¹⁰³ Therefore, it occupied a field overlapping the federal banking law and, in the absence of conflict, could stand together with it.¹⁰⁴

It would therefore appear that parliament has entered its field of legislation under sec. 91(15) to a very limited extent and has not forbidden other persons or corporations, including provincial companies set up under sec. 92(11) from doing business which chartered banks are also empowered to do.

Interestingly enough, at the instigation of the founder of the *Caisses Populaires* movement, Alphonse Desjardins, Parliament had once contemplated credit union legislation of its own. A bill passed the House of Commons in 1907 but missed support in the Senate by one vote. This was apparently on the basis of a legal opinion that such legislation might be beyond federal jurisdiction.¹⁰⁵ Yet, as the opinion of Tucker J. concedes, there were problems with the Saskatchewan credit union scheme with respect to a possible usurpation of core banking functions,¹⁰⁶ although he

¹⁰⁰ *Ibid.*, at p. 779.

¹⁰¹ *La Caisse Populaire Notre Dame Limitée v. Moyen* (1967), 59 W.W.R. 129, at p. 147 (Sask. Q.B.), per Tucker J.

¹⁰² S.S. 1937, c. 25.

¹⁰³ *Supra*, footnote 101, at p. 154.

¹⁰⁴ *Ibid.*, at pp. 156-157.

¹⁰⁵ E.P. Neufeld, *The Financial System of Canada* (1972), pp. 384-385.

¹⁰⁶ Although satisfied that The Credit Union Act, *supra*, footnote 102, was *intra vires* the province, Tucker J. had some doubts which arose "from the fact that two such ancillary powers, namely: (1) The right to 'deal in credit;' or (2) 'The receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer' have been held repeatedly by the courts to constitute the business of 'banking'"; *supra*, footnote 101, at p. 161.

was prepared to characterize them as ancillary to a valid provincial object or, alternatively, severable from the Act as a whole.¹⁰⁷

In *Breckenridge Speedway Ltd. v. the Queen*,¹⁰⁸ an action in contract against the Crown, the constitutionality of The Treasury Branches Act¹⁰⁹ of Alberta came into question. The majority of the Alberta Court of Appeal resolved the matter without touching upon the constitutional issue, although two judges dissented in part and dealt with it.

The Treasury Branches system began life in 1938 by authorizing the minister to take deposits under individual contracts, to invest in securities, to make purchases and to make loans. All earnings and profits were to go to the general revenue of the province. Porter J.A., dissenting, focussed on the apparent power of the Treasury Branches to create credit in the manner of a commercial bank, but absent the constraints on banks which require them to maintain cash reserves to meet deposit liabilities on demand.¹¹⁰ Accordingly, he cited the *Alberta Taxation*¹¹¹ reference for the proposition that "[t]his ability to create credit unquestionably demonstrates that the credit houses are engaged in the business of banking".¹¹² It was the function and practice of the Treasury Branches, and not their formal classification, which determined their legislative characterization.¹¹³

The effect of the creation and operations of the treasury branches if carried on to the magnitude that could be developed if all of the provinces created operations identical to those carried on under *The Treasury Branches Act* in Alberta would be to hamper and perhaps frustrate the power of the parliament of Canada to regulate credit and currency as it has done by the *Bank of Canada Act*. Their operations would minimize the power of Canada to prevent the undue extension of credit incident to the lending and borrowing by these institutions of deposit liabilities without the maintenance of any cash ratio of reserves. By the creation of a substitute for currency it could minimize the use of currency and thus hamper Canada in its duty to exercise control over currency as contemplated by the *B.N.A. Act, 1867* . . .

In my view *The Treasury Branches Act* is invalid as trenching upon a legislative field into which it is prohibited from entering by reason of the assignment of the exclusive right therein to Canada.

¹⁰⁷ *Ibid.*, at pp. 161-172.

¹⁰⁸ *Supra*, footnote 28.

¹⁰⁹ *Ibid.*

¹¹⁰ The applicable Bank Act, S.C. 1953-54, c. 48 provision read as follows:

s.71(1) The bank shall maintain a cash reserve in the form of a deposit with the Bank of Canada and of Bank of Canada notes held by the bank, and such reserve shall be not less on the average during any month than eight per cent, or such other percentage as may be fixed by the Bank of Canada under the provisions of the *Bank of Canada Act*, of such of its deposit liabilities as are payable in Canadian currency.

The modern Bank Act, *supra*, footnote 13, equivalent provision is section 208(1).

¹¹¹ *Supra*, footnote 86.

¹¹² *Supra*, footnote 28, at p. 278.

¹¹³ *Ibid.*, at pp. 278-279.

Allen J.A. joined in this view, emphasizing that the business of the Treasury Branches possessed virtually "all of the characteristics of banking . . .", and that counsel and witnesses referred to it as "the bank".¹¹⁴ In reference to the preamble to the Bank of Canada Act, Allen J.A. further pointed out the intent of Parliament "to establish a central Bank of Canada to regulate credit and currency in the best interests of the economic life of the nation, and to control and protect the external value of the national monetary unit".¹¹⁵ The absence of cash reserve requirements for the Treasury Branches subverted this goal which Parliament had been constitutionally empowered to pursue.¹¹⁶

If every province in Canada were to legislate as the province of Alberta has done with regard to the operation of treasury branches with no effective control on the amount of credit which can be extended by these branches, the purposes of important provisions of the *Bank Act* and the *Bank of Canada Act* designed to exercise control of credit, could be frustrated.

The salient point remained that the provincial law usurped the "exclusive [federal] powers in the field of banking, particularly in so far as they relate to the control of credit, dealings in which are characteristic functions of a banking institution".¹¹⁷

A majority of the Supreme Court of Canada also disposed of the *Breckenridge* case without having to deal with the constitutional issue.¹¹⁸ But again, two judges dissented in part, holding that the Alberta legislation was *ultra vires*. Hall J., writing for himself and for Spence J., was in full agreement with Porter J.A. on his characterization of The Treasury Branches Act as being in relation to banking and had nothing to add in that regard.¹¹⁹ However, the entire Bench agreed that, irrespective of the outcome on the constitutional issue, the appellants had no defence to an action for monies had and received. As a result, the minority view which had adopted an interpretation of federal banking jurisdiction in functional terms was *obiter dictum* and without real impact.

Nonetheless, the foregoing authorities leave one with the distinct impression of judicial receptivity to constitutional argument based on the possibly deleterious effects of provincially regulated near-banking operations on federal responsibilities in relation to banking in general and on national monetary policy in particular.¹²⁰

¹¹⁴ *Ibid.*, at p. 303.

¹¹⁵ *Ibid.*, at p. 308.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, at p. 309.

¹¹⁸ [1970] S.C.R. 175.

¹¹⁹ *Ibid.*, at p. 196.

¹²⁰ See McDonald, *loc. cit.*, footnote 11, at p. 217.

Similarly, with respect to the related emerging field of regulation required to govern electronic funds transfer systems, it appears that federal jurisdiction is maintainable under existing jurisdictional concepts.¹²¹

The use of computer services by banks came under scrutiny by the Manitoba Court of Appeal in *Central Computer Services Ltd. et al. v. Toronto-Dominion Bank*.¹²² It was alleged in that case that the use of computer technology fell outside the "business of banking" as it is defined in what was then section 75 of the Bank Act.¹²³ The trial judge agreed,¹²⁴ based on an interpretation of the section which was limited to the enumerated powers in paragraphs (a) to (d), and granted an injunction restraining the bank from continuing certain computer-based practices.

A majority on the Court of Appeal disagreed, however, and reversed the trial decision. Monnin J.A. confirmed the inadequacy of the existing definition of banking, but started from the proposition that "Parliament never intended to establish a fixed or restricted definition".¹²⁵ Therefore, the use of computer services by the bank in aid of its day-to-day business was not outside the jurisdiction conferred by the Bank Act. Rather, "what the bank did in this case was to engage in and carry on such business as now generally appertains to the business of banking. That is within its statutory power and it cannot be faulted for so doing".¹²⁶

¹²¹ This is the conclusion of Mr. Binavince in The Gowling & Henderson Report, *supra*, footnote 60, at p. 233, based on a jurisprudential analysis of the federal power to legislate with respect to banking, telecommunications, criminal law, money, trade and commerce, and peace, order and good government.

¹²² (1979), 107 D.L.R. (3d) 88 (Man. C.A.).

¹²³ R.S.C. 1970, c. B-1, s. 75:

75. (1) The bank may

(a) open branches;

(b) acquire, deal in, discount and lend money and make advances upon the security of, and take as security for any loan or advance made by the bank or any debt or liability to the bank, bills of exchange, promissory notes and other negotiable instruments, coin, gold and silver bullion and securities;

(c) subject to subsection (3), lend money and make advances upon the security of, and take as security for any loan or advance made by the bank or any debt or liability to the bank, any real or personal, immovable or movable property, except shares of the capital stock of the bank on which the bank has a privileged lien under subsection 83(1), but no such security is effective in respect of any personal or movable property that at the time the security is taken is, by any statutory law that was in force on the first day of July 1923, exempt from seizure under writs of execution;

(d) lend money and make advances without security; and

(e) engage in and carry on such business generally as appertains to the business of banking.

See now s. 173 of the Bank Act, *supra*, footnote 13.

¹²⁴ (1978), 95 D.L.R. (3d) 278 (Man. Q.B.).

¹²⁵ *Supra*, footnote 122. at p. 89.

¹²⁶ *Ibid.*, at p. 90.

O'Sullivan J.A. concurred, but elaborated more fully on the banking practices objected to: "One is the bank's computer payroll service; the other is the bank's 'Compucount' service."¹²⁷ It was conceded that the "activities complained of are new to banks in Canada. They have arisen largely because of the advent of the computer"¹²⁸ The ability to process vast amounts of information on accounts receivable and payable, the credit worthiness of borrowers, and the processing of invoices to honour accounts without requiring individual cheques or other orders to pay were all considered elements of convenience in relation to banking.

The lone dissent of Matas J.A. did not dispute the breadth of federal banking jurisdiction but only the inadequacy of the authorizing statute. "What Parliament may do when the Act is revised is not in issue here. And while the Court must be aware of the evolving nature of commercial and banking practices, it is bound by the words in the existing statute and the evidence adduced before it."¹²⁹

Again, we have the impression that all Parliament need do is to assert itself in order to occupy the field. Yet, the continuing uncertainty over definitions, when viewed in light of both the established overlapping provincial jurisdiction and the general principles of constitutional interpretation militating against a cavalier ouster of provincial jurisdiction, suggest that the goal of comprehensive jurisdiction may now be beyond federal grasp or, at least, that it may have assumed such thorny proportions as to render its implementation too politically hazardous to contemplate.

C. Doctrinal Constraints: the Definitional Status Quo

To date, the vagueness of the definition given to "banking" by Parliament has tended to reinforce rather than to controvert the assumptions of extensive federal power, thereby transforming the latter into a formidable but sleeping giant. Still, as Professor Hogg notes in the newest edition of his constitutional text, "[t]he federal Parliament has never attempted to regulate the activities of the provincially-incorporated near-banks, and provincial regulation has never been challenged".¹³⁰ The Supreme Court of Canada has had occasion recently to reconsider the constitutional characterization of banking activities, this time in the context of labour relations jurisdiction. *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*¹³¹ dealt with a challenge to provincial labour relations jurisdiction by a management company and its two subsidiaries, a trust and a life insurance company, all federally incor-

¹²⁷ *Ibid.*, at p. 101.

¹²⁸ *Ibid.*, at p. 102.

¹²⁹ *Ibid.*, at p. 93.

¹³⁰ *Op. cit.*, footnote 80, p. 529.

¹³¹ *Supra*, footnote 16.

porated. While fundamentally a constitutional decision on the subject of labour relations,¹³² it has also become the leading decision on the definition of banking for constitutional purposes.¹³³ The court unanimously held that both Pioneer Life Assurance Company and Pioneer Trust Company were not under federal jurisdiction and were therefore subject to the jurisdiction of the provincial labour relations board.¹³⁴

The majority opinion of the court, delivered by Beetz J., dismissed the claim of the insurance company that it should be considered to be within federal jurisdiction so as to be subject to the Canada Labour Code.¹³⁵ In this respect, the court declined to overrule century old authority¹³⁶ to the effect that regulation of insurance was a provincial affair and in no sense a federal undertaking.

The claim of Pioneer Trust was less easily disposed of. Basically, it was argued that most, if not all, of the company's business duplicated that of federally chartered banks. On the further basis of a "functional test" for banking jurisdiction, Pioneer Trust then argued that it was subject to federal jurisdiction under section 91(15) of the Constitution Act, 1867 and was therefore a federal undertaking for purposes of federal labour jurisdiction under the Code.

¹³² See, e.g., J.C. MacPherson, *Developments in Constitutional Law: the 1979-80 Term* (1981), 2 *Supreme Court L. Rev.* 49, at pp. 91-94, where the author treats the decision under the heading of "The Labour Relations Decisions" and qualifies it (at p. 91) as a case in which "the normal constitutional result in labour relations cases (provincial jurisdiction) could not be reached easily through the regular doctrinal channels".

¹³³ See, e.g., Hogg, *op. cit.*, footnote 80, pp. 529-532, where the author stresses the importance of this case (at p. 532) as follows:

The provinces have the power to incorporate trust companies, credit unions and caisses populaires, including the power to authorize them to perform functions similar to the chartered banks. *Any doubt on this score has been resolved by the decision in Canadian Pioneer Management.*

(Emphasis added).

¹³⁴ The employees of the companies had been certified as a union by the Saskatchewan Labour Relations Board pursuant to The Trade Union Act, S.S. 1972, c. 137. It was contended for the companies that their businesses fell within federal jurisdiction so as to subject them to the labour regulations of the Canada Labour Code, R.S.C. 1970, c. L-1.

¹³⁵ *Ibid.* Specifically, the companies were trying to bring themselves within section 2 of the Code:

2. In this Act

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing: . . .

(g) a bank; . . .

(i) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures; . . .

¹³⁶ *Citizens Insurance Company of Canada v. Parsons*, *supra*, footnote 79.

The services provided by Pioneer Trust to its customers, as enumerated by the court; largely duplicated those of the chartered banks. Counsel for the Attorney-General of Canada supported the appellant in the proposition that "although *Pion  r Trust* is not a bank, banking is its business. The test was not what *Pioneer Trust* could do under its corporate powers, but what it actually did"¹³⁷ for purposes of characterizing its operations as a federal undertaking. But, as noted by Beetz J., the Attorney-General went further and "dismissed any suggestion that there was room for shared or concurrent jurisdiction in the field of banking".¹³⁸ Thus, an exclusively federal field was claimed, irrespective of whether Parliament had fully occupied it.¹³⁹

Thus, the court was required to characterize the field of banking in some manner, functional or otherwise, for purposes of resolving the primary question of labour board jurisdiction. In this regard, the marked contrast between the rather timid political approach of Parliament to enacting banking legislation and the comprehensive legal claim by the Attorney-General of Canada is noteworthy.

After noting the now familiar difficulty inherent in defining the field of banking,¹⁴⁰ Beetz J. identified and considered three aspects upon which to focus judicial scrutiny: the nature of the relationship between the financial institution and its customers; the functions of banking (the test championed by the appellants); and a formal or institutional means of identifying banks. The first two tests touched on the substance of the actual activities under scrutiny, while the third was purely a question of form. From the outset, the court was sensitive to the possibly far-reaching consequences of its decision.¹⁴¹

Under the first test, banking could not be characterized as entailing a fiduciary relationship: "It is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's cheques."¹⁴² On this view, it could be argued, for example, that trust companies are beyond the purview of the banking power in that their principal relationship with clients is that of trustee and beneficiary.

¹³⁷ *Supra*, footnote 16, at p. 447.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* In support of these propositions, the Attorney-General for Canada cited *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), a leading case for the proposition that "if either Parliament or a Legislature fails to legislate to the full limit of its power this does not have the effect of augmenting the powers of the other level of government": Hogg, *op. cit.*, footnote 80, at p. 333.

¹⁴⁰ *Supra*, footnote 16, at p. 450.

¹⁴¹ *Ibid.*, at p. 448, where Beetz J. notes with respect to the arguments of the appellants and the Attorney General for Canada: "If those submissions express the law, the consequences are quite far reaching."

¹⁴² *Ibid.*, at p. 450.

Beetz J. rejected the notion that the fiduciary distinction separating trust companies from banks entailed no practical differences between the two.¹⁴³ Rather, the court viewed the administration of trust funds and Registered Retirement Savings Plans, for example, as being on an altogether different plane from that of bank deposits which become the actual property of a bank to invest as it pleases. "This type of operation has nothing to do with banking and is not connected with banks unless banks act as mere agents of trust companies, insurance companies and other approved companies."¹⁴⁴

The court then turned to the second substantive test in the determination of jurisdiction: an assessment of the actual functions exercised. This approach is the rallying point for the view that the modern business of banking is now conducted from many quarters. Beetz J. also rejected the argument of functional equivalency, and for essentially the same reason which led him to maintain the fiduciary nature of trust company activities as a substantive and practical distinction between them and the chartered banks. "These factors may not by themselves be determinative of the issue. But they are relevant and indicative that the business of *Pioneer Trust* is not that of banking."¹⁴⁵

The economic analysis of Professor McDonald,¹⁴⁶ which lumps together banks and trust and insurance companies, was also considered in defence of a functional test.¹⁴⁷ Beetz J. acknowledged that the Supreme Court of Canada has applied such a test in *Reference re Alberta Statutes*¹⁴⁸ (which portion of the judgment was upheld by the Privy Council),¹⁴⁹ where the court had no choice but to consider the implications of Social Credit as an economic theory in relation to the field of banking. In that case, Kerwin J. stated:¹⁵⁰

It is not necessary to refer to the various schools of economists with their divergent views as to the extent to which banks create credit or as to the wisdom or otherwise of a state empowering such institutions to do so. It suffices that by current common understanding a business transaction whereby credit is created, issued, lent, provided or dealt in by means of bookkeeping entries is considered to be part of the business of banking as it has been practised and developed . . .

Beetz J. acknowledged that the result in the *Alberta Statutes* reference would be no different today than in 1938, although "whether the

¹⁴³ *Ibid.*, at p. 451.

¹⁴⁴ *Ibid.*, at p. 452.

¹⁴⁵ *Ibid.*, at p. 454.

¹⁴⁶ *Loc. cit.*, footnote 11.

¹⁴⁷ *Supra*, footnote 16, at pp. 454-455.

¹⁴⁸ [1938] S.C.R. 100.

¹⁴⁹ *Supra*, footnote 86.

¹⁵⁰ *Supra*, footnote 148, at p. 156.

same reasons would all be relied upon is a matter of doubt for economic theory has evolved".¹⁵¹ For Beetz J., functional descriptions of banking were not determinative, and most banking activities could therefore be viewed from other vantage points, that is from a fiduciary rather than from a debtor-creditor viewpoint. Therefore, they could not be regarded as necessarily exclusive to the business of banking. The conclusion followed: "On the whole, I do not think that it is possible, at least for the purpose of this case, to define banking in purely functional terms."¹⁵²

That left the institutional test to consider. This the court found to be the most appropriate in the circumstances. By this formal approach, the fact that Parliament had not brought trust companies and other financial institutions under the banking umbrella was decisive.¹⁵³

Pioneer Trust is not authorized by the *Bank Act* nor any other Act to use the forbidden words to describe its business or any part thereof including its chequing account service. If Parliament, which is the competent authority in this matter, wishes to prevent members of the public from mistaking any part of the business of *Pioneer Trust* and other trust companies for a banking business, it seems to me that it is because Parliament considers that it is *not* a banking business. I am also of the view that the opinion of Parliament should be considered as decisive in this case.

Pioneer Trust was authorized to carry on business, aspects of which paralleled the activities of a bank, but it was not specifically authorized to do business as a "bank" and that was the end of the matter.

Apparently, there is everything in a name. Beetz J. explicitly adopted the institutional approach formulated by the intervenor, the Attorney-General of New Brunswick, as follows:¹⁵⁴

"Banking" involves a set of interrelated financial activities carried out by an institution that operates under the nomenclature and terms of incorporation which clearly identify it as having the distinctive institutional character of a bank.

The institutional approach provided a convenient solution to this case which did not upset competing, well-established areas of provincial jurisdiction. It is significant that Beetz J. prefaced his analysis with the observation that "pushed to their logical consequences", the appellant's arguments "might mean that provincially incorporated trust companies and perhaps even credit unions and 'Caisses populaires' with the same type of business as *Pioneer Trust* were unlawfully incorporated and have been operating invalidly".¹⁵⁵

Yet, the institutional approach quite clearly remains a two-edged sword. First, it suggests that Parliament has a major role to play in

¹⁵¹ *Supra*, footnote 16, at p. 458.

¹⁵² *Ibid.*, at p. 461.

¹⁵³ *Ibid.*, at p. 463.

¹⁵⁴ *Ibid.*, at p. 465.

¹⁵⁵ *Ibid.*, at p. 449.

determining the functional scope and limits of federal jurisdiction over banking. Thus, if Ottawa wished to widen the umbrella of the Bank Act, the institutional test would logically endorse such a move despite a longstanding provincial presence in the loan and trust area. The key point here is that the institutional test appears "to preclude judicial inquiry behind the fact of federal designation".¹⁵⁶

While it appears that a functional analysis would have advanced the claim of Pioneer Trust, it has the far greater virtue of leaving power in the court to inquire behind a legislative decree. Assuming a very ambitious future Parliament chose to oust provincial jurisdiction over caisses populaires, for example, it has been suggested that the court could "examine the functions of those institutions, and conclude (perhaps) that the institutions were not engaged in banking and were not, therefore, 'banks' in spite of the federal designation".¹⁵⁷ In our view, however, the preponderance of existing functional analyses support a contrary conclusion, namely, that such institutions would be found to be functioning as banks.¹⁵⁸ Moreover, there are competing doctrinal factors to be considered.¹⁵⁹ But the point going to the court's apparent abrogation of its role of umpire in deference to Parliamentary intentions over an ill-defined field remains essentially valid, not to mention potentially troublesome.

A second feature of the institutional test as stated by Beetz J. may create further ambiguity. He qualified his institutional approach as follows:¹⁶⁰

... it is an approach which is particularly appropriate in a case where what has to be decided is whether a given institution falls within the concept of banking as a business, and not whether a legislative enactment is constitutionally depending on its relationship to banking within the meaning of s. 91(15) of the Constitution. The characterization of legislation and the characterization of a business are not identical processes. Legislation for instance, may be divisible whereas a business as a going concern is indivisible and must stand or fall as a whole on one side of the constitutional line or the other. The concept of banking as a business and the meaning of the word "banking" in s. 91(15) are not necessarily co-extensive; *the meaning of "banking" in the section might very well be wider than the concept of banking as a business.*

The distinction drawn between the possible scope of the term "banking" for purposes of determining if a legislative enactment is *intra vires* under section 91(15), and the institutional definition of banking as a

¹⁵⁶ MacPherson, *loc. cit.*, footnote 132, at p. 94. The author goes on to state in an even more emphatic way:

Pioneer Trust might be interpreted in a later case to stand for the proposition that federal designation is conclusive—if Parliament says caisses populaires are banks then they are!

¹⁵⁷ *Ibid.*

¹⁵⁸ See, e.g., the comprehensive article by McDonald, *loc. cit.*, footnote 11.

¹⁵⁹ For an exhaustive review of the factors to be considered see McDonald, *ibid.*

¹⁶⁰ *Supra*, footnote 16, at p. 466. (Emphasis added).

business carried on by institutions specifically designated as such in existing legislation, is a meaningful one. Pursuant thereto, it may be open to Parliament to regulate the "banking" functions of institutions which are not themselves "banks" within the institutional definition of that term as established in *Canadian Pioneer Management*.

This view could further serve to give the court some flexibility to revert to a functional analysis if the *intra vires* status of federal banking legislation were to come into question. It must be noted, however, that the above-quoted passage remains somewhat ambiguous in light of the primary finding by Beetz J. that he did not think it possible to define banking "in purely functional terms".¹⁶¹

Professor Hogg interprets the same passage to mean that "the institutional test might not be appropriate where the issue was the constitutionality of a particular law with some impact on functions performed by banks".¹⁶² He concludes that "it is fair to surmise that a more comprehensive federal Bank Act, covering some of the activities of the near-banks along with those of the chartered banks, would be upheld by the Court".¹⁶³ However, the institutional test would also support whatever redefinition Parliament came up with regarding institutions falling within its declared sphere of banking activities. In the absence of an institutional or functional elaboration by Parliament, however, the provinces also retain a relatively free hand. Professor Hogg comments further: "If there are no functions that are exclusive to banking, as *Canadian Pioneer Management* decides, then it follows that provincial regulation of the activities of institutions other than the chartered banks cannot be characterized as in relation to 'banking'".¹⁶⁴

According to Professor Hogg, previous case law, notably the *Social Credit* cases, still qualifies the foregoing observation in three respects:¹⁶⁵

(1) where the provincial law is in pith and substance in relation to banking (as in the social credit cases); (2) where the provincial law, although within a provincial head of power, would have the effect of impairing the status or essential powers of the banks, and (3) where the provincial law is inconsistent with the Bank Act or some other federal law.

The first of the above qualifications is relatively straightforward and would appear to have been confirmed by Beetz J. in *Canadian Pioneer Management*.¹⁶⁶ The next two merit some further comment.

Impairment of status in relation to federal corporate entities has been narrowly interpreted by the Supreme Court of Canada. In the 1984 *Chur-*

¹⁶¹ *Ibid.*, at p. 461.

¹⁶² Hogg, *op. cit.*, footnote 80, p. 530.

¹⁶³ *Ibid.*, p. 531.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, pp. 531-532.

¹⁶⁶ *Supra*, footnote 16, at p. 455.

chill Falls reference,¹⁶⁷ McIntyre J. held for a unanimous court that provincial legislation could extend to the seizure of assets and thereby impair the business of a federally incorporated company without violating "constitutional strictures against interference with the essential status and powers of a federally-incorporated company".¹⁶⁸ The *Churchill Falls* reference has effectively scotched previous authority to the effect that a province could not expropriate the assets of a federal company,¹⁶⁹ thereby circumscribing the notion of impairment of status quite substantially.

The last point, as Professor Hogg notes,¹⁷⁰ is simply the doctrine of paramountcy as applied in *Tennant v. Union Bank of Canada*.¹⁷¹ Here again, however, this doctrine has changed considerably in favour of the concurrent operation of federal and provincial laws. Assuming each level of jurisdiction has established a valid legislative field in accordance with the federal division of powers, federal occupation of the field is no longer a sufficient ground to oust a provincial presence in the area of overlap. Rather, since the 1982 decision of the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*,¹⁷² the doctrine of paramountcy has been constrained by the much narrower test of "express contradiction":

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.

Following the *Multiple Access* formula, the Supreme Court did apply the paramountcy doctrine in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*.¹⁷³ There the statutory position of the Alberta Board as a secured creditor was termed inoperative in respect of winding up proceedings governed by the federal Bankruptcy Act.¹⁷⁴ But there was no question that the provincial scheme would otherwise continue to operate, notwithstanding the overlapping field. Wilson J. commented for a plurality of the court: "I believe that the trend of the more recent authorities favours a restrictive approach to the concept of 'conflict' and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation."¹⁷⁵

¹⁶⁷ *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

¹⁶⁸ *Ibid.*, at p. 327.

¹⁶⁹ *B.C. Power Corp. v. A.G. British Columbia* (1963), 44 W.W.R. 65 (B.C.S.C.).

¹⁷⁰ *Op. cit.*, footnote 80, p. 532, n. 112.

¹⁷¹ *Supra*, footnote 81.

¹⁷² [1982] 2 S.C.R. 161, at p. 191.

¹⁷³ [1985] 1 S.C.R. 785, (1985) 60 N.R. 81.

¹⁷⁴ R.S.C. 1970, c. B-3, s. 107(1)(h).

¹⁷⁵ *Supra*, footnote 173, at pp. 808 (S.C.R.), 90 (N.R.).

In *Lamb v. Lamb*,¹⁷⁶ the same approach permitted the court to uphold the possibly conflicting provisions of Ontario family law and the federal divorce laws. In the absence of direct contradiction, two regulatory schemes could stand together even though they disposed of precisely the same asset, namely, the matrimonial home as a proprietary asset under provincial law or as part of maintenance and support in divorce proceedings.¹⁷⁷

Therefore, we may conclude that even the constraints on provincial regulations related to banking which Professor Hogg has identified are not so formidable as they once were.

These doctrinal developments, together with a well-established provincial regulatory presence in relation to the near-banks, all suggest that notions of federal exclusivity may no longer appertain to the field of "banking", functionally construed. Nonetheless, "banks"—those institutions carrying the name—do remain an exclusive federal preserve. There is no doubt that unused federal power exists to enlarge that preserve if Parliament so chooses, although there is perhaps not so much as to embrace the Canadian financial system as a whole. It has become a fair observation that, to a perhaps more significant extent than commonly assumed, constitutional allocations of legislative power over the financial services sector have evolved to complement, if not to mirror, the prevailing political practice of federal acquiescence to a shared field.

Conclusion

The amplitude of federal power in relation to the financial system in Canada, though widely accepted, suffers from substantial ambiguities. In large measure, the blame must be placed at the steps of Parliament. Parliament has never asserted any articulate position on the scope of such power, and it has never been clear on what head of federal power under section 91 it has chosen to anchor the laws it has enacted. In some measure, the courts bear responsibility for the confusion that has arisen in the interplay of the various heads of power that influence the structure and functioning of Canada's financial system. But then again, the paucity of comprehensive prescriptions by the courts is largely explicable in terms of the vastly fortuitous nature of the judicial process. Most of the cases which we have reviewed in the present discussion have tested the scope of federal power on the basis of challenges to provincial statutes.

¹⁷⁶ [1985] 1 S.C.R. 851.

¹⁷⁷ The *per curiam* opinion refers to the test of conflict in *Multiple Access Ltd. v. McCutcheon* (*supra*, footnote 172) and goes on to state as follows (at p. 859):

The provisions in the two statutes are not mutually exclusive. Indeed, they do not even deal with the same subject matter. . . . They are independent jurisdictions in relation to different subject matters conferred by *intra vires* federal and provincial statutes which complement each other. There is therefore no room for the application of the paramountcy doctrine to these two legislative provisions.

Consequently, federal constitutional authority has been articulated in large measure not so much in terms of allocations of federal power *sui generis*, but as a corrective to offending exercises of provincial legislative competence.

The banks, both historically and economically, are institutional *facilitators* of trade and commerce. As such, they hold a position of trust and confidence in the handling of customers' funds whether such customers be in business or government. The technical approach based on the debtor-creditor relationship in the case of banks on the one hand, and on the fiduciary relationship in the case of trust companies on the other, may be inconsequential. In both cases, there is little factual difference between the legal concept of trust and the general confidence that the customer places in the bank or the trust company, as the case may be. But much is made of such distinctions in institutional terms which the Supreme Court of Canada has tended to view as persuasive for purposes of constitutional characterization.

Concern for functional integrity in constitutional analysis does not press for attention in judicial circles when the political will of government actors does not similarly press for an affirmative resolution of these issues. The process of judicial decision-making, particularly in the constitutional context, is meant to mediate political confrontation between competing jurisdictions, not to initiate it. In the meantime, however, it remains useful to ponder alternative points of view on the constitutional framework of banking law and the useful distinctions which flow from such an analysis. A number have been suggested here.

The proposition that the heart of the Canadian financial system lies elsewhere than within the undefined limits of "banking" as allocated to Parliament by section 91(15) displays a logical attractiveness yet to be fully appreciated in constitutional discourse. At the same time, the potential scope and reach of section 91(15), in either functional or analytical terms, remains to be tested authoritatively by way of Parliamentary initiative or otherwise. As already discussed, this has served to facilitate a complex concurrent field of federal and provincial jurisdiction governing the Canadian financial system. Therefore, the development and judicial acceptance of a functional definition for section 91(15) could serve to effect a substantial redistribution of jurisdiction in favour of Parliament.

Nevertheless, Canadian constitutional history and experience in the realm of banking law has consistently belied logical development or functional coherence. To a great extent, this history has been the living corroboration of Oliver Wendell Holmes' oft-quoted statement that "[t]he life of the law has not been logic: it has been experience".¹⁷⁸ In this

¹⁷⁸ O.W. Holmes, *The Common Law* (1881), p. 1. Holmes continues:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share

respect, our own Supreme Court has noted that "[a] page of history may illuminate more than a book of logic".¹⁷⁹

History shows that Canadian courts have been left to grapple with disparate and sometimes contradictory legal conceptions in relation to the Canadian financial system which have been enlisted over time for a variety of discrete purposes—all mandated by the inevitably unique circumstances of the particular case. In summary, we may say that the essentially tangential case-by-case development of banking jurisdiction by the courts, coupled with the failure of Parliament to test the limits of jurisdiction which the Constitution has conferred, have perpetuated the uncertain state of affairs this article has described. The activism of provincial legislatures for avowedly *intra vires* purposes over the years has also served to entrench speculative attitudes toward the frontiers of banking law jurisdiction under the Constitution of Canada. We can do no better than to conclude with the following comment of a banker which we hope will serve more as a challenge to Parliament and the courts than as confirmation of a perpetual *status quo*:

It is very little exaggeration to say that we now have in Canada two banking systems, one incorporated and supervised by the federal government and the other by the provincial governments. The longer this situation exists the more difficult it will be to disentangle it in the future.¹⁸⁰

with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

¹⁷⁹ Cf., *R. v. Wetmore*, [1983] 2 S.C.R. 284, at p. 299, per Dickson C.J.C.

¹⁸⁰ J.H. Perry, *The Legal Basis of Banking* (1980), 87:3 *The Canadian Banker* 6, at p. 12.