Pith and Substance

“Pith and substance” is the first tool that courts use to determine which level of government has authority over a certain matter or issue. At its most basic, a pith and substance analysis asks what the essential character, or “matter”, of a law is. The goal is to determine what the most basic purpose and effect of the law is, and then to determine the appropriate jurisdiction based on those characteristics.[1]

To determine the purpose of a law, courts use both intrinsic and extrinsic evidence. Intrinsic evidence consists of what the law itself says. Often the preamble of a piece of legislation will contain wording indicating what the law intends to accomplish and this can be very useful to a court. Extrinsic evidence, on the other hand, is evidence that is found outside the piece of legislation. This will often come in the form of debates over the law that occurred in the legislature or comments made by the government when the law was introduced.[2] Extrinsic evidence can often be very valuable when the government is trying to mask the true intentions of the legislation as was the case in *R v Morgentaler*.[3] In that case, the true aim of a piece of legislation of the government of Nova Scotia was to stop abortion clinics from being set up in the province. That much is clear from the transcripts of the debate in the legislature. However, the legislation itself was written to appear to be aimed at regulation of medical services within hospitals. The Supreme Court saw through the wording of the legislation and instead looked at those debates to come to its conclusion as to the true purpose of the legislation.[4]

The effects of a law can also be divided into legal and practical effects. Legal effects are those stated effects that were planned as part of the law while practical effects can include effects which may not have been intended but occurred.[5] Often, a law will be deemed unconstitutional because the practical effects cause the law to be outside the constitutional powers of the jurisdiction that created it even though the legal effects were jurisdictionally valid.[6]

Once a pith and substance analysis has been accomplished, the Court can then move on to determining which appropriate head of power the law fits into. It is at that point that the Court determines whether the law was validly enacted.[7]

The pith and substance analysis was central to the Supreme Court’s decision in the *References re Greenhouse Gas Pollution Pricing Act*.[8] Conducting a pith and substance analysis, the majority concluded that the dominant purpose of the federal *Greenhouse Gas Pollution Pricing Act* was “establishing national standards of GHG price stringency to reduce GHG emissions.”[9] Ultimately, the majority concluded that the Act could be validly characterized under the National Concern branch of the federal Peace, Order and Good Government power.[10]

Prominent pith and substance cases:

R v Morgentaler[11]

Reference Re Firearms Act[12]

Canadian Western Bank v Alberta[13]

References re Greenhouse Gas Pollution Pricing Act[14]

[1] Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (date accessed 4 January 2022), (Toronto: Thomson Reuters Canada), ch 15, § 15:4–5. Thomson Reuters ProView.

[2] *Ibid* ch 15, § 15:8; *R v Morgentaler*, [1993] 3 SCR 463, [1993] SCJ No 95 (QL) at 481–485.

[3] *R v Morgentaler*, *supra* note 2.

[4] *Ibid* at 512–516.

[5] Hogg & Wright, *supra* note 1 ch 15, § 15:9; *R v Morgentaler*, *supra* note 2 at 482–488.

[6] Hogg & Wright, *supra* note 1 ch 15, § 15:9.

[7] Hogg & Wright, *supra* note 1 ch 15, § 15:12.

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

[9] *Ibid* at paras 57, 80.

[10] *Ibid* at para 207.

[11] *R v Morgentaler*, *supra* note 2.

[12] *Reference re Firearms Act (Canada)*, 2000 SCC 31.

[13] *Canadian Western Bank v Alberta*, 2007 SCC 22.

[14] *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 8.