Paramountcy

What is the Doctrine of Paramountcy?

In Canada, the doctrine of paramountcy is a constitutional tool that helps resolve conflicts between federal and provincial laws. Under this doctrine, a provincial law that conflicts with a federal law will be inoperative to the extent of the conflict.[1] This means the federal legislation takes precedence over the provincial. While the provincial law will remain valid, the portion of it that conflicts with federal law will cease to apply for as long as the conflict exists. This inapplicable portion can become operative again if the federal law is amended in the future to resolve the conflict.

When is the Doctrine Applied?

When there is an apparent conflict between federal and provincial laws, courts use a two-step test to determine if the doctrine of paramountcy applies.

Step 1: Are both laws valid?

The first step is to establish whether both laws are valid. To do this, courts will ask: "[D]oes the 'matter' (or pith and substance) of … [each] law come within the 'classes of subjects' (or heads of power) allocated to the enacting Parliament or Legislature?"[2]

This means that validity is determined:

1. By characterizing the law's essential character — or "pith and substance" — by considering its purpose and its legal and practical effects.[3]
2. By checking if the "pith and substance" is within the particular government's jurisdiction. Note: The *Constitution Act, 1867* lists different matters and specifies which level of government — federal or provincial — has jurisdiction over them. Despite the existence of these lists, it can sometimes be difficult to determine which level of government has jurisdiction to legislate on a given matter; however, this is beyond the scope of this key term (see here for more).

Step 2: Is there a conflict?

The test's second step asks whether there is actually a conflict between the federal and provincial laws. There must be a conflict between federal and provincial legislation for the doctrine of paramountcy to apply.[4]

In Canadian constitutional law, federal and provincial laws can conflict in several different ways. For example, in some cases, federal and provincial laws will be in operational conflict,

where dual compliance — following both laws — is impossible.[5] This is known as an "express contradiction."[6]

In other cases, a conflict will exist because the provincial law frustrates the purpose of the federal law.[7] For example, in *Law Society of BC v Mangat*,[8] a provincial law prohibited people from obtaining non-lawyers as their counsel, while a federal law allowed parties to be represented by non-lawyers. Although dual compliance with both laws was possible, the provincial legislation defeated the purpose of the federal legislation: to allow for inexpensive and accessible counsel. The provincial law was accordingly held to be inoperative.

If both the federal and provincial laws are valid, and there is a conflict between them, then the doctrine of paramountcy applies and renders the provincial law inoperative to the extent of the conflict. If a conflict does not exist, the doctrine does not apply and both laws will remain operational.

Another key example of the paramountcy doctrine in action is the case of *Multiple Access Ltd v McCutcheon*.[9] In *McCutcheon*, the provincial law duplicated federal law to protect companies against insider trading. Both laws were valid — under the *Constitution Act, 1867*, provinces can legislate on matters relating to property and civil rights,[10] and the federal government can legislate on matters of trade and commerce.[11] It was also possible to follow both laws, so the Supreme Court of Canada did not apply the doctrine of paramountcy. Instead, the court applied the double aspect doctrine, allowing both levels of government to legislate on the issue.

[1] *Rothmans, Benson, & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para 11.

[2] *Ibid*.

[3] *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537.

[4] *Smith v The Queen*, [1960] SCR 776, 25 DLR (2d) 225.

[5] *Ibid.*

[6] Peter Hogg, "Paramountcy and Tobacco" (2006) 34 SCLR 335 at 337.

[7] *Ibid.*

[8] *Law Society of British Columbia v Mangat*, 2001 SCC 67

[9] *Multiple Access Ltd v McCutcheon*, [1982] SCR 161, 138 DLR (3d) 1.

[10] *The Constitution Act*, 1867, 30 & 31 Victoria, c 3, s 92(13).

[11] *Ibid*, s 91(2).