Double Aspect

The double aspect doctrine is a tool of constitutional interpretation used when both levels of government have an equally valid constitutional right to legislate on a specific issue or matter. Double aspect represents the modern notion of co-operative federalism, which abandons the out-dated idea that every subject matter falls under the exclusive control of either the federal or provincial government.[1]

Double aspect fosters respect for the decisions of the elected legislatures of both levels of government. As the name indicates, the double aspect doctrine acknowledges that both Parliament and the provincial legislatures can pass valid legislation relating to the same subject depending on the aspect from which the subject is being approached.[2]

One example of this doctrine at work is in *Multiple Access v McCutcheon*, a 1982 case that dealt with insider trading in Ontario.[3] Both levels of government passed legislation to combat insider trading: the federal government passed legislation dealing with federally regulated corporations, while Ontario's legislation focussed on the actual acts of insider trading. The provinces could claim the power to do this through their constitutional powers over property and civil rights, which includes securities trading such as what was occurring in this case. The federal government had an equally strong jurisdictional claim through its ability to regulate for the peace, order and good government of Canada. The Supreme Court of Canada (SCC) ruled that both pieces of legislation were valid because they dealt with different aspects of the same problem that fell within the constitutional powers of the enacting legislature.

Another, more recent, example is in *References re Greenhouse Gas Pollution Pricing Act*.[4] The double aspect doctrine was discussed at length in the *GGPPA Reference*, where the SCC was tasked with deciding whether the federal government's plan to establish a national pricing system for greenhouse gas emissions was valid law under the national concern branch of its peace, order and good government (POGG) power. The 6-3 majority found that the double aspect doctrine can apply when federal jurisdiction is grounded in POGG, but whether it does will depend on the facts of the case.[5] The SCC noted that this approach conforms to the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction.[6] The doctrine should be applied cautiously, however, to avoid "eroding the importance attached to provincial autonomy."[7] The federal law in this instance only imposed a minimum national standard, and allowed the provinces to legislate above it – the federal and provincial laws apply concurrently, but the federal law is paramount. In cases such as this, to ensure the protection of provincial autonomy, the court must be satisfied that there is a "compelling interest" in enacting rules over the federal matters which interact with provincial ones, and that "multiplicity of aspects is real and not merely nominal."[8]

[1] Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (date accessed 30 December 2021), (Toronto: Thomson Reuters Canada), ch. 15, § 15:7. Thomson Reuters

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[2] *Ibid*.

[3] *Multiple Access v McCutcheon, [1982] 2 SCR 161, 1982 CanLII 55 (SCC).*

[4] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 .

[5] *Ibid* at para 126.

[6] *Ibid.*

[7] *Ibid* at para 128.

[8] *Ibid* at para 131.