COMMENTS
COMMENTAIRES

Legal Theory and the Paramountcy Rule

I. Introduction

Under the constitutional rule of federal paramountcy, provincial enactments or orders will be inoperative to the extent that they conflict with federal enactments or orders. In addition, there have been some suggestions that simple duplication, as well as conflict, will lead to the suspension of provincial law. However, the paramountcy rule is controversial both in its theoretical formulation and in its practical application. It is difficult to interpret the pattern of the cases because there is confusion regarding the meaning of and relationship between the various tests for the invocation of the rule. Recent cases have done little to dispel this confusion, and it seems unlikely that substantial progress can be made without greater attention being given to the theory of legal conflict. The purpose of this article is to clarify the competing tests through a theoretical analysis of the conflict of law and to assess the present support for each test.

Two differing views of the scope of the paramountcy rule can be discerned in the cases. The broader view is that the rule will apply to situations of conflict between not only the express provisions of federal and provincial enactments or orders but also certain legislative intentions which are implicit. This is often described as the test of "the occupied field". It is satisfied whenever it is concluded that, in relation to some matter, a pronouncement of Parliament, or of an agency or court acting under federal jurisdiction, leaves no room for the operation of any pronouncement of a provincial legislature, or of an agency or court acting under provincial jurisdiction. This may be because the federal and provincial provisions are contradictory. It may also be because Parliament has implicitly intended that the federal provision be a full determination of the legal position in relation to the matter and that provincial regulation be excluded. In this aspect, the occupied field test is sometimes described as the test of "negative implication".

The narrower view of the scope of the paramountcy rule is that it will only apply to conflict between the express provisions of

federal and provincial enactments or orders. This is sometimes described as the test of "express contradiction" or of "operational incompatibility". Martland J. seems to have been referring to this test when he suggested that legislative provisions can operate concurrently where there is "no conflict in the sense that compliance with one law involves breach of the other".[1] This refers to a conflict of law in the sense that the duties imposed by the provisions are logically contradictory.

The same kind of legal conflict is involved in the occupied field test, but with the difference that the imposition of duties may also be inferred from implicit legislative intention. The theory of this extension is that Parliament, by its pronouncement, has sometimes implicitly intended to prohibit recognition of a provincial pronouncement on the same matter. It is impossible for a legal official (such as a judge) to comply with this negative implication without breaching the requirement necessarily embodied in the provincial legislation that it be put into effect. This, like the express contradiction test, is a test of operational incompatibility. The alternative description of the express contradiction test as the test of "operational incompatibility" will, therefore, be misleading unless it is borne in mind that it is concerned only with incompatibility in the terms of the provisions.

It will be contended that it only makes sense to speak of a true conflict of law where duties are contradictory. It will be argued that this theory of legal conflict provides the foundation for both paramountcy tests. The difference between the tests relates to the origin of the contradictory duties which produce operational incompatibility.

II. A theory of legal conflict

It has sometimes been suggested that, with regard to the paramountcy rule, the nature of legal conflict may be more complex. For example, Hogg has claimed that, in relation to express contradiction, a test of the impossibility of dual compliance will only be relevant to laws which are designed to operate directly upon human conduct, and that a different approach will be required for other laws:

> For laws which operate at one remove from human conduct, that is to say, which operate only indirectly upon human conduct, the test of possible compliance with both laws may not be appropriate. But an

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[1] *Smith* v. *The Queen* [1960] S.C.R. 776, 800 (separate majority opinion).

> express contradiction will occur if one law says x and the other law says not-x.[2]

The suggestion that the question of compliance is inappropriate to the paramountcy problems raised by some legal rules has also been made by Seaton J.A. in *Hughes* v. *Hughes*.[3] The issue there was whether a family maintenance order, which had been made under provincial legislation, could remain operative after a divorce. It was held that the making of a maintenance order with respect to the same persons under section 11(1) of the federal *Divorce Act*[4] would suspend the operation of the provincial order.[5] However, Seaton J.A. appeared to indicate that, in any event, the question of compliance was irrelevant to the type of rule at issue:

> Some statements that might appear to clash with what I say are not applicable to s. 11 of the *Divorce Act* because it does not require or prohibit specific conduct but provides machinery whereby an order governing specific conduct is made.[6]

When Hogg and Seaton J.A. speak of rules to which the notion of compliance is inappropriate, they presumably have in mind something like Hart's jurisprudential category of "secondary" or "power-conferring" rules.[7] This is contrasted with a category of "primary" or "duty-imposing" rules:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.[8]

Hart draws examples of primary rules from substantive criminal and delictual law and of secondary rules from contractual, constitutional and jurisdictional law.[9] This distinction is important to an

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[2] Hogg, *Constitutional Law of Canada* (1977), 103.

[3] (1977) 72 D.L.R. (3d) 577 (B.C.C.A.).

[4] R.S.C. 1970, c. D-8.

[5] Otherwise, the provincial order would have remained in effect; the test of negative implication, rather than that of express contradiction, is being applied here.

[6] *Supra*, note 3, 581.

[7] See Hart, *The Concept of Law* (1961).

[8] *Ibid.*, 78-79.

[9] *Ibid.*, 27-33.

understanding of the conflicts which may give rise to federal paramountcy since, as Hart asserts, the form of primary rules is to prescribe conduct whereas the form of secondary rules is to confer powers.

It is, however, a mistake to confine the analysis to the surface appearance of rules. Deeper examination indicates that secondary rules do not lack prescriptive or "duty-imposing" character.[10] The reason why they are different from primary rules is that they are "procedural" rules in relation to other rules. Their role is to regulate procedural activities in relation to the operation of rules. These are activities which cannot take place independently of the existence of rules because they are concerned with the management of rules: activities such as identifying rules, making and changing them, determining their application to concrete cases, and enforcing them.

Directly or indirectly, secondary rules usually prescribe conduct for legal officials, including judges. For example, there is direct prescription when a rule confers jurisdiction, within certain limits, to make an order. The rule does not merely confer a power on the judge; it prescribes that these limits should be observed in making orders. The power of ordinary citizens to make contracts is an example of indirect prescription. They have this power because it is prescribed that judges should give effect to promises which meet certain conditions.

It is conceded that some secondary rules, or parts of secondary rules, cannot be explained as directions to officials because they are constitutive of official status. They create roles such as legislator, judge and policeman, the performance of which is governed by other secondary rules. Constitutive rules are nevertheless prescriptive in character. They require that certain pronouncements should be treated as authoritative, both by other officials and by ordinary citizens, because they are expressions of public rather than private will.

To say that someone has a legal power is to indicate that, within the limits prescribed for its exercise, other members of the legal system are expected to give effect to his expressions of will. Thus, the meaning of a legal power cannot be explained without reference

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[10] The following formulation of a general theory of secondary regulation summarizes and develops arguments which are given more extensive treatment in Colvin, *The Sociology of Secondary Rules* (1978) 28 U.T.L.J. 195, 196-202.

to corollary prescriptions which give rise to it and define its limits. A constitutional example will demonstrate this. That the B.N.A. Act[11] confers power on the federal Parliament to legislate in relation to certain specified matters means that persons applying laws are expected to give effect to the pronouncements of Parliament on these but not other matters. This is necessarily implied. If it were not implied, it would not be true that the B.N.A. Act confers these specified powers.

In "power-conferring" rules, the corollary prescriptions which explain the meaning of the power are usually implicit. They do not need to be made express because, given the structure of a legal system and the principles which govern its operation, they follow necessarily from a statement of the terms in which a power is conferred. Their recognition does not require an inference of particular legislative intention which goes beyond those terms.

In addition to this kind of necessary prescription, other prescriptions for conduct may be involved in a conferral of power. The most important case, for present purposes, is where jurisdiction is conferred by Parliament with the intention that it be exclusive. This will require that no attempt be made to effect a legal determination otherwise than under the federal jurisdiction. However, unlike a prescription which is necessary to explain the meaning of the power, this will only follow immediately from the terms of a provision if it is express. If it is implicit, its recognition will require judicial inference in accordance with the ordinary principles of statutory interpretation, applied with the caution appropriate to constitutional affairs.

Only when the prescriptive element of "power-conferring" rules is identified does the problem of conflict emerge. Thus, a province's conferral of jurisdiction in relation to some matter could never, by itself, conflict with a federal conferral of jurisdiction in relation to the same matter; at most, it would provide an alternative. For there to be a conflict, there would have to be incompatible directions as to the exercise of jurisdiction. One way in which this could occur would be for the resolutions required of an issue to be contradictory. Another would be for exclusive federal jurisdiction to be intended. A conflict would then result with any provincial law conferring responsibility in relation to the same matter.

Hogg claims that *Tennant* v. *Union Bank of Canada*[12] is a case of express contradiction of federal and provincial law which cannot

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[11] *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.).
[12] [1894] A.C. 31 (P.C.).

be analyzed in terms of the impossibility of dual compliance.[13] The question there was whether the issuance of certain warehouse receipts to a bank was effective to pass title to goods, or in Hart's terms, whether there was power to pass title in this way. Provincial legislation said that there was not, but federal banking legislation said that there was. The Privy Council held that the federal provision, as valid legislation in relation to banking, was of paramount authority.[14] Hogg contends that the bank could have complied with both laws by not accepting the receipts, but that there was still an express contradiction because the provisions made different determinations of whether title would pass.[15] In fact, neither provision required that any action be taken by the bank. Both laws did, however, require a particular response from a judge who was faced with a question as to title. It was impossible for a judge to comply with one direction without breaching the other. Nevertheless, Hogg is correct to contend that the contradiction should be regarded as express. It follows necessarily from the terms of the provisions and does not depend upon an inference of further legislative intention.

A somewhat similar problem arose in *Hughes* v. *Hughes*, where Seaton J.A. claimed that section 11(1) of the *Divorce Act* does not require or prohibit specific conduct.[16] The literal terms of that section do not require or prohibit anything. They merely empower a judge, upon granting a divorce, to make orders with respect to maintenance and custody if he thinks it fit and just to do so. However, the operation of this section cannot be explained without reference to prescriptions for judicial conduct which necessarily follow from those terms. For example, where a judge thinks it fit and just to do so, he ought to make a maintenance order under the section, and he ought never to make an order under the section with respect to property. In effect, the *Hughes* case decided that the section embodies another prescription, to the effect that, following the making of a maintenance order under it, an antecedent order with respect to the same persons should no longer be given legal recognition. This prescription does not simply follow from the terms used; it depends upon an inference of further legislative intention. Once the inference is made, however, there is a conflict with the prescription necessarily embodied in the provincial legislation, which requires that orders made under it should be enforce-

[13] *Supra*, note 2, 104.
[14] *Supra*, note 12, 45-47.
[15] *Supra*, note 2, 104.
[16] *Supra*, note 3, 581.

able. Dual compliance is impossible, and the paramountcy rule specifies federal priority.

The confusion which surrounds secondary rules may result partly from their frequent lack of "duty-imposing" form and partly from the frequent lack of legal sanction for their violation.[17] Yet, even if the person who breaches a secondary rule is not subject to legal sanction, he will be subject to informal criticism and demands for compliance from other persons; otherwise it would be misleading to speak of the existence of a rule.[18] Hogg falls into what may be regarded as the Hartian fallacy when he claims that there is a category of rules to which the notion of compliance is inappropriate.

It is only with reference to the problem of compliance with duties that it ever makes sense to speak of a true conflict of law. Conflict of law involves more than mere divergent pronouncements; it involves having to choose between alternative courses of action. This choice becomes necessary when compliance with one duty involves breach of another.

III. The pattern of the cases

In *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*, Lord Dunedin set forth the following statement of principle:

> First, ... there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, ... if the field is not clear, and in such a domain the two legislations meet, then the Dominion must prevail.[19]

Laskin has suggested that in so doing, Lord Dunedin was adopting the occupied field test.[20] In modern times, the most notable instances of the adoption of the occupied field test appear in the opinions of Cartwright J. in the Supreme Court of Canada.[21] It has, however, been contended by both Laskin[22] and Lederman[23] that the earliest ex-

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[17] The consequence of nullity is, of course, quite different from a sanction. See Hart, *supra*, note 7, 33-35.

[18] On the concept of a rule, see Hart, *supra*, note 7, 54-56, and Colvin, *supra*, note 10, 198-201.

[19] [1907] A.C. 65, 68 (P.C.).

[20] *Occupying the Field: Paramountcy in Penal Legislation* (1963) 41 Can. Bar Rev. 234, 238-39.

[21] *E.g.*, *McKay* v. *The Queen* [1965] S.C.R. 798, 805 (for the majority); *O'Grady* v. *Sparling* [1960] S.C.R. 804, 820-21 (dissenting opinion).

[22] *Supra*, note 20, 238 and 243.

[23] *The Concurrent Operation of Federal and Provincial Laws in Canada* (1963) 9 McGill L.J. 185, 190-91.

pression of the paramountcy rule related to the incompatibility of *express* provisions. They have attempted to trace this test back to the *Local Prohibition* case,[24] where, at one point, Lord Watson suggested that only the "repugnancy" of federal and provincial provisions could exclude the operation of the latter.[25] As Hogg noted, though, the conclusions which were eventually reached in that case on the interaction of federal and provincial temperance legislation are more consistent with a broader view of the application of the paramountcy rule.[26] It was held that provincial prohibitions in force within a district would become inoperative whenever the federal scheme was adopted there.[27] It would, however, have been possible to comply with the express requirements of both schemes. Only the inference that Parliament had intended the operation of its scheme to be exclusive upon its local adoption could suspend the operation of the provincial law.

The best illustrations of the use of the express contradiction test are to be found in some of the modern Supreme Court decisions concerning overlapping federal and provincial penal legislation: *Smith* v. *The Queen*,[28] *O'Grady* v. *Sparling*,[29] *Mann* v. *The Queen*,[30] and *Ross* v. *Registrar of Motor Vehicles*.[31] In upholding the operativeness of provincial legislation, these cases made reference to the operational compatibility of the provisions. As Judson J. said in *O'Grady*, the provisions could "live together and operate concurrently".[32] It was in *Smith* that Martland J. made his remark about the possibility of compliance with both provisions.[33] In *Mann*, Spence J. accepted this statement as authoritative for the application of the paramountcy rule.[34] Hogg concludes that the cumulative effect of these decisions is that "the sole test of inconsistency in Canadian constitutional law is express contradiction".[35]

Hogg does admit, however, that the *Local Prohibition* case constitutes some authority for the opposing view.[36] Furthermore,

[24] *A.-G. for Ontario* v. *A.-G. for the Dominion* [1896] A.C. 348 (P.C.).
[25] *Ibid.*, 366.
[26] *Supra*, note 2, 109.
[27] *Supra*, note 24, 369-70.
[28] *Supra*, note 1.
[29] *Supra*, note 21.
[30] [1966] S.C.R. 238.
[31] [1975] 1 S.C.R. 5.
[32] *Supra*, note 21, 811.
[33] *Supra*, note 1.
[34] *Supra*, note 30, 252.
[35] *Supra*, note 2, 109.
[36] See *supra*, note 26.

a majority of the Supreme Court of Canada has never expressly rejected the occupied field test, despite several dissents (in cases such as *Smith*[37] and *O'Grady*[38]) which applied it. In both *O'Grady*[39] and *Mann*,[40] issues of "legislative purpose" were considered in the majority judgments affirming the operativeness of provincial law. In *Ross*, Pigeon J. said that *O'Grady* and *Mann* had decided that "Parliament did not implicitly permit conduct which did not come within the description of the *Criminal Code* [R.S.C. 1970, c. C-34] offence", with the result that the provinces could enforce additional prohibitions.[41]

In *Ross*, it was held that an order for a partial prohibition against driving, made upon the accused's conviction for impaired driving under the *Criminal Code*, did not render inoperative a province's total suspension, as a result of the conviction, of the offender's licence to drive.[42] Pigeon J. reached this conclusion despite admitting that "this means that as long as the provincial licence suspension is in effect, the person concerned gets no benefit from the indulgence granted under the federal legislation".[43] He noted that there was "strictly speaking, no repugnancy", because both the federal and provincial provisions could operate simultaneously.[44] This case is perhaps the strongest single authority for the proposition that express contradiction is the sole ground for invoking the paramountcy rule. However, the Court, rather than rejecting in principle the occupied field test, again held that it did not operate so as to suspend the item of provincial law in question: Pigeon J. concluded that Parliament had not purported to deal generally with the right to drive after conviction.[45]

Unfortunately, despite all the consideration which has been given to the application of the paramountcy rule by the Supreme Court of Canada, Laskin's complaint in 1963 is still appropriate today:

> From the time that the paramountcy principle was expounded in the *Local Prohibition* case, and restated in different terms in the *Grand Trunk Railway Company* case, there has been no general examination of it in any Privy Council or Supreme Court of Canada judgment. The

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[37] *Supra*, note 1, 786-89.
[38] *Supra*, note 21, 820-21.
[39] *Ibid.*, 811 and 812.
[40] *Supra*, note 30, 250 and 251.
[41] *Supra*, note 31, 14.
[42] *Ibid.*, 12-13.
[43] *Ibid.*, 13.
[44] *Ibid.*, 12-13.
[45] *Ibid.*, 15.

> approach has been particularistic, with no discernable concern for ramifications.[46]

The judgments fail to weigh the alternative tests, and thereby fail to provide a theoretical context which would permit the existing support for each test to be calculated. There is, however, a possible exception to this; in the recent decision of the Supreme Court of Canada in *Robinson* v. *Countrywide Factors*,[47] Beetz J. appeared to consider the alternatives and to opt for express contradiction as the sole test of paramountcy. He stated that provincial laws could only become inoperative in cases of actual repugnancy with federal laws and that the test of repugnancy is "operational conflict".[48] He contrasted this test with the test of "conflict of legislative policies entailing no operational inconsistency", which he said would depend on the intention of the paramount legislature.[49] He did not elaborate on the meaning of operational conflict or inconsistency; however, short of express contradiction, it is difficult to see how a determination of conflict or inconsistency can be made without reference to legislative intention.

Beetz J. was delivering a separate opinion for the majority, and the other opinions in the *Robinson* case only serve to illustrate the uncertain scope of the paramountcy rule. The case dealt with the validity and operativeness of provincial insolvency legislation. The legislation did not provide a cut-off date after which payments would be void, whereas the federal *Bankruptcy Act* contained a similar provision which avoided all payments occurring within three months of bankruptcy.[50] However, section 50(6) of the latter Act stated: "The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act."

The Court divided 5-4 on the issues of both validity and operativeness, but only operativeness is relevant for present purposes. The main opinion for the majority was delivered by Spence J., who held that, as a matter of construction, Parliament had not intended to occupy the whole field of transactions avoided by the

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[46] *Supra*, note 20, 257.

[47] [1978] 1 S.C.R. 753 (Spence J., Judson, Ritchie and Pigeon JJ. concurring; Beetz J. writing separately for the majority, Pigeon J. concurring; Laskin C.J.C., Martland, Dickson and de Grandpré JJ. dissenting).

[48] *Ibid.*, 808.

[49] *Ibid.*

[50] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 73.

provincial legislation.[51] He found support for this construction in section 50(6), as did Beetz J.[52] Laskin C.J.C., in his dissent, took a more restrictive view of that section. He thought that the *Bankruptcy Act* was "a code on the subject of bankruptcy and insolvency"[53] and that there was "no room for any assertion that such provincial legislation can continue to have operative effect in the face of the scope of the *Bankruptcy Act*".[54] His reasoning endorses the continued validity of the occupied field test.

The application of the paramountcy rule again faced the Supreme Court of Canada in *Montcalm Construction Inc.* v. *Minimum Wage Commission*.[55] On this occasion, the judgment of the majority, delivered by Beetz J., indicated that there would have to be an express contradiction before provincial law could be suspended.[56] However, the context of the remarks was not such that they can be regarded as a general resolution of the paramountcy question. The issue in the case was whether a provincial minimum wage law applied to the employees of a construction company working on an airport project on federal Crown land. The main submission of the company was that regulation of the wages of its employees was *ultra vires* the legislature of a province, either because the construction of airports is an integral part of the exclusively federal field of "aeronautics", or because provincial law cannot apply on federal property. The Court disallowed the submission on validity by a majority of 7-2. The majority also dismissed a submission that the field was occupied by the minimum wage provision in section 3(1)(a) of the federal *Fair Wages and Hours of Labour Act*,[57] which applies to contracts with the federal Crown.[58]

In refusing to invoke the paramountcy rule, Beetz J. said that it was incumbent upon the company "to establish that it could not comply with provincial law without committing a breach of the federal Act".[59] This is in line with the approach he had taken in

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[51] *Supra*, note 47, 794. The statement of Hogg, *supra*, note 2, 109, n. 42, that the "majority applied the express contradiction test" is incorrect. Only the opinion of Beetz J. fits this description.

[52] *Ibid.*, 808-9.

[53] *Ibid.*, 766.

[54] *Ibid.*, 766-67.

[55] (1979) 25 N.R. 1 (S.C.C.).

[56] *Ibid.*, 15.

[57] R.S.C. 1970, c. L-3.

[58] *Supra*, note 55, 15. The dissenting minority did not deal with the paramountcy question.

[59] *Ibid.*

Robinson v. *Countrywide Factors*.[60] It is not clear, however, that the concurrence of a majority of the Court extended to this particular point.

The "fair wages" which are required by section 3(1)(a) of the federal Act are defined in section 2 as follows:

> "fair wages" means such wages as are generally accepted as current for competent workmen in the district in which the work is being performed for the character or class of work in which such workmen are respectively engaged; but shall in all cases be such wages as are fair and reasonable and shall in no case be less than the minimum hourly rate of pay prescribed by or pursuant to Part III of the *Canada Labour Code* [.]

It would not be easy to infer from such an imprecise provision that the operation of the ordinary minimum wage standard of a province was intended to be excluded. Indeed, the company does not appear to have attempted this argument. Apparently, its submission had been no more than that the federal provisions might differ from those of provincial law. Not surprisingly, Beetz J. commented, "This is not good enough".[61] Clearly, therefore, the attempt to invoke the paramountcy rule failed the occupied field test as well as the express contradiction test. It may be for this reason that the remarks of Beetz J. on the paramountcy question were confined to a brief statement of his conclusions. They were not developed to the extent expected of a Court intending a general resolution of the application of the paramountcy rule.

It may seem from the trend of the Supreme Court of Canada decisions that, even if the implicit occupation of a field is theoretically available as a ground for invoking the paramountcy rule, it is almost a dead letter in practice. The argument for implicit occupation prevailed in none of the modern cases which have been discussed here.[62] However, with the possible exception of *Ross*,[63] there has been little disapproval of the Court's view that, in these cases, Parliament had not intended to occupy the field. The heavy concentration of cases concerning penal legislation makes it difficult to draw conclusions about the Court's general stance on paramountcy. *Ross* may be a particularly unsatisfactory precedent from which

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[60] *Supra*, note 47.

[61] *Supra*, note 55, 15.

[62] In *McKay* v. *The Queen*, *supra*, note 21, 805, Cartwright J. was speaking for the majority when he approved a submission that the *Canada Elections Act* [now R.S.C. 1970, c. 14 (1st Supp.)] had occupied the field of the regulation of placards and posters in relation to federal elections. However, his remarks in this respect were clearly indicated to be *obiter dicta*.

[63] *Supra*, note 31.

to generalize, because the provincial prohibition was not effected directly but rather through the withdrawal of a licence. The earlier, and also much disputed, decision in the *Saskatchewan Breathalyser* case[64] made it clear that, rightly or wrongly, some judges of the Court were prepared to treat licensing and penal laws as entirely different matters in considering the possibility of conflict.[65]

It is unfortunate that little attention has been paid to the resolution of paramountcy questions in the field of family law during the last decade. Maintenance provisions of the federal *Divorce Act*[66] and of provincial legislation may now be the most frequent source of conflict between federal and provincial laws.

The Supreme Court of Canada has not yet dealt with the interaction of federal and provincial laws on maintenance. The trend in the provincial courts of appeal has been to hold that a maintenance order under the *Divorce Act* renders inoperative an antecedent or a subsequent provincial order relating to the same persons.[67] The existence of machinery for making orders for corollary relief under the *Divorce Act* has also given rise to contentions (albeit disputed) that a provincial order will be inoperative after a divorce, whether or not an order is made under the *Divorce Act*.[68] The cases which have led to disagreement have concerned general family legislation, not legislation specifically in relation to maintenance as corollary relief upon divorce. The Ontario Court of Appeal has held that the latter form of provincial legislation is ineffective simply because "the federal legislation occupies the field".[69]

Issues of constitutional theory were not examined in detail in these cases. Nevertheless, as was suggested earlier in relation to the *Hughes* case, the conclusion that a provincial order will become

[64] *Validity of Section 92(4) of The Vehicles Act, 1957 (Sask.)* [1958] S.C.R. 608.

[65] *Ibid.*, 616.

[66] R.S.C. 1970, c. D-8.

[67] See *Hughes* v. *Hughes*, *supra*, note 3. See also *Ramsay* v. *Ramsay* (1976) 70 D.L.R. (3d) 415 (Ont. C.A.). The position with respect to custody orders is more complicated. See Colvin, *Custody Orders under the Constitution* (1978) 56 Can. Bar Rev. 1.

[68] See *Gillespie* v. *Gillespie* (1973) 36 D.L.R. (3d) 421, 430 (N.B.C.A.); *Goldstein* v. *Goldstein* (1976) 67 D.L.R. (3d) 624, 628 (Alta C.A.). *Contra*, see *Armich* v. *Armich* (1971) 16 D.L.R. (3d) 326, 332 (B.C.C.A.); *Hughes* v. *Hughes*, *supra*, note 3, 580-81.

[69] *Richards* v. *Richards* (1972) 26 D.L.R. (3d) 264, 265-66 (Ont. C.A.). The Supreme Court of Canada, however, has twice declined to express an opinion on this question. See *Vadeboncoeur* v. *Landry* [1977] 2 S.C.R. 179, 187-88; *A.-G. Quebec* v. *Cumming* [1978] 2 S.C.R. 605, 610-11.

inoperative, whether upon divorce or upon the making of an order under the *Divorce Act,* must involve reference to implicit legislative intention. There is no specific provision in the *Divorce Act* which excludes the operation of other orders; therefore, there can be no question of express contradiction of law with a court's exercise of provincially derived jurisdiction. Moreover, the person who is obligated to provide maintenance under both a federal and a provincial order can comply with each by paying twice. Even if the orders make different determinations of who is to provide maintenance, the result is that part or all of their ultimate effect will be cancelled out, not that compliance with both will be impossible. However much the enforcement of the provincial order would undermine the intent of the federal order, there is no express contradiction of law: the orders do not require courses of action which are incompatible in operation.

Thus, although the question of paramountcy in relation to maintenance legislation and orders has not yet been tackled by the Supreme Court of Canada, the occupied field test appears to be in regular use among provincial courts of appeal in a field where paramountcy problems are relatively frequent.

IV. The problem of duplication

Additional support for the occupied field test may be found in the special situation where federal and provincial laws are duplicative. The cases indicate that the consequence of simple duplication of federal pronouncements will be the inoperativeness of the provincial law. Thus, Lederman has claimed:

> Duplicative provincial legislation may operate concurrently only when inseverably connected with supplemental provincial legislation, otherwise duplicative provincial legislation is suspended and inoperative.[70]

He argued that duplication leads to inoperativeness in the interests of economy, since it involves a waste of legislative and administrative resources.[71] Rather than being a situation of conflict, duplication "is the ultimate in harmony".[72]

Although there is no conflict of express provisions when there is duplication, there can be a conflict of implicit legislative intention.

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[70] *Supra,* note 23, 199. He cited as authorities: *Home Insurance Co.* v. *Lindal & Beattie* [1934] S.C.R. 33, 40; *Lymburn* v. *Mayland* [1932] A.C. 318, 326-27 (P.C.). The Supreme Court of Canada stressed the differences between the federal and provincial provisions in the modern series of cases on overlapping penal legislation: see text, *supra,* p. 89.

[71] *Ibid.,* 196.

[72] *Ibid.,* 195 [italics deleted].

Parliament may have intended its legislation to exclude the operation of provincial enactments which merely cover the same ground. If duplication generally leads to the suspension of provincial law, the courts are taking the position that this negative implication is ordinarily present. Rand J. upheld this position in *Johnson* v. *Attorney General of Alberta*.[73] He thought that duplicative provincial penal legislation could interfere with and effectively displace the enforcement of the *Criminal Code* provisions.[74] The problem arises as well in cases of overlapping provisions. However, if the provincial law in some respects supplements the federal, this may make interference more acceptable and defeat any argument that exclusive operation is intended.

If the duplication test is viewed as a special application of the occupied field test, then it should be rejected if express contradiction is the sole test of conflict for the purposes of the paramountcy rule. This is the position taken by Hogg.[75] It was also adopted in the judgment at first instance in *Multiple Access Ltd* v. *McCutcheon*,[76] a case which involved duplicative provisions with respect to liability for insider trading. On appeal, however, this decision was reversed by a majority of the Ontario Divisional Court,[77] and a further appeal was dismissed unanimously by the Court of Appeal.[78] The reasoning of Morden J. of the Divisional Court was adopted by the Court of Appeal. Morden J. held that application of the provincial law would leave no practical scope within which the federal law might operate.[79] This can only be viewed as a fatal defect if Parliament has intended its provisions to be the operative ones in cases of duplication, and, further, if an implicit intention to this effect is sufficient to suspend a provincial law.

The problem of duplication has received little attention in the modern decisions of the Supreme Court of Canada. Nevertheless, one of the issues in *Nova Scotia Board of Censors* v. *McNeil*[80] involved duplicative prohibitions on indecency. Ritchie J., for the majority, held that, where federal and provincial penal enactments are "virtually identical" or "indistinguishable", the federal excludes

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[73] [1954] S.C.R. 127.
[74] *Ibid.*, 138.
[75] *Supra*, note 2, 110-11.
[76] (1976) 65 D.L.R. (3d) 577, 589-91 (Ont. H.C.).
[77] (1977) 78 D.L.R. (3d) 701 (Ont. Div. Ct).
[78] (1978) 86 D.L.R. (3d) 160 (Ont. C.A.).
[79] *Supra*, note 77, 709-10.
[80] [1978] 2 S.C.R. 662.

the provincial.[81] He sought authority for this proposition in the judgment of Rand J. in the *Johnson* case.[82] The more strongly supported view, therefore, is that duplication results in the inoperativeness of provincial law. In an *obiter dictum*, Ritchie J. remarked that he accepted the test of impossibility of dual compliance with the terms of both federal and provincial provisions as the authoritative test for the paramountcy rule.[83] However, this is inconsistent with the invocation of the paramountcy rule in cases of duplication. If provincial law can be suspended because it simply duplicates federal law, this should indicate the legitimacy, in at least some circumstances, of a search for conflict arising from negative implication. It may even lend support to the general relevance of the occupied field test. Of course, it will not necessarily do so. An alternative interpretation is that the suspension of duplicative law is an exception to a general rule which denies that conflict can exist through implicit legislative intention.

V. Conclusion

It has been argued that the paramountcy rule is invoked where there is a conflict of federal and provincial law in the sense that the prescriptions of each are operationally incompatible, or in other words, where compliance with both will be impossible. The express contradiction and occupied field tests are narrower and broader rules for determining whether there is operational incompatibility. The express contradiction test determines incompatibility only with reference to prescriptions which are express or which are necessarily embodied in what is express. The occupied field test extends to prescriptions which are implicitly intended. The duplication test is only partly a separate test. Either it is a special application of the occupied field test (whereby Parliament is deemed to intend that the operation of duplicative provincial law be excluded), or it is an exception to a general rule which prohibits reference to implicit legislative intention.

The cases certainly demonstrate that the courts will be cautious in inferring that a federal pronouncement was intended to be the

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[81] *Ibid.*, 698-99. It was unnecessary for the dissenting minority to deal with this issue. Ritchie J. actually used the term "invalid" to describe the status of the provincial law, but "inoperative" would have been more consistent with constitutional theory.

[82] *Supra*, note 73.

[83] *Supra*, note 80, 695. Once again, however, he seemed to confuse the concepts of inoperativeness and invalidity.

exclusive law in relation to some matter. There are also some judicial statements which appear to reject the occupied field test in principle. The cumulative effect of the cases, however, does not establish that negative implication has been generally rejected as a ground for invoking the paramountcy rule. Moreover, in view of the confusion which surrounds the meaning of and relationship between the various tests for invoking the rule, any claim that a single test has now emerged in Canadian constitutional law should be treated with caution.

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