

Paramountcy and Tobacco

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I. THE PARAMOUNTCY RULE

A federal system has to have a rule to resolve conflicts between federal (national) laws and provincial (state) laws. Oddly enough, the need for such a rule escaped the framers of the *British North America Act* in 1867, and they made no provision for conflicts between federal and provincial laws. It was left to the courts to invent the rule, and they decided that, in case of conflict between a federal and provincial law, the federal law is paramount.¹ Obviously, the doctrine of paramountcy means that the provincial law must yield to the federal law to the extent of the conflict. But what exactly is the status of the provincial law? The answer is that the provincial law is not rendered invalid or *ultra vires*; nor is it repealed; it is rendered “inoperative”. The difference between “inoperative” and the alternatives is that the operation of the provincial law is suspended for as long as the conflicting federal law remains in force; if the federal law is repealed, the provincial law will automatically revive (come back into operation) without any re-enactment by the provincial legislature.²

It is the meaning of *conflict* or *inconsistency* (I treat these two terms as synonymous) that has proved most troublesome, and is the topic of this paper. It is worth noting at the outset that the definition of conflict carries profound implications for the scope of federal review and for the balance of legislative power within the federation. Given the overriding force of federal law, a wide definition of conflict will result in the defeat of provincial laws in “fields” that are “covered” by federal law. This is the course of judicial activism, because it leads to the striking down of provincial laws. In that sense, it favours central power. A narrow

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¹ Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 4th ed., 1997, annually supplemented in looseleaf format), c. 16.

² *Id.*, s. 16.6, “Effect of inconsistency”.

definition of conflict, on the other hand, will allow provincial laws to survive so long as they do not “expressly contradict” a federal law. This is the course of judicial restraint, because it leaves provincial laws in place except where they give rise to unavoidable conflict. In that sense, it favours provincial power.

II. COVERING THE FIELD

The broadest definition of inconsistency is the covering-the-field (or negative implication) test, which was well articulated by Cartwright J. in *O’Grady v. Sparling*.³ In that case, the issue was whether a provincial highway traffic offence of driving carelessly (without due care and attention) was in conflict with the federal *Criminal Code* offence of driving recklessly. Justice Cartwright, dissenting, would have found the two laws to be in conflict. Here is how he described the test:

In my opinion, when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.⁴

The premise of this reasoning is that when Parliament enacted the *Criminal Code* offence of reckless driving, it intended to cover the field of negligent driving, and pre-empt any provincial law in the same field. In other words, the express terms of the Act carried a negative implication that there should be no provincial laws in the same field.

Justice Cartwright’s opinion in *O’Grady v. Sparling* was a dissenting one. The majority of the Supreme Court, in an opinion written by Judson J., rejected the covering-the-field test, holding that “both provisions could live together and operate concurrently”.⁵ Other cases also rejected the covering-the-field test. Justice Cartwright dissented in two other cases decided at the same time. In *Stephens v. The Queen*,⁶ the majority of the Court held that there was no conflict

³ [1960] S.C.J. No. 48, [1960] S.C.R. 804.

⁴ *Id.*, at 820-21.

⁵ *Id.*, at 811.

⁶ [1960] S.C.J. No. 49, [1960] S.C.R. 823.

between the provincial highway traffic offence of failing to remain at the scene of an accident and the federal *Criminal Code* offence of failing to remain at the scene of an accident “with intent to escape civil or criminal liability”. In *Smith v. The Queen*,⁷ the majority of the Court held that there was no conflict between the provincial securities law offence of furnishing false information in a prospectus and the federal *Criminal Code* offence of making, circulating or publishing a false prospectus. Other cases decided in the 1960s and 1970s refused to find conflict when provincial laws were in the same field as federal laws, and even when the provincial laws were very similar to federal laws. Justice Cartwright himself, after dissenting in the three 1960 cases that I have just described, bowed to precedent and joined with the other members of the Court in rejecting the covering-the-field test in the later cases.⁸

III. EXPRESS CONTRADICTION

By 1982, it was clear that covering the field was not the test for determining whether there was conflict between a federal and a provincial law. But it was not at all clear what the actual test was. In contrast to Cartwright J.’s admirable clarity of definition, albeit in a lost cause, the majority opinions in the chain of cases through the 1960s and 1970s mostly contented themselves with vague affirmations that laws could “live together” or could “co-exist” or were not in “direct conflict”, without clarifying what laws could not live together or could not co-exist or would be in direct conflict. Only Martland J. articulated a test with some real traction. Writing one of the two concurring opinions that made up the majority in *Smith v. The Queen*, the false prospectus case mentioned earlier,⁹ he said that there was “no conflict in the sense that compliance with one law involves breach of the other”.¹⁰ The case where the provincial law could not be obeyed except by breaking the federal law was an “express contradiction”. On any view of the law, that had to be a conflict that triggered paramountcy. But was it the only case of conflict?

⁷ [1960] S.C.J. No. 47, [1960] S.C.R. 776.

⁸ The story is told in Hogg, *supra*, note 1, s. 17.4(a), “Covering the field”.

⁹ *Supra*, note 7.

¹⁰ [1960] S.C.J. No. 47, [1960] S.C.R. 776, at 800.

In *Multiple Access v. McCutcheon*,¹¹ Dickson J., writing for a majority of the Supreme Court, brought his sharp mind to bear on the question. The issue in the case was whether there was conflict between the insider trading provisions of Ontario's securities law and the virtually identical provisions of federal corporation law. Despite the duplication, Dickson J. held that there was no conflict. Indeed, he pointed out that duplication was the "ultimate in harmony". He cited Martland J.'s dictum in *Smith* with approval,¹² and went on to hold that:

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.¹³

This was a rather clear statement that only an express contradiction between two laws — where "compliance with one is defiance of the other"— would suffice to trigger the paramountcy doctrine. This was a very tight restriction on the paramountcy doctrine, since cases where the provincial law expressly contradicts the federal law are few and far between.¹⁴

Multiple Access was followed in the *Spraytech* case.¹⁵ The issue in that case was whether the Town of Hudson had the power to enact a by-law severely restricting the use of pesticides in the town. The paramountcy issue arose because the pesticides, the use of which was prohibited throughout much of the town, satisfied federal standards that had been enacted to regulate the importation, manufacture, sale and distribution of pesticides in Canada. The Supreme Court of Canada held that the federal legislation was only permissive. It permitted, but did not require, the use of the federally-approved pesticides. The by-law's prohibition of the use of pesticides did not create an "operational conflict" with the federal law; compliance with the by-law (by not using pesticides) would not entail a breach of the federal law.¹⁶ And, to anticipate the next section of the article, it could not be said that the

¹¹ [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161.

¹² *Id.*, at 187.

¹³ *Id.*, at 191.

¹⁴ The decided cases exhibit a few examples: Hogg, *supra*, note 1, s. 16.3(a), "Impossibility of dual compliance".

¹⁵ 114957 *Canada v. Hudson*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241.

¹⁶ *Id.*, at paras. 35 *per* L'Heureux-Dubé J., 46 *per* LeBel J.

by-law frustrated the purpose of the federal law. It was not the intention of the federal law to “grant a blanket authority to pesticides’ manufacturers or distributors to spread them on every spot of greenery within Canada”.¹⁷

IV. FRUSTRATION OF FEDERAL PURPOSE

Multiple Access seemed to have settled the law of paramountcy by adopting the express contradiction test for conflict. However, in *Bank of Montreal v. Hall*,¹⁸ the Supreme Court unexpectedly held that the doctrine of paramountcy rendered inoperative a provincial law that required a creditor to give notice to a defaulting debtor, giving the debtor a last opportunity to repay the loan, before bringing proceedings for foreclosure (to seize and sell the security for the loan). The conflict was with the federal *Bank Act*,¹⁹ which provided a procedure for foreclosure by a bank that did not include the giving of this last-opportunity notice to the debtor. This was not a case of express contradiction. If the bank had served the notice required by provincial law, it would not have been in breach of the *Bank Act*. The sole effect would have been to delay the bank in realizing its security. But La Forest J., writing for the Court, claimed that there was an “actual conflict in operation” and that “compliance with the federal statute necessarily entails defiance of its provincial counterpart”. Although the decision was framed in the language of express contradiction, the holding that the provincial law was inoperative seemed to depend on something very like the old covering-the-field test. The *Bank Act* had enacted a complete code with respect to enforcement of bank loans, and supplemental provincial law had to yield to that code. An alternative way of looking at the case was that it depended on a judicial finding that the *purpose* of the *Bank Act* would be frustrated if the bank had to comply with the provincial law.

The latter explanation was accepted and applied in *Law Society of B.C. v. Mangat*.²⁰ In that case, the provincial *Legal Profession Act*²¹ required that only lawyers could appear as counsel before administrative

¹⁷ *Id.*, at para. 46 *per* LeBel J.

¹⁸ [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121.

¹⁹ S.C. 1991, c. 46

²⁰ [2001] 3 S.C.R. 113.

²¹ S.B.C. 1998, c. 9.

tribunals and boards (including those established under federal law). The federal *Immigration Act*²² provided that, in proceedings before the Immigration and Refugee Board a party could be represented by a non-lawyer. Once again, there was no express contradiction, since a person appearing before the board could comply with both laws by retaining a lawyer. However, the Supreme Court, speaking through Gonthier J., pointed out that the purpose of the *Immigration Act* provision was to provide an informal, accessible and speedy process, in which parties could be represented by agents who spoke their language, understood their culture and were inexpensive. That purpose would often be defeated if only lawyers were permitted to appear before the board. Justice Gonthier held that compliance with the provincial law “would go contrary to Parliament’s purpose in enacting [the representation provisions] of the *Immigration Act*”.²³ In that sense, there was a conflict in operation between the provincial and the federal law. For that reason, the Court held that the provincial law was inoperative in its application to proceedings before the Immigration and Refugee Protection Board.

As the result of the *Bank of Montreal* and *Mangat* cases, it is clear that Canadian courts now accept a second case of inconsistency, namely, where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, that is also a case of inconsistency. In deference to *Multiple Access*, the Court seems to regard the frustration-of-federal-purpose test as a subset of express contradiction, although it is much less “express” than the impossibility of dual compliance. The new test requires the courts to interpret the federal law to determine what the federal purpose is, and then to determine whether the provincial law would have the effect of frustrating the federal purpose. If the answer is yes, then paramountcy renders the provincial law inoperative.

The latest news at the level of the Supreme Court of Canada — and the reason for the word “tobacco” in the title to this article — is *Rothmans, Benson & Hedges v. Saskatchewan*.²⁴ In that case, the federal *Tobacco Act*²⁵ prohibited the promotion of tobacco products, except as

²² R.S.C. 1985, c. I-2 [repealed].

²³ *Id.*, at para. 72.

²⁴ [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188.

²⁵ S.C. 1997, c. 13, s. 30.1.

authorized elsewhere in the Act, and the Act went on to provide that “a person may display, at retail, a tobacco product”. The Saskatchewan *Tobacco Control Act*²⁶ banned the display of tobacco products in any premises in which persons under 18 years of age were permitted. The Supreme Court of Canada, speaking through Major J., interpreted the federal permission to display as intended to circumscribe the prohibition on promotion, and not to create a positive “entitlement” to display. That meant that a retailer could comply with both laws, either by refusing to admit persons under 18 or by not displaying tobacco products. But what about the frustration of the federal purpose? Did not the express permission to display indicate a federal purpose to allow retailers to display tobacco products? No, answered the Court. Both the general purpose of the *Tobacco Act* (which was “to address a national health problem”) and the specific purpose of the permission to display (which was “to circumscribe the *Tobacco Act*’s general prohibition on promotion”) “remain fulfilled”.²⁷

With respect, there is much to be said on the other side of this issue. Parliament did, no doubt, recognize a national health problem, but it chose to “regulate” tobacco use only by restricting Charter-protected commercial expression. Parliament had to do that within the reasonable limits allowed by section 1 of the Charter of Rights. Indeed, the previous version of the Act had been struck down as an unreasonable limit on freedom of expression.²⁸ The express permission to retailers to display the product was an effort to impose a reasonable limit on the prohibition of commercial speech about a product that retailers were lawfully entitled to sell. By narrowing the federal limit on the prohibition of commercial speech, the provincial law arguably frustrated an important *general* purpose of the federal Act, which was to comply with the Charter of Rights.²⁹ And, having regard to the impracticality of excluding persons under 18 from the supermarkets, convenience stores, news stands, gas stations and other retail outlets where cigarettes are sold, the provincial law surely frustrated the *specific* purpose of the

²⁶ S.S. 2001, c. T-14.1.

²⁷ *Id.*, at para. 25.

²⁸ *RJR-MacDonald v. Canada*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199. The current version of the Act is now under challenge in the Quebec courts as an unreasonable limit on freedom of expression.

²⁹ The Court did not address the interesting question of whether the imposition by federal law of reasonable limits on a Charter right could be undermined by supplementary provincial laws that expand the violation of the Charter right beyond the federally set limits.

explicit permission to display. The Court, however, decided otherwise, holding that the provincial law did not frustrate the purpose of the federal law, and, therefore, was not rendered inoperative by paramountcy. The Court acknowledged that it was influenced³⁰ by the curious decision of the Attorney General of Canada (normally so careful to protect federal turf) to intervene in the litigation on the side of the province, despite the fact that the provincial law undermined a federal law that expressly granted permission to display tobacco products at retail.

V. CONCLUSION

It is clear from the recent cases that the Supreme Court of Canada does not infer an inconsistency between federal and provincial laws based on an imputation that federal law “covers the field” or carries a “negative implication” forbidding supplementary provincial law in the same field. However, as we noted earlier, the Court will infer an inconsistency where it concludes that a federal law has a purpose that would be frustrated by a provincial law. Cases where the provincial law frustrates the purpose of a federal law are not easily distinguishable from the old covering-the-field test, since they interpret the federal law as implicitly intending to foreclose at least some kinds of supplementary provincial law. The Court has to make a judgment as to whether the two laws can indeed live together, bearing in mind not just the compatibility of the provincial law with the literal requirements of the federal law, but also the compatibility of the provincial law with the purpose of the federal law. Because there is no objective way of ascertaining the purpose of a particular federal law, and no objective way of determining whether a provincial law would frustrate that purpose, the decisions have become highly unpredictable.

The clarity of the *Multiple Access* ruling that only an express contradiction will serve as a conflict for the purpose of triggering federal paramountcy has been completely lost. Of course, clarity is not the only value served by rules of constitutional law, and it may be that express contradiction was simply too narrow a definition to recognize all the varieties of conflict that really did have the effect of derogating from a federal law. In particular, the *Mangat* case illustrates why

³⁰ [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188, at para. 26.

express contradiction is too narrow a test. In that case, the provincial law requiring only lawyers to appear before federal boards would have seriously undermined the goals of the federal law permitting non-lawyers to appear before the Immigration and Refugee Board, even though compliance with the provincial law (by hiring a lawyer) would not have caused a breach of the federal law. The *Bank of Montreal* case is much less clear, and the reasoning is not to be found in the judicial opinion. But it is arguable that requiring banks to comply with provincial rules respecting foreclosure would frustrate the purpose of the federal *Bank Act's* regulation of the process. In the *Rothmans* case, the federal law's express permission to retailers to display tobacco products seemed, at the very least, to indicate a federal purpose to allow display (as a reasonable limit on freedom of expression), and yet the Court held that severe provincial restrictions on display did not frustrate the purpose. Obviously, the courts retain a lot of discretion in deciding these cases, and it may be that the Court in *Rothmans* was reluctant to interfere with provincial efforts to limit tobacco use.

The Supreme Court will have another opportunity to examine the paramountcy doctrine, when it decides the appeal from the decision of the Alberta Court of Appeal in *Canadian Western Bank v. Alberta*.³¹ At issue here is whether the province of Alberta may impose on the banks a licensing regime for the promotion of creditors' insurance to the banks' customers. The federal *Bank Act* and regulations under the Act permit the banks to promote the sale of certain defined types of "insurance" to their customers. The insurance is mostly of the kind in which the bank is the beneficiary, and the proceeds would pay off a bank loan in the event of (for example) the death, disability or loss of employment of the debtor. The effect of the Alberta regulation is to impose a layer of provincial regulation on the promotion of Bank-Act-authorized insurance by the banks. The sanction for non-compliance with the Alberta law is the denial of a licence to a bank to promote authorized insurance in the province. Does this frustrate the purpose of the *Bank Act's* authorization of the promotion of insurance by the banks? The Alberta Court of Appeal said no, leaving the banks to comply with the provincial licensing requirements on pain of losing their power to

³¹ [2005] A.J. No. 21, 2005 ABCA 12.

promote insurance in the province.³² The Supreme Court of Canada heard the appeal on April 11, 2006, and has not yet (as of August 1, 2006) rendered a judgment.

³² The other issue in the case was whether the provincial law was inapplicable to the banks' promotion of insurance on the ground of interjurisdictional immunity; the Court answered that question no as well. The opposite conclusion had earlier been reached by the British Columbia Court of Appeal in *Bank of Nova Scotia v. Canada (Superintendent of Financial Institutions)*, [2003] B.C.J. No. 92, 11 B.C.L.R. (4th) 206 (C.A.). The B.C. Court did not need to decide the paramountcy issue and did not do so.